

IN THE STATE OF SOUTH CAROLINA
SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Unpublished Opinion No. 2023-UP-011 (S.C. Ct. App. Filed Jan. 11, 2023)

Therese Hood,

Petitioner,

v.

United Services Automobile Association,

Respondent.

PETITIONER'S APPENDIX - VOLUME III

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1 And in here the damages were potentially high. But it
2 was not a case of liability. It was the opposite, as the
3 jury found. And we did make a settlement offer. And the
4 fact that they're saying we should have made a higher
5 settlement offer gets into the Collins case.

6 Now, there -- I'm glad Mr. Willey reminded me. Their
7 complaint had some other causes of action. They allege
8 negligence per se for not having licensed insurance
9 adjusters. They have no evidence whatsoever for that.

10 MR. WILLEY: May I say something else on the first
11 piece ---

12 MR. WHELAN: Sure.

13 MR. WILLEY: --- before we get into the other causes
14 of action?

15 So in the Snyder case -- and I think this is
16 illusionary in the section. And, again, these are
17 federal law cases. I will submit to the Court that Fourth
18 Circuit insurance law is way worse for the insured, in
19 general, than South Carolina law. That's why we also
20 argued the instate court, because the law is better for our
21 client. Okay.

22 Here is -- here is the issue. Meyers simply held that
23 if it was clear that the insured suffered damages greatly
24 in excess of the liability limits of the at-fault party,
25 the insurer could not in bad faith delay or withhold

1 benefits to which it was certain that the insured was
2 entitled.

3 And in this case the insurer was certain that Ms. Hood
4 was entitled to \$250,000 of the proceeds of her UIM policy.
5 That was their reasonable evaluation, taking into account
6 all of the mud on the wall that Mr. Whelan has presented to
7 the Court. And they never made it available to her through
8 settlement offer. That's what the Snyder court says, the
9 opinion that he just cited.

10 THE COURT: And I understand also that there was a
11 liability issue. I mean there is a legitimate liability
12 issue that she could be found comparatively negligent.

13 MR. WILLEY: That's correct. And the reserve takes
14 into account liability and comparative negligence issues.
15 And what they had determined, it was an 80-20 comparative
16 issue.

17 The amount of that reserve takes that into account.
18 And so that was the total figure.

19 Now, of course someone can always go and get zero.
20 But that was the total figure. And Ms. Moats says this in
21 her deposition: Their reasonable valuation that they
22 should have made available to her in this case, and they
23 didn't do it. And so I think in that instance Snyder
24 really makes that clear.

25 MR. WHELAN: Your Honor, I'll be happy to hand up Jack

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Dec 15 2020

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Appellate Case No.: 2019-001943
Case No.: 2018-CP-10-00666

Therese Hood Appellant,

v.

United Services Automobile Association Respondent.

RECORD ON APPEAL – VOLUME 3

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1 Daniel's letters. But he says basically every time that
2 there -- this is a comparative negligence case, there is a
3 possibility of a verdict for the plaintiff, there's a
4 possibility for a defense verdict.

5 It was -- you're right, it was a case of comparative
6 fault the whole time. At the beginning it was a case of
7 comparative fault. At the end the jury found them two
8 percent away from a -- from a goose egg.

9 So for him to say that USAA was certain that the
10 liability would be \$250,000 is an absolute
11 mischaracterization of the evidence. There's no evidence
12 for that. I

13 Yet there is a potential for a zero. There is a
14 potential for a more than zero. That's how they evaluated
15 the case. Same thing for the plaintiff. They had a
16 potential for a zero. They had a potential for more than a
17 zero. They evaluated it somewhere between 650 and 350, it
18 sounds like.

19 THE COURT: Okay. Let's move on to your next issue if
20 you've got ---

21 MR. WHELAN: Sure.

22 THE COURT: --- something else you want to address
23 with me.

24 MR. WHELAN: Yeah. But I suppose we should address --
25 I suppose we should address their other causes of action.

1 Which I'm not sure whether they're pursuing them or not. I
2 get -- it sounds like he's pursuing negligence. Which
3 negligence the duty has to -- I mean, that's the same thing
4 as bad faith. In a -- this is a contract action. It's
5 based on a contract. And South Carolina has recognized a
6 tort cause of action, which is bad faith arising from the
7 contract. There's no separate cause of action for
8 negligence. There's no separate duty for negligence. So
9 the same arguments apply on the negligence cause of action.

10 They have -- I don't think this applies anymore, but
11 they originally sued for breach of contract because the
12 other suit was going on. Of course, she got a million
13 dollars; we paid a million dollars. So I don't think
14 there's a breach of contract claim anymore.

15 They also sued for something called barratry, which
16 is -- I don't know if Your Honor has encountered that,
17 barratry.

18 THE COURT: One time ---

19 MR. WHELAN: Okay.

20 THE COURT: --- in a very odd ---

21 MR. WHELAN: Yeah.

22 THE COURT: --- it was in the criminal context.

23 MR. WHELAN: It's an odd cause of action. And, in
24 fact, it is a criminal statute that was put on the books
25 during the civil rights movement to try and keep the NAACP

1 from filing suits to segregate the schools.

2 And what it is, is it's the vexation inside --
3 vexation -- vexatious instigation of lawsuits. And what
4 that is, is when a third party to a relationship, you know,
5 causes somebody else to sue someone else.

6 So if I, you know, was whispering to Your Honor and
7 getting you to sue somebody else, that could be barratry if
8 they met all the other element which they can. But
9 barratry does not apply between two parties.

10 I mean, here we were exercising our statutory right
11 under 38-77-160 to defend a lawsuit that they brought. So
12 there's just no way barratry can apply under these facts.

13 And I was telling Your Honor about the negligence per
14 se cause of action, which they just allege -- I think they
15 allege in every complaint that the adjusters aren't
16 licensed. We submitted an affidavit that our adjusters
17 were licensed. They haven't presented any evidence. And
18 there is no evidence that our adjusters weren't licensed.
19 Because they were.

20 And then the last cause of action they he has is -- is
21 outrage, intention infliction of emotional distress. And
22 on that one, when ruling on a motion for summary judgment
23 the Court must determine whether the plaintiff has
24 established a prima facie case as to each element of the
25 tort.

1 And there are a lot of cases on intentional infliction
2 of emotional distress. There's a lot of cases granting
3 summary judgment on those. I haven't seen many going the
4 other way.

5 A doctor mistakenly informing a patient's daughter
6 that her father died when he was in fact alive is not that
7 entitles you to summary judgment under -- that's the
8 Strickland vs. Madden case. A supervisor's conduct in
9 ridiculing a speech impediment of the plaintiff and
10 threatening to fire an employee who had cerebral palsy did
11 not provide a sufficient basis for intentional infliction
12 of emotional distress. That's Shipman vs. Glenn, Court of
13 appeals. Moving a plaintiff in a wheelchair from the
14 departure gate in an airport because the plaintiff was not
15 able to travel and placing the plaintiff in a baggage area
16 near the ticket counter did not level -- did not reach the
17 required level. It goes on and on.

18 Again, we go back to what actually are we talking
19 about in this suit. The only thing I have heard is not
20 offering enough at mediation and filing this answer that
21 said that her lights were on, and maybe the request to
22 admit, which we really didn't talk about the last time.

23 But those three things, none of them reach the level
24 of outrage, Your Honor.

25 THE COURT: Okay. Yes, sir?

1 MR. WILLEY: Briefly as to the barratry cause of
2 action, he is partially correct; but in this case it's a
3 little interesting because there still is another case
4 going on with a third party, which is the Kuck's. And the
5 Kuck's have been forced, essentially, to drag Ms. Hood
6 through litigation in that case because in that case USAA
7 is still taking the position that her lights were on. And
8 she has had to go through deposition and mediation and this
9 week was up for trial.

10 That trial was continued, but we'll be calling in and
11 have to go and re-live all of this as a result of their
12 taking disparate positions in the litigation.

13 Their position is now that her lights were off. Which
14 I believe Mr. Whelan has said, you know, at least fifty
15 times. And they shouldn't be taking in that position the
16 opposite case in order to drag her through the litigation,
17 and protect their money.

18 Her letter then said: I want you to be compensated.
19 You are an innocent party.

20 So this isn't about her. It's about them and their
21 money. And so that goes to the barratry cause of action.

22 There is another case that's pending against her where
23 suit has been filed that she's having to go through and
24 continually -- continually in that case be called a liar.
25 So that is I think the quintessential toward barratry.

1 The outrage is pretty -- is pretty clear. I mean, the
2 question is can your insurance company drag you through
3 five years of litigation and call you a liar, all along the
4 way knowing that their own paid experts say your lights
5 were off. That's the question.

6 Your agents sit in deposition and call you liar. They
7 go to court and call you liar. They come again today and
8 call you a liar.

9 And outrage is simple. The defendant intentionally or
10 recklessly inflicted emotional distress or are certain or
11 substantially certain that such distress would result from
12 the defendant's conduct.

13 Well, when we filed this case we told them that their
14 conduct was causing her emotional distress. They knew
15 that. They continued to do it and continue to do it today.

16 So it is intentional. And it does inflict emotional
17 distress. She testified to that in her deposition, which
18 is marked: Defendant's conduct was so extreme and
19 outrageous to exceed all possible bounds of decency and
20 must be regarded as atrocious and intolerable in a
21 civilized community.

22 What could be worse than taking opposite positions in
23 court, in a court of law, in order to protect your money
24 from the insured who had the benefit of that bargain.

25 The action of the defendant caused the plaintiff

1 emotional distress. She's testified to that in her
2 deposition. And the emotional distress suffered was
3 severe. No reasonable person could be expected to endure
4 it.

5 Again, I don't think any of the people, the nine
6 people that stood up in this jury and said they had UIM
7 coverage or the -- or the eight people that stood up and
8 said they have USAA, or you or I, would want to be treated
9 this way or think that this is how an insurance company
10 should be able to treat its insured's and taking disparate
11 positions, calling you a liar, just to protect their money.
12 That's outrageous.

13 And it's particularly outrageous -- you know,
14 everybody assumes insurance companies kind of do this in
15 the background to protect their money. It's particularly
16 outrageous when you have a case and it's in black and white
17 and it's signed and on top of that you have a coverage
18 opinion where they determine the reasonable value of the
19 claim that she was owed was 250 and they never offered it
20 presumably just so they could keep dragging her through it.
21 That's a jury question. But that's what they did in this
22 case.

23 THE COURT: Okay. Thank you.

24 MR. WHELAN: Your Honor, just quickly on that. And I
25 realize this is probably beating a dead horse. But first

1 of all, nobody called her a liar. And second of all,
2 there's a case Todd vs. South Carolina Farm Bureau, 321
3 SE2d 602: Evidence that an independent contractor retained
4 by the plaintiff's employer to conduct an investigation
5 lied and asked the plaintiff to take an illegal voice
6 stress analysis test was not sufficient as a matter of law
7 to prove outrage.

8 And we didn't ask -- nobody lied or called her a liar
9 or whatever. But there's just -- there's just no facts
10 here.

11 And then on the barratry I don't see how somebody that
12 she was in a wreck in, that sues her, is USAA's fault or
13 every insurer is going to be sued for barratry.

14 And he didn't respond to the other causes of action.

15 THE COURT: Okay. Thank you. I'd like to break here
16 and let me look at these cases. If we can be back at
17 2:30 ---

18 MR. WHELAN: Sure.

19 THE COURT: --- so we have some time. I know we still
20 need to address defendant's motions in limine. So let's go
21 ahead and break now until 2:30.

22 MR. WHELAN: Thank you, Judge.

23 THE COURT: Thank you.

24 [Whereupon, a recess is taken 6/25/19, 1:41 p.m. to
25 2:30 p.m.]

1 [Whereupon, resume 6/25/19, 2:43 p.m.)

2 THE COURT: Okay. Thanks for your patience. I did
3 want to get a chance to look through the case law. I am
4 ready to rule with respect to the motion for summary
5 judgments.

6 The motion is granted with respect to the cause of
7 action for barratry. I find that there's -- there is no
8 evidence to suggest that any lawsuits were at the
9 instigation or stirred up by the defendant, USAA.

10 As to the cause of action for outrage, the motion for
11 summary judgment is granted. Of course, the conduct has to
12 be so extreme that it shocks the conscience, that no
13 reasonable person can be expected to endure it. The Court
14 is the gatekeeper for that cause of action. I don't find
15 that the conduct rises to the level of outrage, and so that
16 motion is granted.

17 The breach of contract action, that is granted. My
18 understanding is they -- there's been an award now that has
19 been paid, the insurance now has been tendered.

20 The cause of action for negligence per se, I am
21 granting the motion for summary judgment as to that cause
22 of action.

23 I am denying the motion for summary judgment as to the
24 bad faith cause of action and negligence.

25 I recognize the federal courts seem to evaluate the

1 insurance company's position for reasonableness and then
2 rule as a matter of law whether or not the conduct was
3 reasonable. And, honestly, it seemed to always say that
4 the insurance company, as a matter of law, was not acting
5 in bad faith. But the South Carolina cases seem to favor
6 this as a jury question, that the reasonableness of the
7 conduct is a jury question. I am looking at the Howard
8 case and the state -- Howard case and the Tadlock case. So
9 the motion is denied as to those two causes of action.

10 However, in reading through these cases I am going to
11 revisit the issue, the motion in limine, plaintiff's
12 motion, to exclude plaintiff's testimony at trial. It's
13 very clear under Howard and Tadlock that the later conduct
14 is inadmissible. It's what the parties knew at the time or
15 what the insurance company knew at the time it denied the
16 claim. Or in this case, at the time it mediated the claim.
17 It's what they knew at that point that controls. And so I
18 don't think any of the trial testimony is going to be
19 relevant. I would say the exception to that would be
20 possibly for impeachment under the right circumstances.
21 But other than that, it's going to be the conduct at the
22 time of mediation or at the time that they took their
23 respective positions on the headlights.

24 So the trial testimony -- I am granting the motion in
25 limine with respect to the trial testimony.

1 As to the letter that the plaintiff sent to the
2 Kuck's, I do think that is admissible. According to what
3 Mr. Whelan shared with us, was directly referenced in the
4 letters from Mr. Daniel and was known to USAA prior to
5 mediation.

6 So I know that we still have several of defendant's
7 motions in limine to address.

8 MR. WHELAN: Your Honor, may I just request
9 clarification ---

10 THE COURT: Sure.

11 MR. WHELAN: --- to understand your ruling.

12 With respect to the duty at issue, the breach that --
13 the question of fact for the jury, we're talking about the
14 failure to offer the full amount at mediation and the
15 position that the -- or not admitting that the lights were
16 on, those are the issues that we're putting in ---

17 THE COURT: Well, I mean, I don't know that I can say
18 that that's the only thing that they will raise at this
19 point. But, I mean that was enough to overcome your motion
20 for summary judgments.

21 MR. WHELAN: Well, I suppose my point is that under
22 the Snyder case -- I mean, that looked at duty. And it
23 said that duty does not extend necessarily to make a
24 settlement offer. And so with respect to the specific duty
25 that's a question of law for Your Honor, I assume your

1 holding is that there is a duty to make an offer?

2 THE COURT: I just think there's a duty of good faith
3 and fair dealing, and it's for the jury to decide what
4 constitutes that good faith and fair dealing. I think
5 there's a jury question. Snyder is a federal case, it's my
6 understanding.

7 MR. WHELAN: But it applies to state law. All of them
8 do.

9 THE COURT: It does. And I understand that they -- if
10 this is the one I'm thinking of, this is the one where they
11 said, well, you had \$150,000 is what you evaluated the
12 claim at but you only offered 100.

13 MR. WHELAN: That was -- that was Collins, I believe.

14 THE COURT: Okay. So I don't think that we are locked
15 into what the court said on that. But, again, I think that
16 the state court cases, especially -- I can't remember if it
17 was Howard -- I believe it was Howard upheld it going to
18 the jury for a determination of whether the insurance
19 company acted in bad faith. And so I think it's a jury
20 question.

21 MR. WHELAN: Okay. I understand, I think, your
22 ruling, Your Honor. But as far as the -- well, I don't
23 want -- I don't want to belabor the point.

24 MOTION IN LIMINE

25 MR. WHELAN: With respect to the motions in limine,

1 our first motion is to exclude payment -- evidence of
2 USAA's payment to Woody Poplin, who was an expert hired by
3 counsel for Therese Hood. Counsel for Therese Hood was
4 being paid by USAA, but Therese Hood was their client.

5 The fact that USAA wrote the check to Mr. Poplin is
6 not -- is not relevant, does not make any fact at issue
7 more or less likely. In fact, the -- USAA was doing what
8 it was obligated to do in defending Ms. Hood in the
9 liability case. And so the fact that Woody Poplin was paid
10 by USAA is not relevant to any point.

11 Also, we ask to exclude any evidence that USAA changed
12 positions in this request to admit or otherwise. And that
13 just gets back to the point that we're complying with 38-
14 77-160, which allows us to defend in the name of the
15 underinsured motorist for the benefit of the insurance
16 company.

17 THE COURT: Mr. Willey?

18 MR. WILLEY: Your Honor, as to the first motion in
19 limine with respect to Mr. Poplin's payment and retention,
20 the alleged change of position, I think it's actually in
21 the standard jury charge that who pays an expert can be
22 used to weigh their credibility and -- in the underlying
23 case.

24 And in this case USAA wrote the check, which we marked
25 as a Court's Exhibit, to Mr. Poplin. He was actually paid

1 for that opinion by USAA, has been retained I believe by
2 USAA before, and still came to the conclusion in that
3 particular case that the lights were on.

4 And so who paid Mr. Poplin goes to the reasonableness
5 of USAA then, totally disregarding his opinion in the
6 subsequent case. Because as we often know, when you have
7 a -- when you have a situation where the other side hires
8 an expert -- you know, in litigation we could talk all day
9 about whether or not we should even have experts on some of
10 these issues. But there is an inherent bias or thought
11 that the other side probably went and looked for somebody
12 to support their position.

13 In this case those -- that individual, so to speak, is
14 USAA. They hired Mr. Poplin through Mr. Nickels. And, in
15 fact, USAA has to approve - Ms. Moats testified to this in
16 her deposition - any case expense.

17 So she approved hiring him. They hired him. They got
18 his report. And in the one case it supported what they
19 wanted him to say. In the other case it didn't, and so
20 they just totally disregarded it.

21 And I think the jury is entitled to know that Ms. Hood
22 did not seek out Woody Poplin. She didn't know who Woody
23 Poplin is. You know, she didn't know what a lamp filament
24 analysis test is. That is all USAA in this case.

25 And so the only question is whether or not who paid

1 him is relevant. And, of course -- of course it's
2 relevant. I mean, because it goes to the credibility of
3 that position and the weight that USAA should have given it
4 in reaching their reasonableness. He ---

5 THE COURT: There's no doubt that USAA had a copy of
6 that report at the time of the mediation ---

7 MR. WILLEY: Correct.

8 THE COURT: --- and certainly at the time it took its
9 respective positions with regard to the headlights.

10 MR. WILLEY: The evidence will actually show, Your
11 Honor, in this case, that when that report -- what happened
12 factually is in a subsequent case, the UIM case. Mr.
13 Smith, who was Ms. Hood's counsel trying to get the UIM
14 money, disclosed Mr. Poplin as an expert witness and then
15 his report went from the BI file, which was being handled
16 to a separate adjuster, through the manager, into the UIM
17 file; and the manager is the one that at that point
18 actually changed the reserve and increased it to 250,000,
19 with the only thing changing in that period of time being
20 the transfer of Mr. Poplin's file from the BI to the UIM
21 claim file, which we will get into in evidence, but is
22 improper.

23 It's USAA's policy that those claims are supposed to
24 be kept separately and investigated separately. But the
25 minute that Mr. Smith disclosed him and did not provide a

1 report, because he didn't have one at that time, they
2 went -- the manager pulled the report from the other file
3 and put it in the UIM claim file and then raised the
4 reserve based on that information.

5 And so it's -- so, yes, not only did they have it all
6 along, but if the impetus for that increase in evaluation
7 which is at the heart of the case.

8 MR. WHELAN: So, I mean, this argument just -- it is
9 just -- so now he's saying that USAA got the Poplin report
10 and increased its valuation.

11 What is he -- what is the complaint there? How does
12 that pertain to anything? They've looked at the report and
13 he's saying they increased their valuation based on some
14 report that his high beams were on.

15 And, yes, the report was known to USAA. And, you
16 know, if we're going to try the case the way it looks like
17 we are, then I do think the report comes into evidence.

18 But as far as who paid for it, what Mr. Willy is
19 talking about is when you have an expert on the stand and
20 you're impeaching the expert. You know, Mr. Expert, you
21 were paid by the party for the report. But here we're
22 talking about the underinsured motorist versus liability
23 motorist. And what Mr. Willey is trying to do is take
24 advantage of the way the legislature has set up this
25 insurance to work.

1 And it's weird. And Lord knows how the jury is going
2 to follow it. I mean we saw that they did not even know
3 whether they had it or not. They are all looking around at
4 each other when we asked them the question earlier.

5 But what he's trying to do is to take advantage of the
6 legal fiction that, you know, your own insurer is standing
7 in the shoes of somebody else. And it's just designed to
8 confuse the jury, and it is going to lead to severe
9 prejudice to USAA. It has limited, if any, relevance. And
10 it's extremely unfairly prejudicial.

11 THE COURT: I'm going to let in the fact that Mr.
12 Poplin was hired by the plaintiff's attorney, but not who
13 paid his bill. I don't know that that's really relevant.

14 The issue is was USAA aware of it, did they have that
15 in their possession at the time they took the positions
16 that they took. And I don't find that who actually paid
17 that bill is relevant in this case.

18 MR. WILLEY: Without arguing, Your Honor, I just -- I
19 want to point out that he was not hired by the plaintiff's
20 attorney. He was hired by defense counsel, who was hired
21 by USAA, and USAA wrote the check.

22 Plaintiff's counsel, subsequent to that, in the other
23 case, disclosed Mr. Poplin. At that time, the report he
24 had prepared for the first case, where USAA paid him for
25 that report, made its way into the UIM claim file,

1 increasing the valuation.

2 THE COURT: Again, you can discuss which attorney
3 hired him and even that that attorney was provided by USAA,
4 but not who actually paid that bill.

5 MOTION IN LIMINE

6 THE COURT: Let's move on to USAA's retention of
7 consulting experts.

8 MR. WHELAN: Yes. Thank you, Your Honor.

9 THE COURT: I think it was Mr. Black.

10 MR. WHELAN: Yeah, that's Mr. Black.

11 And, you know, again, this is something that happens
12 in every case. Every lawyer -- not every case. But it's
13 common for a lawyer to use an expert.

14 In any case where there's an expert witness, the
15 expert witness was first consulted by the lawyer. The
16 rules specifically sanction and the practice is common for
17 you to talk to that expert and make a decision, what Mr.
18 Willey would call a strategic decision about whether you
19 want to enlist the expert or not.

20 And here, USAA did that; and it reached a strategic
21 decision that it would overcomplicate the case. So they
22 didn't name him. There is -- there is nothing wrong with
23 that. It's just not relevant, and it's very -- it's very
24 prejudicial.

25 Because what he wants to do is say, well, USAA is

1 hiding -- you know, hiding something. Well, no, this is --
2 this is litigation.

3 And I should say something else. The duty of good
4 faith goes both ways ---

5 THE COURT: Well, let me ask you this. Because I
6 don't think that it would be relevant to say, well, USAA
7 didn't disclose this in the litigation. Because that's --
8 that's a more recent occurrence.

9 Mr. Willey might -- are you going to try to get in the
10 fact that -- some allegation that they failed to disclose
11 hiring Mr. Black?

12 MR. WILLEY: Well, they're -- it's a two part -- the
13 short answer is I think some of that is relevant, yes. And
14 I think some of it is relevant to the extent that USAA sets
15 the -- its own standard for itself through the deposition
16 testimony that I took that's on the record that says we're
17 always forthcoming with our insured. And they ---

18 THE COURT: I understand. But tell me the timeframe.
19 Because, again, if this was something that happened during
20 the litigation and after the settlement conference ---

21 MR. WILLEY: No, this occurred before. This was
22 before the settlement conference. So this is something
23 that USAA knew going into that settlement conference, that
24 Mr. Black had this position that was not disclosed.

25 THE COURT: I understand. And with respect to the

1 fact that they had consulted with Mr. Black and they were
2 aware of his opinion at the time that they entered into the
3 mediation, I do think that's admissible.

4 MR. WILLEY: Right.

5 THE COURT: But then any, oh, well, we didn't disclose
6 this during discovery, that's the issue that I have. That
7 sounds like something that happened during the course of
8 litigation and not relevant to the decisions they made at
9 mediation.

10 MR. WILLEY: And I agree -- I agree with that point.
11 I think that they are entitled to hire a consulting expert
12 that they don't have to disclose. I agree with that.

13 But I think the fact that they had hired a consulting
14 expert that essentially agreed with Mr. Poplin and that
15 information was known to them, goes to their reasonableness
16 in the case.

17 THE COURT: Well, again, I agree to that extent
18 that -- the fact that they had Mr. Black, opinion is
19 admissible. Any inference that they then wrongfully failed
20 to disclose that would not be admissible or relevant.

21 The next one regards ---

22 MR. WHELAN: Your Honor, may I just make another
23 similar clarification, because we are sort of learning what
24 the case is about. And you heard Mr. Willey say, you know,
25 USAA called her a liar, USAA called her a liar. And that's

1 not -- I mean, that's sort of like the what he's trying to
2 with the consulting expert.

3 That's not relevant to USAA's valuation at or before
4 mediation. And certainly was whether USAA -- he can argue,
5 you know, she was credible and you didn't believe her, or
6 where you didn't sufficiently take her credibility into the
7 evaluation. But any statement that -- or argument that you
8 called her a liar, et cetera, et cetera, should be
9 excluded.

10 MR. WILLEY: Now, I mean, of course it's relevant. It
11 doesn't go to reasonableness; it goes to damages. It goes
12 to her emotional distress and going through the process of
13 constantly having her integrity and her good name and after
14 serving our country for twenty years questioned repeatedly,
15 repeatedly, repeatedly. And at one point, even questioning
16 her sanity.

17 That goes to damages. It doesn't go to
18 reasonableness. We're in agreement on that. But that's
19 part of the damages in the case, and it's totally
20 admissible. I mean, that's the conduct that harmed her.

21 THE COURT: So what is your motion, that we exclude
22 any ---

23 MR. WHELAN: I mean, he can't have -- you can't have
24 damages that aren't associated with the duty and the
25 breach. And the duty and breach is a negligent evaluation

1 and a failure to offer certain amounts in mediation.

2 And you heard what Mr. Willey wants to do. He needs
3 to turn that into damages somehow; so he wants to say USAA,
4 you didn't -- you called her a liar and caused her damages.

5 Which, first of all, isn't factually true; and second
6 of all, isn't connected to what -- to the negligent
7 evaluation. So ---

8 THE COURT: Well, I just -- we need to be careful
9 here. Because, Mr. Willey, if you get up and say, well,
10 they called my client a liar because she said her
11 headlights were on, then I think you're opening the door
12 for them to bring in her trial testimony where she said
13 that her lights were not on, ---

14 MR. WILLEY: Well ---

15 THE COURT: --- or whatever that trial testimony was.
16 If that's the basis of you saying, well, they called her a
17 liar, they called her a liar, then I think you're opening
18 that door.

19 MR. WILLEY: And I -- and I understand the point that
20 you make on that. The problem is that the damages continue
21 to flow from the negligent act. And so they can't use the
22 trial testimony to go back to their reasonableness. They
23 just can't. Her damages ---

24 THE COURT: Well, that's fine as long as you limit,
25 okay, ---

1 MR. WILLEY: Right.

2 THE COURT: --- everything that happened up until this
3 point.

4 MR. WILLEY: Right.

5 THE COURT: But if you go beyond that and you try to
6 get into anything that happened after the mediation
7 conference, then I think you're opening the door to what
8 she ultimately testified to at trial. I mean, you can't
9 have it both ways.

10 MR. WILLEY: Right. And I -- and I don't disagree
11 with that. But I don't think that was his motion, but I
12 don't disagree with what you said.

13 MR. WHELAN: Yeah, I mean, if he says -- you know, if
14 she says, well, they called me a liar or something like
15 that, then we get to bring out that ---

16 MR. WILLEY: No.

17 MR. WHELAN: --- she ---

18 MR. WILLEY: No.

19 MR. WHELAN: --- maybe -- I'm not going to say it was
20 a liar, but definitely she testified under oath
21 inconsistently at trial so.

22 THE COURT: Okay. Let's move to Number 3.

23 MR. WHELAN: All right. Thank you, Your Honor.

24 MOTION IN LIMINE

25 MR. WHELAN: Number 3 is to exclude evidence that --

1 the argument that USAA should have voluntarily paid
2 amounts, you know, up to the \$250,000 reserve. There's
3 just no case law to support that.

4 Lawson -- talk about state law, Lawson v. Porter, a
5 South Carolina state case, says there is no duty to pay
6 under the contract until the -- until there's a judgment
7 and the verdict. That's Lawson v. Porter. There's other
8 cases on that, too, that follow Lawson v. Porter. And ---

9 THE COURT: Well, I think we've also case law, don't
10 we, that says you can -- you can bring a bad faith case
11 prior to actually getting a judgment.

12 MR. WHELAN: Correct.

13 THE COURT: But you've got to -- you've got to
14 establish liability ---

15 MR. WHELAN: Well ---

16 THE COURT: --- is the verbiage.

17 MR. WHELAN: So the law is very clear that there's not
18 contractual duty to pay prior to the verdict.

19 Now, the Meyers case talks about there may be a duty
20 to make an offer if liability is clear and damages are
21 clear. So -- and I assume that's -- that that's where Your
22 Honor sees us right now. But even if this is a case of
23 clear liability and a case of clear damages, the only duty
24 would be to make an offer of settlement, which was done
25 here. There is no duty whatsoever to offer whatever you

1 think the value is.

2 Again, that gets back to my point that that would just
3 make mediations moot because the plaintiffs would just say
4 pay us your highest value.

5 It just -- it's -- it's confusing to the jury. It's
6 irrelevant. And it's just not the law.

7 THE COURT: Yes, sir?

8 MR. WILLEY: The law is reasonableness. And when
9 USAA's testimony through its corporate representative, who
10 is present at trial as its corporate representative, is
11 that they reasonably value what should be paid to Ms. Hood
12 is 250,000 and they never offered it.

13 That's unreasonable. And I'll tell you this ---

14 THE COURT: I mean, that's exactly though what -- in
15 the Collins case they said that's not unreasonable, that
16 they -- they valued it at 150, they offered a 100, the
17 lowest I think was -- a million dollars was the lowest
18 demand.

19 MR. WILLEY: Right.

20 THE COURT: And they said it doesn't matter, you're
21 \$900,000 apart, insurance company acted reasonably.

22 MR. WILLEY: Right, but in that -- it's a different
23 factual circumstance when you don't have the admissions we
24 have in this case. And in that case there was some issue
25 about whether or not that was the value of the case.

1 Here the testimony is the reserve is a reasonable
2 valuation that she was owed. That's the deposition
3 testimony that I read earlier from USAA. That's an
4 admission. That's not an argument.

5 In that case there was an argument about the value of
6 the case. Here there is not. They say that's the value of
7 the case. They never offered it. I

8 So their motion, then, is whether or not USAA should
9 have voluntarily paid a non agreed upon amount to the
10 plaintiff prior to verdict in the underlying suit. Agreed.

11 Now, they represent an insurer, State Farm, that does
12 that sometimes. They'll pay the uncontested amount and go
13 argue about the contested amount because they care about
14 their insured's. That's the reasonable thing to do.

15 But in this case that's not the argument. The
16 argument in this case is about the offer, not that they --
17 not that they should have paid that amount.

18 THE COURT: And, ou know, I think the jury is going to
19 have to determine did USAA act reasonably during the course
20 of that settlement. And I think that's a jury question.

21 MR. WHELAN: Well, I agree with you Honor -- with you,
22 Your Honor. But the implication is that -- I agree that
23 seems to be what we're trying. But the implication that
24 USAA had an obligation to pay the top of its reserves is
25 what I -- I mean, that's not consistent with -- that's just

1 not the law, and I don't think Mr. Willey should be able to
2 argue that USAA had a duty to pay its top reserve.

3 THE COURT: I don't think there is any case law that
4 says you have an obligation to offer, you know, some
5 specific amount.

6 MR. WHELAN: Right. Yeah, it says that there's a duty
7 to make an offer if liability is clear and damages are
8 clear. There's nothing that says, you know, anything
9 beyond that. So I just don't -- I just don't think it
10 would be proper to make that argument.

11 THE COURT: Well, I would agree to the extent that
12 there's any argument to the jury that they had a legal
13 obligation to offer a specific amount. Again, the question
14 is whether their conduct was reasonable.

15 MOTION IN LIMINE

16 THE COURT: Number 4 is plaintiff's injuries from the
17 car wreck?

18 MR. WILLEY: I agree with that. I don't think any --
19 I don't think anything is -- as far as trial testimony on
20 injuries is relevant.

21 MR. WHELAN: Yeah, and I did notice that this motion
22 talks about physical injuries. It should say physical or
23 emotional injuries, really any injuries arising from the
24 car wreck.

25 THE COURT: I would agree with that.

1 MR. WHELAN: Thank you.

2 MOTION IN LIMINE

3 THE COURT: Number 5, plaintiff's fee agreement in the
4 underlying suits. And I understand the testimony was that
5 it was the same fee agreement whether it was settled prior
6 to court or after trial.

7 MR. WHELAN: Right.

8 MR. WILLEY: Your Honor, I agree that the plaintiff's
9 agreement with their counsel in the underlying suit or the
10 amount of attorney's fees that were paid to her counsel
11 should not be evidence in this particular case as a
12 subsequent.

13 THE COURT: Okay.

14 MR. WILLEY: We'll deal with that later.

15 THE COURT: Mr. Daniels -- making faces or otherwise
16 having some kind of antagonistic attitude?

17 MR. WHELAN: I'm not sure what Mr. Willey means about
18 dealing with the attorney's fees later.

19 But, yes, they -- I mean, earlier they did not say
20 that they were pursuing any --

21 Are you pursuing some -- are you saying USAA breached
22 some duty because of antagonistic actions by Jack Daniel or
23 Jack Daniel talking an antagonistic position towards Mrs.
24 Hood?

25 MR. WILLEY: To the extent that Mr. Daniel is an agent

1 of USAA took unreasonable actions, they are imputed to
2 USAA. So, yes, I would take the position that those are
3 admissible in this action.

4 MR. WHELAN: Okay, so in her deposition she said that
5 Mr. Daniel -- she was made uncomfortable by Mr. Daniel
6 asking her questions in the deposition. She said the same
7 thing at trial.

8 MR. WILLEY: I'm not -- well, let me clarify it. This
9 talk about the faces he made and all that, I don't -- I
10 don't really care about any of that. That's not ---

11 MR. WHELAN: She claims ---

12 MR. WILLEY: I don't -- we don't intend to get into
13 that. So to the extent it's limited to this, I think we're
14 in agreement.

15 I think to the extent he was taking some of the
16 unreasonable actions, that may be admissible. But I don't
17 think the faces he was making is an issue. I mean, that's
18 petty at this point.

19 MR. WHELAN: But my point is, Jack Daniel was an
20 attorney who was representing the insurance company. He is
21 not representing Ms. Hood. I understand he's saying that
22 USAA acted through Mr. Daniel in denying the request to
23 admit and being at mediation; but if there's something more
24 that he's saying that Jack Daniel was too aggressive with
25 her in her deposition or -- I just want to know what other

1 actions he's talking about. Because if it's something more
2 than that, it should be excluded.

3 THE COURT: Are you referring to anything other than
4 positions that he's taken in the case, such as, you know,
5 brow-beating her at deposition or -- I don't know what ---

6 MR. WILLEY: Well, yeah, I mean I think some of that
7 goes to damages. But I don't -- I mean, it's not a case
8 about what Jack Daniel did or didn't. It's about what USAA
9 did.

10 So to the extent he was acting for USAA, I think it's
11 relevant. I'm not here to try a case about Jack Daniel. I
12 don't -- I mean, I think we're in agreement on that. This
13 case is about USAA.

14 You know, is she going to mention that she -- after he
15 repeatedly called her a liar in her deposition that, you
16 know, she went home and cried? Maybe. I mean, that's a
17 damage, you know, when they took a position in such an
18 extreme way that it affected her.

19 I mean, she had to see -- I mean, she went to a
20 psychiatrist, I mean, over the -- over the thing. It's
21 going to be the evidence in the case.

22 This is not just I felt bad. This is a repeated
23 course of conduct, and Mr. Daniel took some of those
24 actions. So to the extent, you know, that's relevant, I
25 think it is. It's not as petty as -- I'm not -- you know,

1 I have no intention of getting into he made this face or
2 that face at a deposition or wore a tie that offended me,
3 or, you know, whatever. I mean I don't

4 MR. WHELAN: This is ridiculous. I mean, there is a
5 deposition transcript. There is a trial transcript. There
6 was nowhere in there where Jack Daniel calls her a liar.
7 It is -- and I would encourage Your Honor to read it if --
8 or maybe he can point us to the positions that he's talking
9 about.

10 But it's just an attempt to try and impassion the jury
11 over absolutely nothing. It's standard in -- I mean, it's
12 just standard defense work.

13 THE COURT: Well, I'm having a hard time here on what
14 exactly my ruling is going to be. I think you're going to
15 need to object to the specific testimony, rather than me
16 trying to speculate what this is going to look like when I
17 hear it. I think we'll just have to take it up at the
18 time.

19 MR. WHELAN: Yeah, and if I could just say that
20 what -- if Jack Daniel did call her a liar - which he
21 didn't - that has nothing to do with the evaluation of the
22 case. It's just not relevant, and it's prejudicial.

23 And, I mean, I'd like him to -- I would like him to
24 tell us what he's going to say Jack Daniel did that caused
25 her damages as, you know, conduct by an attorney. This

1 is -- this is pretty unusual, pretty unusual allegations,
2 which I think should be fleshed out.

3 THE COURT: Well, again, you make an objection.
4 Again, I can't speculate as to what testimony might come
5 out.

6 MR. WHELAN: Okay.

7 MOTION IN LIMINE

8 THE COURT: Number 7 is with regard to emotional
9 distress.

10 MR. WHELAN: Yes, Your Honor. Well, since Your Honor
11 has dismissed the allegation for intentional infliction of
12 emotional distress, we don't think emotional distress is a
13 proper recoverable element in a bad faith case. There's no
14 case that's ever found emotional damages, that I'm aware
15 of, as a result of bad faith conduct in South Carolina.

16 And I mean you can't recover emotional distress in a
17 fraud case. You shouldn't be able to recover emotional
18 distress in a bad faith case. And ---

19 THE COURT: I didn't see -- I mean, I saw reference to
20 consequential damages. I did not see any reference to
21 emotional distress as a damage of bad faith.

22 Mr. Willey?

23 MR. WILLEY: Well, Your Honor, the negligence cause of
24 action exists as a tort. And as far as I know, mental
25 anguish and emotional distress is a part of the standard

1 jury charge in those situations.

2 I think of course she's entitled to recover for that.
3 That is -- that is a damage in a negligence action. I've
4 tried I don't know how many car wrecks at this point, but
5 the jury is also charged on mental anguish and emotional
6 distress.

7 THE COURT: Well, I mean that's usually where there's
8 an accompanying physical injury; is it not?

9 MR. WILLEY: Well, there has to be some manifestation.
10 And in this case her testimony is going to be that she got
11 medical treatment as a result of that.

12 It's not -- you know, it's not just she's making it
13 up. She actually, you know, suffered it. It is a -- it is
14 a damage.

15 THE COURT: I'm going to need some authority for
16 emotional damages as an element of the damages you can
17 recover in a bad faith case.

18 For the negligence, again, where there's no physical
19 injury -- I mean, there's the physical injury in the car
20 wreck case; but I'm going to need some authority that -- if
21 that's a recoverable damage. I'm just not seeing that.

22 MOTION

23 THE COURT: Punitive damages? Mr. Willey, are you
24 still going forward with the claim for punitives?

25 MR. WILLEY: Yes.

1 MR. WHELAN: Your Honor, there's no evidence of
2 reckless, willful, or wanton conduct on behalf of USAA.
3 Nothing that we've heard today rises to that level. I
4 think that's consistent with your ruling on the intentional
5 infliction cause of action.

6 And, regardless, I handed up to you earlier the --
7 what Mr. Willey said to get past the motion to amend last
8 week. He said, advice of counsel is appropriate in some
9 punitive damages case to show there is no gross negligence.
10 This is not a --

11 What did he actually say?

12 [Whereupon, defense counselors confer]

13 MR. WHELAN: Okay. And -- okay. So he says, advice
14 of counsel defense that they wish to assert in this case
15 sometimes can be asserted in a malicious prosecution case,
16 a contract case involving reliance or contract
17 interpretations, and in some punitive damages cases just to
18 show there was no gross negligence.

19 This is none of those things, period. This is a
20 simple negligence case, which he calls a bad faith case.

21 So Mr. Willey, to get around the motion to amend, said
22 this wasn't a punitive damages case in open court to Judge
23 Culbertson. Ms. Hood is bound by his statement to the
24 Court. And in any event, there's no evidence to get into
25 reckless or willful conduct.

1 MR. WILLEY: Your Honor, again, I haven't seen the
2 transcript. I didn't know ---

3 MR. WHELAN: That's in the one I gave to you.

4 MR. WILLEY: Where did you give to me?

5 MR. WHELAN: I handed it to you.

6 MR. WILLEY: Oh, you did?

7 So my recollection of that is I am reading from a case
8 that talks about the types of cases that you can have
9 advice of counsel defense in. And what we're talking about
10 in that situation is whether or not an agency relationship
11 gives rise to the advice of counsel defense. And that's
12 not what this case is.

13 In a negligence action, of course you can recover
14 punitive damages. And the way that in an advice of counsel
15 case, for example, might be relevant in a punitive case
16 might be to say, well, this was the advice we got so that's
17 what we did and as a result we weren't reckless because we
18 sought counsel's advice.

19 Again, in this case, anything Mr. Daniel did, he did
20 as a direct agent of USAA ---

21 THE COURT: Okay. Let me just say this. I'm going to
22 withhold a ruling on that until the directed verdict stage
23 so I can actually see what the testimony bears out.

24 MOTION

25 THE COURT: Any reference to discovery in this case

1 being incomplete, I don't think that would be appropriate
2 to come in front of this jury.

3 MR. WHELAN: Thank you, Your Honor. The last motion
4 is plaintiff's counsels -- I just don't -- I'm not sure if
5 Mr. Willey -- Mr. Willey will probably agree to this. But
6 he should not be talking about, you know, I said this
7 or ---

8 THE COURT: I wasn't sure in reading -- because
9 there's been so many plaintiff's counsel I didn't know
10 which plaintiff's counsel we were referring to. But if
11 you're referring to Mr. Willey talking about firsthand --
12 he's not going to testify.

13 MR. WHELAN: Exactly.

14 THE COURT: Mr. Willey, I would think that would go
15 without saying that you're not going to testify as a fact
16 witness.

17 MR. WILLEY: Right, I'm not going to testify as a fact
18 witness.

19 THE COURT: Or otherwise get into the back door
20 anything that you would have testified to if you were a
21 fact witness.

22 MR. WILLEY: Right. And the only way that I -- and I
23 will try not to do this; but I see me potentially slipping
24 up, potentially. Hopefully not. But when I'm talking
25 about the evidence in the underlying case and, you know, we

1 sent this letter, meaning me -- meaning Ms. Hood, my
2 client, you know.

3 But I'm not going to talk about USAA called me up and
4 said, hey, your client's a F'ing liar and so -- they didn't
5 do that, by the way; but for example.

6 THE COURT: And then that would be granted.

7 MR. WHELAN: Thank you.

8 THE COURT: I think that covers everything.

9 MR. WILLEY: Your Honor, just two things briefly.

10 There's been a lot of talk this morning about the UIM
11 statute. And I don't think that that is proper. When I
12 read it in the pretrial brief I thought they meant that
13 they were going to use this and ask for a jury charge that
14 they could argue through the law. Now going back and
15 talking at lunch, it looks like they want to put that up
16 and say this is a piece of evidence in the case. And I
17 don't think a statute is a piece of evidence. I think
18 you're going to charge them on the law at the end. And
19 so I just want to be very clear, you know, on that.
20 They're ---

21 THE COURT: Are you referring to like using the
22 statute as an exhibit in the opening argument; ---

23 MR. WILLEY: Exactly.

24 THE COURT: --- is that what you're referring to?

25 MR. WILLEY: Right.

1 MR. WHELAN: Your Honor, I actually don't intend to
2 use the statute as an exhibit in opening. But I do want to
3 be fair that I feel like I have the unenviable task of
4 having to explain to this jury what underinsured motorist
5 coverage is.

6 MR. WILLEY: No, we'll take care of that.

7 MR. WHELAN: All right, Mr. Willey will take care of
8 that.

9 I have the unenviable task of trying to fix what Mr.
10 Willey says about underinsured motorist coverage.

11 But the thing is, it is a -- it is something set by
12 the legislature. It is not something that USA- -- USAA
13 didn't decide, hey, we're going to go step in Ms. Hood's
14 shoes and defend this case and keep money from Ms. Hood.

15 THE COURT: I mean I am going to give you some
16 latitude to talk with the jury about how UIM works.

17 MR. WHELAN: Right. And if he says that we don't have
18 the right to do this, then, I mean, maybe I will bring the
19 stat- -- I mean, maybe somehow we need to get that in front
20 of the jury. I'm not sure how he's going to do it or not.

21 I guess Your Honor can fix that -- can fix that. But,
22 I mean, I just -- obviously, the jury is -- I think the
23 jury is going to be asked to do a lot of -- to understand a
24 lot of pretty complicated law.

25 THE COURT: Well, yeah, I mean the jury is going to

1 hear about the statute for sure.

2 MR. WILLEY: Right.

3 THE COURT: Yes, sir?

4 MR. WILLEY: The final thing that I have, Your Honor,
5 is after openings, depending on the defense that Mr. Whelan
6 decides to promulgate, Ms. Hood may be our first witness.

7 THE COURT: Uh-huh.

8 MR. WILLEY: And I know that she's been sitting here
9 the entire time. But I am -- she's not a lawyer, and I'm
10 equally confident that she probably has not fully
11 understood the meaning or impact of all your rulings on the
12 motion in limine. So either now or after openings, I would
13 just ask for a period of, you know, fifteen minutes or so
14 where I can sit down with her and explain to her the things
15 that she can and cannot say.

16 Going into that, if you're going to require us to
17 provide authority on the mental anguish element of damages
18 for negligence, that would obviously also be part of her
19 testimony since she's the witness that we would get that
20 through. And so we may need -- I don't think we need a
21 whole lot of additional time on that. I hope somebody has
22 emailed back and is working on that. But I don't know
23 where we stand because I've been speaking with you.

24 THE COURT: Well, let's talk about the timing here.
25 I'm hoping we can bring this jury in by 3:30. It's 3:22.

1 We need to get through my instructions to them and opening
2 statements. How long do y'all anticipate taking?

3 MR. POULIN: Your Honor, I haven't timed mine all the
4 way through; but I would guess probably no more than thirty
5 minutes or so on mine.

6 MR. WHELAN: I mean, I'm planning to sort of react
7 with what they do -- to what they do, Your Honor. But
8 it's -- it will not be thirty minutes.

9 THE COURT: I'm just -- you know, I don't know if we
10 want to start her testimony at 4:30.

11 Tell me what you anticipate -- if we started in the
12 morning -- I just don't want us to -- it's now -- it's now
13 Tuesday. I would like very much for this not to go into
14 next week. I think we're all in agreement.

15 MR. WILLEY: Your Honor, I certainly think that our
16 case, if we went past lunch, would probably not go until
17 the end of the day tomorrow, given your ruling now on the
18 trial testimony. I think that narrows the issues pretty
19 significantly.

20 THE COURT: Okay.

21 MR. WILLEY: So I think our case is probably a one day
22 or less case. I always say that with reticence, but that's
23 my -- that would be our objective ---

24 THE COURT: Yeah. I ---

25 MR. WILLEY: --- if we did openings today.

1 THE COURT: I will say that the case I had Monday they
2 told me they would finish the same day, and I did not
3 believe them for one minute.

4 MR. WILLEY: Right.

5 THE COURT: And they finished well -- I mean easily in
6 a day so.

7 MR. WILLEY: I am an optimist.

8 THE COURT: Mr. Whelan, what are your thoughts?

9 MR. WHELAN: I don't think we'll -- I mean, we
10 won't -- we have -- there are very few witnesses listed.
11 So ---

12 THE COURT: Okay. Well, let's get through my
13 instructions. We'll do openings, and then we'll send them
14 home.

15 MR. WHELAN: Okay.

16 THE COURT: And we'll start with your first witness in
17 the morning.

18 MR. WHELAN: All right. Can we have a little break
19 before openings?

20 THE COURT: Sure.

21 MR. WHELAN: Thank you.

22 THE COURT: Ten minutes?

23 MR. WHELAN: That's great.

24 [Whereupon, a recess is taken 6/25/19, 3:26 p.m.]

25 [Whereupon, resume 6/25/19, 3:36 p.m.]

1 MR. WILLEY: I asked to sequester the witnesses. And
2 Mr. Hood is here, Ms. Hood's husband. It is my
3 understanding sequestration only applies to other
4 witnesses' testimony. May he stay in the courtroom for
5 openings?

6 THE COURT: Do you have any problem with that, Mr.
7 Whelan?

8 MR. WHELAN: Yeah, I don't have a problem with that.

9 Your Honor, what about the -- their motion in limine I
10 am just a little confused about the trial testimony. The
11 fact that the jury found Ms. Hood 49 percent at fault ---

12 THE COURT: I think that that is relevant.

13 MR. WHELAN: Okay. Thank you.

14 THE COURT: Okay, we are ready for the jury. Thank
15 you, sir.

16 [Whereupon, jury enters 6/25/19, 3:36 p.m.]

17 THE COURT: All right, ladies and gentlemen, thank you
18 for your patience with us. We did have a number of legal
19 issues that we needed to take up outside of your presence
20 that will hopefully make the trial go a little bit more
21 smoothly.

22 I am going to ask Mr. Miller if you will go ahead and
23 swear the jury for us.

24 (WHEREUPON, the jury was duly sworn.)

25 THE COURT: Thank you so much. I am going to make a

1 few remarks to you here at the beginning to sort of prepare
2 you for the case and what your role is in the case that we
3 are going to try next.

4 First of all, if I can introduce some of the people in
5 the courtroom. You have met some of the bailiffs here.
6 And at this door these gentlemen are here to assist you,
7 show you where you need to go and answer questions for you.
8 If there is anything that needs to be brought to my
9 attention you can do it through those gentlemen.

10 You will see this young lady to my right is the court
11 reporter. She is taking down everything that is being said
12 in case we need a transcript. Everything that everyone
13 says during the course of the trial she is making a
14 recording of that.

15 This young lady (indicating) is a law clerk. She is
16 actually not my law clerk. She is a law clerk for Judge
17 Price who is another circuit court judge in this building.
18 My law clerk has left for another employment and I don't
19 have another one starting for a couple months, so she has
20 been nice enough to assist me this week. Just so you know
21 who the people are that are in the courtroom.

22 Of course the courtroom is a place of honor. It is
23 dedicated to the protection and preservation of citizen's
24 rights under what many have called the greatest justice
25 system ever created.

1 The attorneys that are appearing before you in this
2 case, Therese Hood versus United Services Automobile
3 Association, also known as USAA, they are advocates for the
4 parties that they represent. But first and foremost they
5 are officers of the court, so they are sworn to uphold the
6 integrity and fairness of our judicial system. You should
7 expect them to be professional, competent, and ethical in
8 the representation of their client's interest.

9 And remember that you have also taken an oath to try
10 this case and reach a fair and just verdict and you are
11 also expected to be professional, reasonable, and ethical.

12 So I thank you, first of all, for accepting this very
13 important responsibility. The first thing that is going to
14 occur is that the attorney for the plaintiff - and the
15 plaintiff is the person who has brought this action or
16 suit - her attorney will make an opening statement which
17 will be followed by a similar statement by the attorney
18 for the defendant.

19 These opening statements are not evidence, and they
20 are not arguments. Arguments will come at the conclusion
21 of the case. The purpose of the opening statements is for
22 each party to outline their respective claims and maybe
23 give you a preview of what type of evidence you will hear
24 during the course of the trial.

25 Following the opening statement each side will present

1 its evidence with the plaintiff once again going first.
2 Evidence might take different forms. You may hear sworn
3 testimony from the witness stand of a witness.

4 There may be documents, photographs, or other pieces
5 of evidence that are admitted during the course of the
6 trial. And so certainly you should pay close attention to
7 all of the evidence which is presented to you by each party
8 in whatever form it may be.

9 You the jury are the sole fact finders in this case.
10 That means it is your ultimate responsibility to determine
11 what the true facts are. No one else is going to be
12 permitted to weigh the evidence and determine what the
13 facts are.

14 After all the evidence has been presented the
15 attorneys will make their closing arguments. Unlike the
16 opening statements, the final remarks will be true
17 arguments. That is each side will emphasize certain pieces
18 of evidence and try to persuade you to agree with their
19 version of the facts.

20 Keep in mind that the opening statements as well as
21 the closing arguments of the attorneys do not represent
22 evidence. Of course give the attorneys your undivided
23 attention but bear in mind that what they say is not
24 actually evidence.

25 After the closing arguments are finished I will then

1 explain to you the law that applies to this case and you
2 will then retire to the jury room to consider the facts,
3 apply the facts to the law. And once you have done so you
4 will return a verdict in favor of one side or the other.

5 During the course of this trial the plaintiff has the
6 burden of proving her claims to you. And the plaintiff
7 must meet this burden by proving her claims by what we call
8 the greater weight or preponderance of the evidence.

9 And what we mean by that is best illustrated if you
10 just imagine a traditional set of scales. At the beginning
11 of this case the scales are even. After all of the
12 evidence has been presented if the scale should remain
13 evenly balanced or if the scales should tip even slightly
14 in favor of the defendant then the plaintiff will have
15 failed to meet her burden of proof and your verdict would
16 be for the defendant.

17 If on the other hand the scale should tip even
18 slightly in favor of the plaintiff then she will have met
19 her burden of proof and your verdict would be for the
20 plaintiff.

21 Again, I am going to instruct you on the law at the
22 end of the case, and you can't disagree with me on what the
23 law is. But you are the only ones who can determine the
24 facts. I don't have the right to indicate to you how I
25 feel about the evidence presented or what the facts are.

1 Throughout this trial it will be my intention to act
2 impartially toward each party.

3 Please don't read anything into any legal rulings I
4 may make during the course of this trial that I am trying
5 to give you my opinion about the facts. My opinion about
6 the facts does not matter in the slightest. You are the
7 only ones who get to make that call.

8 From time to time you may hear an attorney object to a
9 particular piece of evidence. And there are rules that
10 each side must obey in making the objections. It may be
11 necessary for me to send you out of the courtroom in order
12 to hear the arguments. We may have to have some discussion
13 of the facts that needs to take place outside of your
14 hearing.

15 Please don't think anyone is trying to hold anything
16 back from you. But, again, I will have to make some
17 rulings possibly on the admissibility of evidence before
18 you hear it.

19 And so the objection is the procedure that the
20 attorneys use to call this to my attention. They are not
21 being rude when they make objections. This is what they
22 are required to do.

23 Please don't hold an attorney's objection against his
24 client, and please don't think from my ruling on the
25 objection that I favor one side or the other. There are

1 just certain rules that we have to follow in a court of
2 law.

3 Finally I would ask that you pay close attention to
4 all of the evidence presented to you. Again, it is you who
5 will determine the facts in this case. You will have to
6 evaluation the credibility of the witnesses who testify,
7 their believability. And so it is important that you pay
8 close attention to the testimony, listen to it, listen to
9 the witness's demeanor while testifying.

10 Okay. I am going to turn it over to the plaintiff,
11 Mr. Willey, for opening statements if there is nothing
12 further. Or, Mr. Poulin, you are going to make the opening
13 statement? Go right ahead.

14 MR. POULIN: Thank you, Your Honor.

15 **OPENING BY MR. POULIN:**

16 MR. POULIN: All insurances companies must operate in
17 good faith and be ---

18 MR. WHELAN: Your Honor, may I approach? I am sorry.

19 THE COURT: Sure.

20 (WHEREUPON, bench conference.)

21 MR. POULIN: All insurance companies must operate in
22 good faith and be fair. This is especially true when
23 dealing with their own customers. Now everybody in this
24 case, even USAA's attorney, will agree that this is a
25 mandatory rule. And this rule doesn't just apply to car

1 insurance companies. It applies to every kind of
2 insurance.

3 So if your house burns down, if your boat sinks, if
4 your business gets vandalized or burglarized, and if all
5 along you have been paying premium payments to an insurance
6 company to cover that, your insurance company has got to
7 treat you fairly if you are then forced to make a claim.

8 And this is one of the most important and fundamental
9 rules in our society. Because just about every one of us
10 spends some of our hard-earned money every month making
11 insurance payments. And unfortunately just about every one
12 of us at some point in our lives will have to deal with an
13 insurance claim.

14 When an insurance company doesn't follow this
15 important rule and it puts its own interests above the
16 interests of its customers then innocent people get hurt.

17 And this is a case about an insurance company telling
18 a lie. This is a case about an insurance company that took
19 certain positions including taking positions under oath and
20 in official court documents that they knew weren't true.
21 And when they did this, it hurt one of their customers.
22 And that customer was Therese Hood.

23 My name is Eric Poulin. I introduced myself to you
24 earlier. And along with Roy Willey we represent Ms. Hood
25 in this case. And you will learn about Ms. Hood during the

1 course of this case. She is a woman of deep faith,
2 involved in her church. She served our country honorably
3 in the armed forces for several several years. She is a
4 citizen of the community.

5 And the people that know Ms. Hood will call her Terry.
6 And that is what I will call her throughout the course of
7 the trial. But USAA -- USAA calls Terry Loss Number
8 11043233-7. She is just a number to them. Just another
9 potential customer paying premiums every month.

10 Now let me take you back and tell you the story of how
11 we got here today. You have to go back with me all the way
12 to November of 2014. There's a car wreck down in Hilton
13 Head. And Terry, Ms. Hood, is driving straight down the
14 road with the right-of-way when a man name Antoine Johnson,
15 Mr. Johnson, runs a stop sign and T-bones her.

16 The force of the collision sends Terry's car shooting
17 forward and up into the opposite lane where then she
18 collides with an oncoming car, a third vehicle.

19 And it is a bad wreck. Terry suffers severe injuries.
20 And it has already been determined by another jury that her
21 damages in that case, the amount that would take to make
22 her whole for her injuries, was \$2.5 million. It has
23 already been determined.

24 At the time of the wreck Ms. Hood was insured, Terry,
25 with USAA. At the time of the wreck Mr. Johnson, the guy

1 who ran the stop sign and hit her, was insured by Geico.
2 Now this is probably a good opportunity for us to just chat
3 for a minute about how insurance works in South Carolina.

4 And I think that most of you probably already know
5 this, based upon the responses we got earlier and about how
6 many people had UIM and that kind of thing. But there are
7 actually a couple of different kinds of car insurance in
8 South Carolina.

9 One kind is called liability insurance. And that's
10 what everybody has. If you drive a car you have liability
11 insurance. That is what you are required to have. That is
12 mandatory in South Carolina.

13 And the way liability insurance works is if you hurt
14 somebody else, it is your fault and they are injured, your
15 insurance company has to compensate the person that you
16 hurt. So the liability insurance compensates the other
17 person.

18 In other words probably a better way to think about it
19 is that the liability insurance pays on behalf of the
20 driver who is liable. Now everyone is required to have
21 liability insurance in South Carolina. But unfortunately
22 we are only required to carry up to \$25,000. You are
23 allowed to buy more. Some people do buy more. But nobody
24 is required to have more than \$25,000.

25 Now obviously if you are driving down the road if

1 somebody hits you and hurts you pretty bad and they only
2 got \$25,000 worth of liability insurance to reimburse her
3 for all of your damages you are going to be -- it is not
4 good, okay.

5 So how do we protect ourselves against other people on
6 the road that maybe don't have enough insurance? And that
7 is actually exactly what happened in this case. So Mr.
8 Johnson's liability insurance coverage was only \$25,000.

9 The way we protect ourselves is that we buy a
10 different kind of insurance. And this is a kind of
11 insurance called underinsured motorist coverage. And this
12 is something that we buy for ourselves. This is
13 abbreviated UIM. It is completely optional. You don't
14 have to have it. It is a good thing to have because it
15 protects you, but it is something that you pay extra for
16 every month if you choose to have it.

17 And what it does is it helps protect you if a liable
18 driver doesn't have enough insurance on their liability
19 coverage. In other words they are underinsured. So that
20 is where underinsurance or UIM pays. Again, there is an
21 extra charge for it.

22 In this case Terry, as a safe person and as a cautious
23 person, did elect to pay extra every single month to USAA
24 for UIM insurance.

25 And at that because she is so cautious she has got a

1 million worth of UIM insurance, which is a lot more than
2 most anybody driving around on the road has.

3 So in a perfect world here is how this should all
4 work. We know that Terry has got 2.5 million at least in
5 damages. This wreck happens that Mr. Johnson causes.
6 Geico is Mr. Johnson's liability carrier. Pays Terry
7 \$25,000 under the liability. Then Terry is supposed to go
8 to USAA, her UIM company, and try to collect the balance of
9 what she is owed up to the million dollars in her policy
10 that she has.

11 So that in a perfect world that is how it would work.
12 Mr. Johnson would pay. USAA would pay. There would be no
13 trial. Nobody would be in court this time or the last
14 time.

15 So that is how everything should have worked out. But
16 that's not what happened in this case. What happened in
17 this case is that while Terry was kind of recovering from
18 the wreck and going through everything she needed to do for
19 herself these people in the other car, in this third car,
20 well, they were hurt too. Okay, so they were entitled to
21 make a claim too. And they made a claim against Mr.
22 Johnson also. They said you ran a stop sign, you hit Terry
23 and you pushed her into her car, you were liable, pay us.

24 But the problem is Geico only has \$25,000 worth of
25 insurance. We already talked about that. Now whether the

1 people in this third car had their own UIM to protect them
2 or not, I don't know. That doesn't have anything to do
3 with this case.

4 But they did see this million dollars that Terry has.
5 And of course they are not entitled to Terry's UIM. But
6 she also has a million dollars in liability coverage.

7 So the people in this third car decided there is some
8 extra insurance, why don't I make a claim against Terry, go
9 try to get some of her coverage from USAA. So they do.
10 They make a claim against Terry.

11 Now obviously for them to make a liability claim
12 against Terry they have to say that she did something wrong
13 in the wreck, right. That is the only way they can go
14 after her liability.

15 So there were some allegations thrown around. And I
16 guess eventually some questions arose where these people in
17 the third car said, well, maybe Terry was at fault,
18 partially at fault for the wreck, because maybe she was
19 driving without her headlights on and so Mr. Johnson
20 couldn't see her and that is why he pulled out in front of
21 her, so she is partially at fault and we are bringing a
22 liability claim against USAA. That is what these people in
23 the third car are saying.

24 Well, let me just tell you USAA, just like most
25 insurance companies, that don't want to pay out any money

1 they don't have to pay. So they ---

2 MR. WHELAN: Your Honor, I object ---

3 THE COURT: Sustained.

4 MR. POULIN: So USAA gets this claim from the third-
5 party and they spring into action. They hire an attorney
6 named Chris Nichols to defend against this claim that this
7 third car is making.

8 They take a statement from witnesses to the wreck. In
9 fact, they talk to the guy driving that third car, the
10 black car. His name is Mr. Kuck. And they talk to him.
11 And he actually admits in a statement that her headlights
12 were on. He says all I saw were headlights coming at me
13 when she came across and smacked into me. So they did
14 that.

15 And then they hired an engineer, an expert named Woody
16 Poplin or -- or -- so Chris Nichols, this attorney hired by
17 USAA, gets an engineer, a guy named Woody Poplin. And they
18 hire him to go out and do what is called a lamp filament
19 analysis.

20 So this is actually really cool. You know, I like
21 science. An engineer can actually look at the aftermath of
22 a wreck and tell whether the lights were on at the time of
23 the collision or not.

24 And of course I am not a scientist. But you will hear
25 testimony about this throughout the case. Basically if the

1 lights are on, the filament in the bulbs are very very hot,
2 right, because the lights are burning. When the lights
3 are off the filament in the bulbs is cold because they are
4 not burning.

5 And apparently when there is a collision a very hot
6 filament will be damaged in a certain way, in one way; and
7 a very cold filament will be damaged in a different way,
8 bend a different way, damaged in a different way.

9 So an engineer can look at these filaments even after
10 the wreck and they can say, okay, based on the damage to
11 this filament it was either hot or it was cold. And based
12 on that they can tell, okay, the lights were either on or
13 they were off at the time of the collision.

14 So Mr. Nichols is hired by USAA. He goes out and
15 hired this engineer, Mr. Poplin. and Mr. Poplin creates
16 report. He does this lamp filament analysis. And his
17 findings are that the Chevy Equinox, which was Terry's car,
18 that his test provided conclusive evidence that the high
19 beam headlamps on both sides of the vehicle were
20 illuminated at the time of the wreck. Right.

21 So now in the response to this claim from the third
22 car they have gone out and they have said we don't -- they
23 said we don't have to pay anything to the people in that
24 third car because Terry didn't do anything wrong, her
25 lights were on at the time of the wreck.

1 Okay. Now most of that doesn't really have anything
2 to do with Terry or why we are here. But it is very
3 important background.

4 So eventually Terry starts to heal up from her
5 injuries and it is time for her to make her claims to be
6 made whole. So like she is supposed to, she hires an
7 attorney, a local attorney here in town, a guy named Kevin
8 Smith who will be here to testify at the trial this week.
9 And you will hear from him. She hires Kevin Smith and they
10 go make a claim against Mr. Johnson. Just like I told you
11 it was supposed to work before, they said you ran a red
12 light, you injured us, pay us your liability.

13 Well, Geico does what it is supposed to do. Geico ---

14 MR. WHELAN: Your Honor, I object again. This is ---

15 THE COURT: I sustain.

16 MR. WHELAN: The same -- the same thing.

17 THE COURT: Move along -- move along Mr. Poulin.

18 MR. WHELAN: May we approach, Your Honor?

19 THE COURT: Sure.

20 (WHEREUPON, bench conference.)

21 MR. POULIN: So Terry makes the claim against Geico,
22 and Geico pays the \$25,000. So next Terry through her
23 attorney goes to make a claim against USAA for the balance
24 of what she claims are her injuries under the UIM policy.

25 USAA now takes the position that Terry was at fault

1 for the wreck and that her headlights were off at the time
2 of the wreck. They take that position. It is their
3 argument that they don't have to pay her any money under
4 the UIM claim. They hire another attorney, an attorney
5 named Jack Daniel.

6 Terry and her attorney Kevin Smith are forced to file
7 a lawsuit, a different lawsuit. This is the second trial
8 we have had on this case. I am talking about a first
9 lawsuit that happened. Okay, this case has been pending
10 since 2014 that we have got here today.

11 She and her attorney Mr. Smith are forced to file the
12 lawsuit ---

13 MR. WHELAN: Your Honor, I am sorry to keep objecting.
14 But they weren't forced to file a lawsuit. It is just
15 misstating facts. It is misstating the law. They had to
16 file a lawsuit under the law. He continues to say these
17 things. I apologize that I have to keep interrupting.

18 THE COURT: I sustain.

19 Ladies and gentlemen you are going to hear about how
20 the law operates at the appropriate time. Keep in mind
21 that the statements of the attorneys, both attorneys during
22 opening statements, is not evidence. I am going to
23 instruct you on the law that applies during the course of
24 the trial.

25 Thank you. The objection is sustained.

1 MR. WHELAN: Thank you, Your Honor.

2 MR. POULIN: Terry files the first lawsuit. USAA
3 hires Jack Daniel and he defends that lawsuit the whole
4 time by saying Terry was at fault, Terry didn't have her
5 lights on, we don't have to pay, we shouldn't have to pay
6 her any money under her UIM claim.

7 Now this whole time that Mr. Daniel in Terry's first
8 lawsuit is arguing and taken the position that Terry's
9 lights were off and that she was at fault and that they
10 shouldn't have to pay her any of the UIM money, Mr.
11 Nichols, Chris Nichols, UIM's -- the attorney that USAA
12 hired in the other case, is in a different courtroom taking
13 exactly the opposite position. Taking the position that we
14 shouldn't have to pay the third car any money because Terry
15 wasn't at fault in the wreck and her headlights were on.

16 So Terry's first lawsuit takes almost two years to
17 work its way through the process. And it actually makes it
18 all the way up to trial. So there has been a trial in this
19 case already, which is where that 2.5 million figure comes.
20 And I will talk to you more about that in a minute.

21 Now during this time USAA has their positions and they
22 are filing paperwork and official court documents in both
23 cases. And so they have their outward position. But of
24 course they are also thinking about the case sort of
25 internally. They have their own internal thoughts about

1 the case.

2 And during this time what we will see in this case,
3 what the evidence will show, is that USAA internally had
4 discussions about maybe what they should have paid or what
5 they should be paying to Terry. They had discussions about
6 what a reasonable settlement offer might be that -- what
7 good -- or what do they think they should offer as a
8 reasonable settlement for the case so that it doesn't have
9 to go all the way to trial.

10 And we will see that as far back as August of 2016 in
11 their own internal documents and their own internal claims
12 files they determined themselves that Terry's case a
13 reasonable settlement for that would be at least \$250,000.
14 But they never once offered that \$250,000 to Terry, not one
15 time between the time she initially made her claim and had
16 to go all the way to trial on her case.

17 Now Terry takes her first case all the way to trial.
18 And by the way, it is not cheap to get a case all the way
19 to trial. Terry will testify and you will hear from her
20 attorney in the first case, Mr. Smith, that it costs about
21 \$50,000 worth of actual out-of-pocket litigation expenses
22 just to get the first case to trial.

23 And that is like court fees and costs to get the case
24 to trial. That is not attorney's fees. That is not
25 medical needs or anything else. It costs \$50,000 in costs

1 just to get the first case all the way to trial.

2 She goes to trial. And the first jury hears all of
3 the evidence about the medical bills in the wreck and the
4 damages and the lights and everything which way like that.
5 And that jury determines that the appropriate amount of
6 money to reimburse her for all her injuries is \$2.5
7 million. Okay.

8 Now USAA thought it was \$250,000. So they were off by
9 a factor of 10. But the law doesn't require them to be
10 perfect. The problem is they didn't even offer what they
11 thought the right amount was. They never even offered her
12 250. It turns out the right amount was \$2.5 million.

13 Now some other things that happened in that trial.
14 They continued -- there was a continued position that Ms.
15 Hood didn't have her lights on and everything like that.
16 And so at the end of the day the judge in that first trial
17 actually reduced the verdict and said -- they reduced it by
18 49 percent.

19 So the verdict that -- the final verdict that came out
20 of that first trial was that jury said that Ms. Hood was
21 entitled to -- it comes out to about \$1.275 million. That
22 was the result of the first trial.

23 MR. POULIN: Can you turn this off for just one
24 second.

25 (WHEREUPON, ELMO display turned off.)

1 MR. POULIN: Okay.

2 (WHEREUPON, ELMO display turned on.)

3 MR. POULIN: Now all of that has already been decided.
4 And it has nothing to do with why we are here this week.
5 And you don't have to worry about any of that. You don't
6 have to worry about who was at fault in the wreck. You
7 don't have to worry about whether the lights were actually
8 on or off. You are not going to have to hear from doctors.
9 You are not going to have to look at Terry's medical bills.
10 You are not going to have to decide what her injuries were
11 or what her damages are. That has all already been
12 decided. A jury has already decided that it would take
13 \$2.5 million to compensate her for her injuries but that
14 she is entitled because of what we call comparative
15 negligence to about 2.7 -- to about one -- \$1.275 million
16 after the 49 percent.

17 So all we have to figure out this week is whether USAA
18 complied with its duty of good faith and fair dealing in
19 the way that it treated Terry through this whole situation.

20 We brought this case and had to have this trial
21 because we believe the evidence shows that USAA did not
22 comply with that rule, that mandatory rule that says an
23 insurance company has got to treat people fairly and act in
24 good faith.

25 And we will show you -- we will show you and the

1 evidence will show that USAA put its own interests above
2 the interest of Terry, its client. It took one position in
3 the case against the third car so that -- to say they
4 didn't owe them any money. And it took a completely
5 opposite position in Terry's case so it could say it didn't
6 owe her any money.

7 We will show you that USAA internally knew that it
8 should have settled the case with Terry for at least
9 \$250,000 and never ever offered it.

10 We'll -- you will hear from Terry and you will hear
11 about the impact that all of this had and about, you know,
12 what it is like to have to fight for four years and go
13 through two trials to get this day in court that we finally
14 made it to.

15 And we will show you that after all of these years of
16 living up to her end of the bargain, to paying all of this
17 extra money to USAA for this extra insurance that she
18 wasn't required to have to make sure that she was
19 protected - and other people on the road were protected, by
20 the way, because she had this extra. After living up to
21 her end of the bargain for all these years when it came
22 time for USAA to live up to their end of the bargain they
23 completely disappeared. They were nowhere to be found.

24 Now I will tell you this. Because I think this is
25 important. After the first trial, after the jury came back

1 and the verdict was reduced to 1.275 million, USAA did make
2 payment to Terry. Okay. So I don't want us to sit here
3 and be talking about the fact or be thinking that Terry
4 hasn't received any compensation from this case yet.
5 Because she has.

6 After that trial USAA paid Terry the million dollars
7 that it had on its coverage. Okay. Now this is in -- this
8 is in January of 2018 that they make this payment. So this
9 is almost four years -- three plus years after the wreck.
10 Okay.

11 And they didn't make this payment to Terry because
12 they just all of a sudden decided that it would be a good
13 thing to do. They made that payment to Terry because she
14 had already taken him to court one time and a jury had
15 already said you have to make that payment.

16 Okay. So that is the first thing to keep in mind.
17 They have paid her a million dollars. Okay. And you are
18 probably sitting here thinking, huh, a million dollars is a
19 lot of money, that is pretty good, she came out pretty
20 good, like why are we still at this, why did she come back.

21 But the evidence will show you -- again, remember that
22 first jury said that it would actually take two-and-a-half
23 million dollars to actually fully compensate her for all of
24 her damages and everything that she went through.

25 And they saw the medical bills. And they heard

1 testimony about injuries. That is not something y'all will
2 have to worry about. Because that has already been
3 decided.

4 But they said two-and-a-half million is what it would
5 actually take to make her whole. And they said, you know,
6 maybe she is not entitled to actually be made whole because
7 she was 49 percent or whatever.

8 So they said at a minimum \$1,275,000 is what she would
9 be entitled to even if her lights were off and even if all
10 of this other stuff USAA said about her was true. It has
11 already been decided.

12 Now that verdict too -- and here's the difference.
13 That verdict that that first jury rendered and the million
14 dollars that they have already paid her, that was to
15 compensate her for the damages that Mr. Johnson caused.
16 Right. Okay. So that was for her injuries in that case
17 and her medical bills and everything for the damages that
18 Mr. Johnson caused.

19 But this case too now we are here to talk about the
20 damages that USAA itself caused damages, the money it made
21 her spend to take that case all the way to trial by never
22 offering what they valued the case at, by never trying to
23 settle the case at their own value, all the damages that
24 Terry suffered for having to go through that litigation for
25 all of the time and take it all the way to trial. And this

1 one too. So that is what this case is about.

2 Now during this case you will hear from Terry. I told
3 you she will testify. You will hear from Kevin Smith, the
4 attorney who represented Terry in the first case. You hear
5 from Kathy Motes. She is actually in the courtroom with us
6 today. She is a representative of USAA. She is basically
7 the named USAA adjuster that was assigned to Terry's
8 claims. So we will get a chance to talk to her about what
9 USAA did when all of this was going on.

10 A woman named Gail Howard, another adjuster that works
11 for USAA, we have invited her to be here this week. I
12 don't know whether she will be here to testify or not. But
13 if not, we have taken her deposition and you will hear some
14 of her testimony through what is contained in her
15 deposition transcript.

16 Some other people, some names that you might hear of
17 this week that you may -- probably won't testify, but
18 probably won't be witnesses necessarily, but just so you
19 know who they are so when you hear their name you can kind
20 of put all of the pieces together.

21 We already talked about Jack Daniel. So when people
22 are talking about Jack Daniel they're talking about the
23 lawyer that USAA hired to try to avoid paying Terry any
24 money in -- for the wreck claim.

25 MR. WHELAN: Objection, Your Honor.

1 MR. POULIN: To take a position -- to argue the
2 position that they weren't required to pay Terry any money
3 in her direct claim.

4 THE COURT: And ladies again -- ladies and gentlemen,
5 once again, we are going to explain to you the law that
6 applies at the end of the case. That objection is
7 sustained.

8 MR. POULIN: Woody Poplin, we talked about him a
9 minute ago. He was the engineer that USAA -- or that their
10 attorney Chris Nichols hired to run the lamp filament
11 analysis, the one that determined the lights were on.

12 Again, probably won't come in and testify. But you
13 will see his report. His report I believe will go into
14 evidence and will go back with you so you can see what he
15 found.

16 There is another expert that USAA talked to in this
17 case, a man named Mr. Black. You probably won't hear from
18 him either. And I don't think he ever actually did a
19 written report. But we will hear about him when Ms. Motes
20 testifies.

21 So Mr. Poplin, the expert that you -- that Chris
22 Nichols hired in the top case who said the lights were on.
23 Well, Jack Daniel down here in this bottom case, he went
24 out and hired a different expert, another expert.

25 Because, again, in the bottom case USAA was taking the

1 position that the lights were off. So they go hire this
2 other guy named Mr. Black. Well, we are going to find --
3 we are going to hear it turns out Mr. Black came to the
4 same conclusion that Mr. Poplin did. He said, ah, I think
5 the lights were on based on Mr. Poplin's test. So actually
6 two different experts that USAA and their attorneys talk to
7 who say the lights were on.

8 Chris Nichols we talked about. Also USAA's attorney
9 who is the attorney taking the opposite position in either
10 case.

11 And the people in that third car are Mr. and Mrs.
12 Kuck. They were the Kuck's or the Kuck's depending --
13 you will hear it pronounced different ways. So those are
14 the people we are talking about when we go through the
15 case.

16 So I am almost done. But before I sit down we need to
17 talk about the root cause here and what the evidence is
18 going to show. Because it is not just your responsibility
19 as jurors to determine what happened. But it is your
20 responsibility to try to determine why it happened and what
21 the appropriate allowance in your verdict would be to
22 remedy that situation.

23 At the end of the case you will have heard all of the
24 evidence, and you will certainly know what happened. But
25 if we need to know why it happened, you will have to be

1 asking yourself some questions throughout the course of the
2 case. And so some of the questions I would like for y'all
3 to be thinking out as you are hearing the evidence and the
4 testimony in the case is I want you to think about the
5 decision of USAA to hire two different lawyers to go into
6 two different courtrooms and take completely opposite
7 positions.

8 I want you to think about the decision that USAA made
9 to disregard the opinions of the two experts that USAA's
10 attorneys hired.

11 I want you to review the evidence and think about the
12 decision that USAA made to not even ever try to offer Terry
13 the amount that internally they knew was a reasonable value
14 of the claim, a minimal reasonable value of the claim. And
15 also the decision that they made to even ignore the
16 witness statement, Mr. Kuck's statement that said, oh, the
17 lights -- all the lights were coming.

18 That is what this case is about. This case is about
19 an insurance company with two competing claims taking
20 completely opposite positions so that they can argue that
21 they didn't have to pay any money on either claim.

22 And when you hear all of the facts and the truths and
23 you see the evidence in this case you will understand why
24 this is the type of case that we had to bring before you
25 and why Roy will have to stand up at the end of the case

1 and ask you to allow a verdict against USAA to fix the harm
2 that they caused Terry in this case.

3 Thank you very much for listening.

4 THE COURT: Thank you, Mr. Poulin.

5 Mr. Whelan.

6 MR. WHELAN: Thank you, Your Honor.

7 **OPENING BY MR. WHELAN:**

8 What is a better beach, Sullivan's Island, Folly
9 Beach, Isle of Palms? What is the best restaurant in town?
10 Who is a better quarterback, Peyton Manning or Tom Brady?

11 This is the case -- we can disagree because we are
12 humans and humans disagree. Not everybody has the same
13 opinion about everything. This is a case about a
14 reasonable disagreement. It is a case about a plaintiff
15 and her attorneys who believe that she was entitled to a
16 lot of money, \$650,000 -- \$650,000 was their settlement
17 offer from USAA that they wanted because of her insurance.
18 You will also hear that that was a number that they would
19 negotiate down to between 300 and \$400,000. That is one
20 side.

21 On the other side you will hear about the defendant,
22 USAA, who thought that the value of her claim was more like
23 \$250,000. And Mr. -- you will hear the evidence. It is
24 not at all that it was worth at least \$250,000. The
25 evaluation was maybe somewhere between \$100,000 and

1 \$250,000.

2 And the reason they made that evaluation was because
3 they believed that Ms. Hood was partially at fault,
4 possibly totally at fault, for the accident that happened.

5 And under South Carolina law if two parties are in an
6 accident and one of the parties is found to be
7 predominately at fault, at least 51 percent at fault, that
8 party recovers nothing. Okay. USAA thought it was
9 possible that a jury would find she was predominately at
10 fault. So they valued the case at up to \$250,000.

11 The plaintiffs took a different positions. And so
12 their value was 350,000 to \$650,000. Well, it turned out
13 that both sides were a little bit wrong.

14 Because the plaintiffs contended Ms. Hood wasn't
15 involved at all. They contended that her lights were on
16 when this accident occurred. Well, a jury down in Jasper
17 County found that she was at fault but she was only 49
18 percent at fault. And because of that she was able to
19 recover -- remember if she was 51 percent at fault she
20 couldn't get anything. But at 49 percent she could recover
21 but the verdict would be reduced by 49 percent. And the
22 jury knew that.

23 As far as damages, it was a lot higher than anyone
24 expected. It wasn't 250. It wasn't 350. It wasn't 650.
25 It was two-and-a-half million dollars. And so as a result

1 of that, that amount was reduced down to about 1 1/4
2 million dollars.

3 And you hear about USAA's contract with Ms. Hood
4 required them to pay her a million dollars as a result of
5 that. And they paid her that and interest, \$1,023,000 or
6 something like that.

7 So this case is about reasonable disagreement. We
8 will talk more about that. But first let me reintroduce
9 myself. I am Ronnie Mr. Whelan. Katie Mellon is next to
10 me.

11 Kathy Motes is next to her. Kathy has been at USAA
12 for 24 years. And Mr. Poulin is right, she was primarily
13 for this case. And you will hear about -- you will hear
14 from her and you will hear why she thought that the value
15 was between 100 and \$250,000.

16 You know, as the judge said, what the lawyers say is
17 argument. It is not evidence. And I think that when you
18 actually hear the evidence you will find out that it is not
19 exactly as Mr. Poulin says it is.

20 There are a few things that I think I ought to
21 clarify. I mean this subject of insurance and underinsured
22 motorist coverage, I know it's confusing. I saw the looks
23 back there from some people when she asked about
24 underinsured motorist coverage. But the thing about it is
25 it is set up by law. Okay. And it is funky.

1 So Mr. Poulin talked about liability coverage. And we
2 are all pretty familiar with that. Liability coverage does
3 two things. One, it hires a lawyer to defend you when
4 someone sues you for an accident. And number two, it pays
5 damages when you are at fault for an accident.

6 Now, underinsured motorist coverage, which is a lot of
7 times abbreviated to U-I-M, is different. It is governed
8 by state statute. Number one -- and here's the weird thing
9 about it. I am going to write steps into shoes (writing on
10 board). And this is really weird. This is just how the
11 legislature does it. Let me just sort of flesh this out.

12 Okay. So let's say I am in a wreck with Katie. And
13 Katie is a good driver. But we are going to say she was at
14 fault. And I am hurt. So I sue Katie.

15 Now her liability insurance is going to do two things.
16 First, it is going to hire her a lawyer to protect her
17 against my lawyer. And second, if a jury gives me damages
18 it is going to pay for those damages up to her policy
19 limit. Okay.

20 And as Mr. Poulin said, the minimum limit in South
21 Carolina is 25,000. So if I sue Katie and she has \$25,000
22 in coverage and a jury says, Robbie, you get \$10,000, her
23 carrier will pay that.

24 If it says, Robbie, you get a million dollars, what
25 happens? Her carrier is only responsible for \$25,000. So

1 I have to go after her for the rest. And she may not be
2 able to pay that. That is where underinsured motorist
3 coverage comes in.

4 Okay. At that point my carrier can come in and stand
5 in the shoes of Katie. All right. And the judge will
6 instruct you on the law. When the carrier does that, my
7 insurance carrier is actually sort of representing Katie
8 even though she's not in the case anymore. So they are
9 adverse to me.

10 And so now my lawyer instead of going against Katie's
11 lawyer is going against a lawyer hired by my underinsured
12 motorist coverage. Okay.

13 And that is -- you know, Mr. Poulin talked about
14 premiums. That keep premiums low. The adversarial system
15 that we -- that we live in.

16 So I know it is weird. It is set up by the
17 legislature. That is the way it works.

18 So in this case -- I am just going to quickly sketch
19 this accident. So Mr. Johnson is here (pointing), Antoine
20 Johnson. Ms. Hood is coming up this way (pointing),
21 Therese Hood. And then you have William Kuck and Mary
22 Kuck. That is Kuck, K-U-C-K, coming down the other
23 direction.

24 And as Mr. Poulin showed you, Antoine Johnson pulls
25 out, hits Therese Hood, and then she goes across and hits

1 the Kuch's. And the big question is were her lights on or
2 off.

3 So there are a few lawsuits filed. The first lawsuit
4 that is filed -- and I don't think this is what Mr. Poulin
5 said, but the evidence will show that the first lawsuit
6 that was filed was Therese Hood sues Antoine Johnson.

7 So that is her personal attorney, Kevin Smith, with
8 the Hoffman Law Firm, files a suit against Antoine Johnson.
9 Now Antoine Johnson's liability insurance carrier defends
10 that suit.

11 Then the next suit is Antoine Johnson sues Therese
12 Hood. And then William Kuck sues Teresa Hood and Antoine
13 Johnson. And then Mary Kuck also sues both of them as
14 well.

15 Okay. So I primarily want to talk about this first
16 suit, because that is what the plaintiffs are suing about.
17 But before I do, let me just make a point. For these three
18 lawsuits, the ones against Therese Hood, USAA is her
19 liability carrier.

20 So USAA has to do two things. Number one, they hire
21 her a lawyer to defend her against these plaintiff's
22 attorney's claims. That was Chris Nichols.

23 And then number two, that have got to pay -- they are
24 going to have to pay the damages. Okay. And you would
25 hear that USAA has already paid damages to Antoine Johnson

1 and has paid damages to Mary Kuck. And the William Kuck
2 case is still out there, and it is being defended. So that
3 is the liability insurance.

4 But this case concerns this suit primarily, the suit
5 against Antoine Johnson.

6 So what happens? Eventually -- I think it was
7 Geico -- yeah, it was Geico. They pay their \$25,000
8 limits. All right. And Therese Hood releases Antoine
9 Johnson. He is not going to be personally responsible
10 anymore. She is going to go after USAA for the rest up to
11 her policy limit of a million dollars.

12 So at this point USAA steps into the shoes of Antoine
13 Johnson, and an attorney named Jack Daniel is hired to
14 represent Antoine Johnson even though it is US- -- it is
15 Ms. Hood's insurance company. And the plaintiff's counsel
16 will and have tried and make a big deal about the fact that
17 there is one USAA lawyer representing Antoine Johnson and
18 one lawyer representing Therese Hood.

19 MR. POULIN: Your Honor, I object. May we approach?

20 THE COURT: Sure.

21 (WHEREUPON, bench conference.)

22 MR. WHELAN: So -- and to clarify, so in this suit --
23 and again this gets back to this weird insurance set up by
24 the legislature. USAA does not actually represent Antoine
25 Johnson. Jack Daniel does not represent Antoine Johnson.

1 Because Therese Hood has released him. Said you don't have
2 to pay anything else, I am going after USAA for the rest.

3 So Jack Daniel represents -- his client is USAA, but
4 the defendant is Antoine Johnson. And when the case is
5 tried Antoine Johnson is sitting right next to Jack Daniel
6 and Jack Daniel is saying -- you know, defending Antoine
7 Johnson. So I wanted to clarify that.

8 Another thing, just to point now, Antoine Johnson
9 counterclaimed in this suit -- and I know this is a
10 confusing subject. And I apologize. But Therese Hood sues
11 Antoine Johnson. Antoine Johnson counterclaims back
12 against Therese Hood. So I don't think that is a
13 distinction that is important at all, but I want to point
14 it out.

15 So if you are evaluating this case and you are trying
16 to figure out whether or not Therese Hood was at fault for
17 that accident and how much the case was worth, what do you
18 look at?

19 One question might be were there any eyewitnesses to
20 the accident. What if there was a witness behind Therese
21 Hood who happened to be a municipal judge in Hilton Head
22 and what if that witness said that before the accident
23 Therese Hood came speeding up behind him and tailgated him
24 and he was in the left lane and moved over to the right to
25 let her pass and she sped right on by without her lights on

1 with only her parking lights on and that Antoine Johnson
2 could not have seen her? What if that -- would that affect
3 your evaluation? Would that make -- would that be a
4 reasonable thing to consider?

5 This man's name is Dustin Lee. What if there was a
6 witness behind the Kuck's named Cary Tameron; and what if
7 Cary Tameron said, well, my view was obstructed by the
8 Kuck's but I saw -- I could see part of Ms. Hood's car and
9 it did not have a headlight on, I did not see a headlight
10 on?

11 What if the police officer came --- you may be
12 interested to know who the police officer determined was at
13 fault for that accident. You may be interested to know
14 that the police officer found Therese Hood's car running
15 without its lights on.

16 MR. POULIN: Your Honor, I object to that. That is
17 never admissible at trial. A police officer didn't witness
18 the wreck, so -- UIM -- they wouldn't be entitled to even
19 consider that because they know that it is not admissible
20 at trial because the police officer is just guessing.

21 THE COURT: That is overruled at this point. It is
22 not a matter of what came in front of the jury. It is what
23 was known to USAA at the time that it was negotiating with
24 your client. Thank you.

25 MR. WHELAN: So those are all things you may be

1 interested in.

2 Another thing is Mr. Poulin talked to you a lot about
3 this expert. All right. What did the expert -- I can't
4 remember if he put it up there or not. But what did the
5 expert conclude in his opinion? That her high-beams were
6 on. I think he said headlights. The expert said her
7 high-beams were on.

8 Now this was dusk on Highway 278 going to Hilton Head.
9 All right. With cars going in both directions and
10 driveways coming in and out. And you may want to know when
11 you evaluate the case what Therese Hood said, whether she
12 thought her high-beams were on and whether she thought her
13 low beams were on or what she said about the lights at all.

14 Now I want to talk a little bit about the value of the
15 case. We have already talked about it. Mr. Poulin says
16 250 was the minimum. And the opposite is true.

17 When the suit was litigated, all right -- and so let
18 me just make one other thing clear. On lia- -- on UIM
19 insurance governed by statute, governed by South Carolina
20 law, "A", there is no obligation to pay UIM insurance until
21 a trial is concluded.

22 All right. The obligation to pay arises when the
23 underinsured motorist, Antoine Johnson, is told by a jury
24 how much he owes. That is how you know how much to pay.
25 And as a practical matter, parties settle cases before

1 litigation all the time. All right.

2 You know how that works? The plaintiff says I want
3 this much. The defendant says I want this much. And you
4 negotiate, like buying a car or buying a house.

5 And you will hear that there was a mediation in this
6 case. Mr. Poulin mentioned it. Mediation is when the
7 parties get together and try and settle to help the third
8 parties mediate. And you will hear in this case that the
9 mediation the plaintiffs wanted a certain amount and the
10 defendants offered a certain amount. Mr. Poulin told me
11 they didn't offer any of the 250. What if they actually
12 offered 200?

13 And with the plaintiffs at 650 would it make any
14 sense -- I mean if you are buying a house and they are at
15 650 are you going to put all your money out there until
16 they come down a little bit more? That is something that
17 you will have to evaluate in this case.

18 I guess the last thing I need to talk about is he
19 talked about damages and he said that Ms. Hood was damaged
20 because she had to pay \$50,000 for her attorney. Pay
21 \$50,000 to try the case.

22 Well, if you were willing to settle the case for
23 \$350,000 because you think that is what the case is worth -
24 that is what the plaintiff's were - and then you take the
25 case to trial and you get over \$1 million, have you been

1 damaged? That is what she claims that she was damaged
2 because she made almost \$700,000 by trying the case.

3 And the other thing, he mentioned medical liens.
4 There is no medical liens that come out of this. The
5 million dollars did not pay for any medical bills. She had
6 other recovery. Remember? Antoine Johnson paid her. And
7 she also had other insurance to pay her you will hear
8 about.

9 So I am going to sit down, folks. I do want to say
10 that we know it is not fun sitting there listening to all
11 of this insurance. And we know it wasn't fun sitting out
12 there for hours while we had these motions earlier.

13 We do appreciate your service. We really ask you to
14 pay close attention to all of the evidence that you hear.
15 And we think at the end of the day you will find that this
16 was just a reasonable disagreement that worked out in Ms.
17 Hood's favor, frankly.

18 Thank you very much.

19 [Whereupon display moved at the request of the Court]

20 THE COURT: Okay, ladies and gentlemen, this is a good
21 stopping point for us. We are reluctant to start with the
22 first witness. We would probably most assuredly keep you
23 here probably past the time you would like to be here
24 today. So we are going to go ahead and break for the
25 evening.

1 Once again, please don't begin discussing the case.
2 You have only heard just a preview of the testimony. You
3 haven't actually heard any evidence. Don't discuss the
4 case with anyone again even to tell them the parties
5 involved or what type of case it is.

6 Were you able to select a foreperson? Okay, and
7 whoever is the foreperson -- I need you to tell me your
8 name.

9 FOREPERSON: Hilliary Sabbato.

10 THE COURT: Got it. Thank you so much.

11 Okay. Anything further before I release the jury?

12 MR. WILLEY: Nothing from the plaintiff, Your Honor.

13 MR. WHELAN: Nothing, Your Honor.

14 THE COURT: 9:30, we need to start at 9:30.

15 Okay, ladies and gentlemen, if I could ask you to be
16 in the jury room a little bit before 9:30. We are going to
17 do our very best to start at 9:30 tomorrow. So thank you
18 very much and have a good evening.

19 [Whereupon, jury exits courtroom 6/25/19, 4:30 p.m.]

20 THE COURT: Anything further before we adjourn?

21 MR. WHELAN: No thanks, Your Honor. Thank you.

22 THE COURT: All right. We will get started at 9:30.

23 Thank you so much.

24 [Whereupon, recess for the evening, 6/26/19, 4:38
25 p.m.]

1 [Whereupon, resume 6/26/19, 9:30 a.m.]

2 THE COURT: Are we ready to bring the jury?

3 MR. WILLEY: Your Honor, I have a few things pretrial
4 -- or pre-jury to bring to the Court's attention. We did
5 submit last night our memo on emotional distress to Your
6 Honor, damages in a bad faith action. And we have all the
7 authority that was cited in that memo.

8 In addition to that -- in fact, in a book put out by
9 the South Carolina Bar called Causes of Action -- mine is a
10 little disheveled here. I use it a lot. But when it talks
11 about insurance bad-faith damages, in fact, on Page 159 of
12 that book it says: We have implicitly recognized that
13 emotional distress damages are related to insurance bad
14 faith actions, just as they are in a typical negligence
15 action.

16 So we've provided Your Honor with -- I'm happy to show
17 you the page in the book. But I think more elucidating
18 than that are -- is the actual law in South Carolina, which
19 we have provided in a memorandum to you, including cases.

20 You know, we've got state court orders here which, of
21 course, cite Supreme Court precedent. And then we have Mr.
22 Whelan's favorite, which are the federal cases, including
23 from the Fourth Circuit Court of Appeals, which also say
24 that emotional distress damages are related.

25 So our first witness is likely to be Ms. Hood, and so

1 we just want to make sure that we get that before the
2 Court.

3 THE COURT: Mr. Whelan, have you had a chance to look
4 at it?

5 MR. WHELAN: Well, Your Honor, I've briefly reviewed
6 the federal case that he cited. And I think it's
7 interesting that yesterday the plaintiff took the position
8 that the Court should not follow the Federal District
9 Court's interpretation of insurance cases and then today
10 he's saying that the Court should follow the Federal
11 District Court's interpretation of insurance cases.

12 I mean these cases are applying to South Carolina law
13 on bad faith or predicting the South Carolina law for bad
14 faith. Justice was done in the Collins case, the Meyers
15 case, and the Snyder case.

16 So it's interesting that they have flip-flopped on the
17 persuasiveness of that authority. I presume that's the
18 authority that the Causes of Action book refers to, because
19 he didn't say what that cites.

20 The South Carolina cases that we cited, Carrig v. Blue
21 and the Sparrow v. Toyota, go to the point that there is no
22 emotional distress damages for a purely economic tort. And
23 so those cases involve fraud. And the Court said you can't
24 recover emotional damages in those cases because it's a
25 purely economic tort.

1 Here the damages they're talking about are purely
2 economic, we didn't offer enough at mediation, and if that
3 caused her suffering, just like if somebody commits fraud
4 on somebody else and it causes them suffering, it's not
5 compensable under those cases.

6 And the other thing I'd like to point is it's the
7 plaintiff's burden to prove damages with a reasonable
8 degree of particularity. And they are alleging that she
9 was -- suffered emotional distress during -- this is sort
10 of the point I made yesterday. In the underlying trial,
11 when they asked the underlying trial for damages for
12 emotional distress, were awarded two-and-a-half-million
13 dollars.

14 So I can't conceive of how they could present evidence
15 to a jury to unpack how some emotional distress was caused
16 by Antoine Johnson, which they've already recovered for,
17 and there's some additional emotional distress that's
18 unrelated to that.

19 In fact, it has to be related to or caused by Antoine
20 Johnson. They've already recovered from it, and they
21 can't -- they can't recover for it again.

22 And the other point that I make is that -- well, this
23 is a -- this is a Fourth Circuit case. I'm sure if Mr.
24 Willey will contend that it's persuasive or not. But
25 Knussman v. Maryland, 272 F.3d 625, Fourth Circuit, 2001,

1 goes to the point that anxiety, stress or other
2 unpleasantness experienced is a byproduct of litigation, is
3 not caused by the constitutional deprivation itself, such
4 mental distress is inherent in most litigation; and
5 although it can be argued that the plaintiff should not
6 have been placed in the position where he had to assert his
7 rights, the same can be said of a successful plaintiff in
8 any case.

9 Litigation is always stressful. It should not be
10 argued to this jury that that caused damages to her.

11 Thank you, Judge.

12 MR. WILLEY: Your Honor, a few things on that point.

13 The standard for damages in a negligence or bad faith
14 action is not reasonable degree of particularity; it's
15 preponderance of the evidence. And so that's what we have
16 to prove in those cases. Second ---

17 MR. WHELAN: That's the burden of proof. But you
18 have -- but damages have to be -- they cannot be left up to
19 conjecture or speculation. You have to -- there has to be
20 evidence that a jury can determine ---

21 MR. WILLEY: I'm half finished.

22 MR. WHELAN: Yeah, I'm sorry. But that was just
23 correct- -- correcting argument.

24 MR. WILLEY: Testimony in a case is evidence. And so
25 when Ms. Hood testifies that she suffered emotional stress

1 as a result -- not of the car wreck. That's not what we're
2 claiming. I will agree with counsel that emotional
3 distress as a result of the car wreck is not an element of
4 damages in this case. But when she testifies that she
5 suffered emotional distress, and now anguish specifically
6 as a result of USAA's unreasonable actions, that is
7 recoverable in this action and, in fact, is only
8 recoverable in this action.

9 It would not have been, and was not, recovered or
10 recoverable in the underlying action. It's only recovered
11 in this action as a consequential damage as a result of
12 USAA's conduct.

13 And, in fact, we're talking about bad faith. But,
14 Your Honor, also going to the jury is a just straight
15 negligence action. And in a negligence action, mental
16 anguish is a standard jury charge. It is a standard
17 element of damages.

18 The cases that we've cited actually provide you with a
19 state court order from Judge Nettles where he uses some of
20 the law. I will not concede that a Maryland case applies.
21 But I will agree, actually, with the premise that she
22 cannot recover in this case for emotional distress as a
23 result of the car wreck. She can only recover for her
24 emotional distress as a result of what USAA did or failed
25 to do.

1 And I think the law on that, under both negligence
2 cause of action and the bad faith cause of action, is
3 clear. It is a damage in the case that she can testify to
4 in this matter.

5 THE COURT: All right. Let's break for about ten
6 minutes. I want to take a look at this. Before we put her
7 on the stand I want to take a look at these cases. So
8 let's be at recess for about ten minutes ---

9 MR. WILLEY: Your Honor, I do have one more issue that
10 concerns her testimony.

11 First, however, do you have our memo from last night?
12 Did you get the email?

13 THE COURT: Uh-huh. I did.

14 MR. WILLEY: Okay. Just wanted to be sure of that.

15 The second issue that concerns her testimony goes back
16 to this Kuck letter. And, honestly, I had not read it
17 fully in a while. After yesterday I had an opportunity to
18 review it last night.

19 And I am a little confused about the purpose for which
20 this letter might be admitted. And here's why. There's
21 been several motions in limine offered by the defense,
22 including relating to Ms. Hood's injuries, which we
23 consented to, that her specific injuries in the underlying
24 case could not come into evidence. This letter contains
25 information regarding her injuries.

1 In the underlying motions in limine we also had an
2 argument about police reports not being admissible in the
3 underlying case. This letter includes information ---

4 THE COURT: I don't recall us having any motion in
5 limine regarding the police report.

6 MR. WILLEY: Not -- I didn't say motion in limine.
7 Conversation regarding that. And I believe it was conceded
8 that the police report and the police officers finding of
9 fault in the lower case would not be admissible. And,
10 therefore, there's no way that USAA could rely on that
11 coming into evidence in order to reach a determination on
12 fault. This letter includes information about who Ms. Hood
13 believes the police officer found at fault.

14 And in fact, Your Honor, there's noting in this
15 letter, after I read it again -- because I thought there
16 might be. I realize the Court read it. There's nothing in
17 this letter that is not capable of coming through another
18 source.

19 And there are -- this letter is highly prejudicial in
20 aspects. Ms. Hood gets the insurance information
21 completely wrong. Which she's not expected to have an
22 understanding of, of course, you know. And there's really
23 nothing in here that goes to anything in USAA's case that
24 would make any action they took more or less likely at all.

25 And so, you know, if the letter is still going to come

1 in, I think it has to be highly redacted, which only serves
2 to further confuse the jury on the bases of the agreed-to
3 motions in limine. But I think any information -- and I'm
4 interested to know what specific information from this
5 letter ---

6 THE COURT: Well, I mean, we've already had this
7 discussion. I'm not going to re-hear all the motions in
8 limine. My ruling was based on the fact that it was part
9 of the consideration. They had it prior to the mediation.
10 It's specifically referenced in the Jack Daniel letter as
11 bearing on her credibility if they were to go forward with
12 trial. So it was part of what the insurance company
13 considered at the time they entered into the mediation. So
14 I do find it's relevant.

15 Is there anything you want to say, Mr. Whelan?

16 MR. WHELAN: I agree.

17 MR. WILLEY: My concern is, Your Honor, in this letter
18 it says that her injury -- the only injury she mentions is
19 a fractured ankle. And if the jury thinks that's all that
20 they were able to consider as far as her injuries, that's
21 not accurate.

22 THE COURT: Well, I think they're going to
23 understand -- since she got a sizeable verdict, you know, a
24 two-and-a-half-million dollar verdict, I'm not concerned
25 that the jury is going to underestimate her injuries.

1 Again, I've already ruled on this. It is admissible.

2 MR. WILLEY: And it won't be redacted, just so we're
3 clear ---

4 THE COURT: Well ---

5 MR. WILLEY: --- as to the rulings on the other
6 motions in limine? Because the agreed-to motion in limine,
7 was no mention on what plaintiff's injuries are. This is
8 evidence as to what her injuries are.

9 THE COURT: Let me take a look at the letter.
10 Because, again, y'all are asking me to rule on it and I
11 don't have a copy in front of me.

12 [Whereupon, Mr. Willey proffers documents to the
13 Court]

14 THE COURT: Thank you.

15 [Whereupon, the Court reviews documents]

16 THE COURT: And, I'm sorry. Maybe I'm just
17 overlooking this. Tell me where she talks about her
18 injuries.

19 MR. WILLEY: I don't have a copy. May I see your
20 copy?

21 THE COURT: She asks if they've had any injuries.

22 MR. WILLEY: Maybe I was thinking of something else.
23 I read a lot last night. I thought it does say it in
24 there, too. Give me a second. We actually talked about
25 this this morning.

1 [Whereupon, Mr. Willey reviews documents]

2 MR. WHELAN: And, Your Honor, I don't think it talks
3 about the ankle. But they say ---

4 MR. WILLEY: I guess we were mistaken, Your Honor. We
5 had a whole conversation at breakfast about how it
6 mentioned the fractured ankle. But ---

7 THE COURT: I don't see it.

8 MR. WILLEY: I don't either, so I apologize for that.

9 THE COURT: No problem.

10 MR. WILLEY: I still think it's -- you know, I'll make
11 a contemporaneous objection and preserve it, and all like
12 that, when we get to that point. But I still don't see how
13 it goes to anything that they did or would have done but.

14 THE COURT: Okay. Let's be at recess for about ten
15 minutes.

16 [Whereupon, a recess is taken 6/26/19, 9:51 a.m. to
17 10:13 p.m.]

18 THE COURT: Okay. I just wanted to take a look at the
19 cases. It does seem to me that the Fourth Circuit has
20 recognized emotional distress damages as part of the
21 consequential damages, specifically in a bad faith case.
22 Of course, they have to be related to the bad faith. But I
23 find that it is an element of damages in a bad faith case.

24 MR. WHELAN: Okay. Thank you, Your Honor.

25 And you mentioned yesterday when Mr. Willey brought

1 this up, that they had to be related to a physical injury
2 that occurred. And I assume that she's going to have to
3 establish that first.

4 THE COURT: Well, I think there's two different
5 issues. In negligence -- in a negligence cause of action
6 there's got to be -- I still stand by there's got to be a
7 physical injury or there's got to be outrage.

8 But in a bad faith cause of action, the Fourth Circuit
9 in several cases has specifically recognized that emotional
10 distress is an element of bad faith, it's not an element in
11 under negligence cause of action.

12 MR. WHELAN: I understand your ruling, Judge.

13 THE COURT: It's specifically just for bad faith.

14 MR. WHELAN: I understand your ruling.

15 The other thing I wanted to just address at this point
16 is Mr. Willey's -- what Mr. Willey said about the injuries,
17 the evidence of injuries.

18 So in our motion in limine was to prevent the
19 plaintiff from testifying in this case about what her
20 injuries were to the jury. Which, you know, obviously we
21 did not know what theory they're going to present. That
22 would have no relevance to USAA's alleged different
23 positions about whether her lights were on or off. It
24 would have no relevance to any argument about Jack Daniel
25 making faces or anything like that.

1 But Your Honor has -- I think the way the case has
2 been structured now is this case is about USAA's evaluation
3 at mediation. And what Ms. -- I don't think Ms. Hood can
4 get up and say, you know, hey, I was -- I was hurt this
5 bad, blah, blah, blah. That's not relevant. But what's
6 relevant is what USAA knew going into the mediation at the
7 time we're talking about the valuation.

8 So I don't see how -- I mean, this -- that evidence
9 has to come in to some extent. I mean what the plaintiffs
10 want to do is what Mr. Poulin said in the opening, is she
11 was injured and her injuries were worth two-and-a-half-
12 million dollars. And they want to show her -- the -- you'd
13 see the blow up of the picture of the car and all that over
14 there (indicating). That's not -- what's rele- -- what
15 Your Honor has ruled as relevant is what USAA knew and how
16 USAA evaluated the case. So I don't see -- I just wanted
17 to raise that right now.

18 THE COURT: So I guess spell out for me -- I'm not
19 following what you -- what you want to keep out or what you
20 want to come in that's different from what we've already
21 talked about.

22 MR. WILLEY: I think I can color it in a little bit,
23 Your Honor.

24 So during the break I realized my mistake. And my
25 mistake with respect to that letter saying fractured ankle

1 was in the letter forwarding that letter to USAA, which was
2 the subject of the motions in limine yesterday, Mr.
3 Daniel's letter providing advice he mentioned that she had
4 a fractured ankle.

5 And so that's where I kind of conflated those two
6 things. And while we talked about it -- because to the
7 extent that letter comes in then perhaps his -- all of his
8 letters come in and they should be redacted in concert with
9 the agreement that we had on the motion in limine.

10 It was their motion. I agreed to it, or I would have
11 made the motion. Because we don't want to re-litigate the
12 underlying case. We don't intend to re-litigate the
13 underlying case. We've all agreed on that.

14 And I think Your Honor's rulings to this point have
15 kept us within the narrow length of what was reasonable and
16 what wasn't reasonable.

17 And the question of reasonableness is not, again,
18 whether or not they should have evaluated the case at two-
19 and-a-half-million. It's whether or not they should have
20 paid what they did evaluate the case at. And they didn't.
21 And so that's -- that's the narrow lane kind of within
22 which we go with respect to the injuries. Because they had
23 evaluation. They never even offered that with everything
24 they knew.

25 So it doesn't matter if they would have evaluated it

1 higher or not, because they wouldn't even say what they
2 evaluated it at. And that is what I think we're proceeding
3 under, as far as this case goes. And I think the motions
4 in limine handle that. I

5 I just wanted to be clear -- and I will bring it up
6 again when we get to Mr. Daniel's letters. And of course
7 those will have to come in through one of their witnesses.

8 But I don't think anything unrelated to those issues
9 that are in those letters should be admissible. But we'll
10 have to take that when we get there.

11 MR. WHELAN: I just don't understand how they can say
12 USAA negligently evaluated the case but they can't tell --
13 you know, the evidence of the injuries aren't going to come
14 in. And the other thing is ---

15 MR. WILLEY: Well, you made the motion to keep the
16 evidence ---

17 MR. WHELAN: No, ---

18 MR. WILLEY: --- of the injuries out.

19 MR. WHELAN: --- I made the evidence -- I made the
20 motion to prevent you from eliciting evidence from her
21 concerning telling her -- her telling the jury essentially
22 what Mr. Poulin already has done, which is that I was
23 injured, my injuries are worth two-and-a-half-million
24 dollars. That's not relevant to this case.

25 THE COURT: Well, I mean the amount of the verdict is

1 relevant. It's ultimately relevant.

2 MR. WHELAN: To -- I'm not sure to what issue.

3 THE COURT: Well, I mean, they gave her a verdict for
4 something. You know, they -- I don't know how we keep from
5 the jury the fact that she got a two-and-a-half-million-
6 dollar verdict. It was for personal injuries. I mean,
7 that's just a fact in the case.

8 MR. WHELAN: So they are -- in that case they are
9 getting into evidence her injuries.

10 MR. WILLEY: No, ---

11 THE COURT: Well ---

12 MR. WILLEY: --- we are not talking about her specific
13 injuries at all; the month in the hospital, the month in
14 the nursing home, the fractured ankle, and the three
15 surgeries ---

16 THE COURT: We're not -- we're not going into any of
17 that.

18 MR. WILLEY: No. Correct.

19 THE COURT: But the jury has got to know what the
20 verdict was. And, I mean it wasn't a -- it wasn't a breach
21 of contract action; it was a car wreck case. So I don't
22 know how we get around the fact that they're going to know
23 what the verdict was, they're going to know that she was
24 found 49 percent comparatively negligent.

25 MR. WHELAN: Well, Your Honor, I see the -- I see the

1 relevance of the 49 percent. But if what we're -- if what
2 we're talking about is USAA's evaluation as of March of
3 2017, the amount of the verdict later is irrelevant.

4 And if he says that the injuries are irrelevant -- the
5 amount of the verdict -- he just said that we're not saying
6 USAA should have paid two-and-a-half-million or should have
7 evaluated at two-and-a-half-million, we're saying they
8 should have paid 250. So what in the world does the fact
9 that a jury later came to two-and-a-half-million have to do
10 with that issue?

11 THE COURT: Well, I think the fact that they had to go
12 to trial and that the jury came back with a verdict in her
13 favor is relevant.

14 And, again, there was no motion to keep out the fact
15 that -- of what the verdict was. I think that's going to
16 be part of the consequential damages, I'm sure, are
17 litigation costs.

18 So, again, if y'all need to make a contemporaneous
19 objection to something, that's perfectly fine. We need to
20 go ahead and bring this jury in.

21 [Whereupon, the jury enters the courtroom 6/26/19,
22 10:23 a.m.]

23 THE BAILIFF: The jury is all present.

24 THE COURT: Good morning, ladies and gentlemen. Thank
25 you again. I passed most of you in the hallway this

1 morning, so I know that you were on time and early. And we
2 appreciate that. We did have a number of issues to take us
3 before bringing you in. So I appreciate your patience with
4 us. But we're now going to move into plaintiff's first
5 witness.

6 Mr. Willey?

7 MR. WILLEY: Thank you, Your Honor. The first witness
8 will be Ms. Terry Hood.

9 [Whereupon, Ms. Hood comes forward]

10 [Whereupon, Ms. Hood is duly sworn by the clerk of
11 court]

12 THE CLERK OF COURT: Please be seated.

13 [Whereupon, the witness takes the witness stand]

14 THE CLERK OF COURT: And for the record please state
15 your full name, spelling your last.

16 THE WITNESS: My full name is Therese Hood.

17 H-O-O-D. I go by the name of Terry.

18 THE COURT REPORTER: And how do you spell Terry?

19 THE WITNESS: T-E-R-R-Y.

20 THE COURT REPORTER: Thank you.

21 THERESE HOOD, Having Been First Duly Sworn, was Examined
22 and Testified as Follows:

23 **DIRECT EXAMINATION BY MR. WILLEY OF THERESE HOOD:**

24 Q. Ms. Hood, will you please tell the jury where you
25 live?

1 A. I live in Goose Creek, South Carolina, in Fairfax
2 Subdivision. And I live there with my husband, which is
3 here today. We've been married for 44 years, and he will
4 be testifying later.

5 Q. Ms. Hood, will you tell the jury a little bit about
6 what you do with your time?

7 A. [No response]

8 Q. Prior to the wreck, what did you enjoy doing?

9 A. Before the wreck ---

10 MR. WHELAN: Your Honor, I object that he's getting
11 into injuries that she suffered in the wreck, so with what
12 we were just talked about.

13 THE COURT: Sustained.

14 Q. Ms. Hood, I'll tell you what. Tell the jury a little
15 bit about your family. How about that? We're going to
16 talk about your hobbies.

17 A. I think -- I have six grandchildren, three girls and
18 three boys. The oldest girl is thirteen. I have a
19 seven-year-old and a five-year-old girl through my eldest
20 daughter, Stephanie Hood Erwin. And my youngest daughter,
21 Christine, has a soon to be four-year-old, a two-year-old,
22 and a four-month-old; and they're all boys.

23 So it's an interesting grandchildren kind of thing. I
24 used to interact with them quite often, go visit and play
25 with them, take them to places; but I can no longer ---

1 MR. WHELAN: Your Honor, this is ---

2 Q. We are going to ---

3 A. That's okay. Okay.

4 Q. We are going to cut it -- cut it off there.

5 Are you currently working?

6 A. No. I'm disabled.

7 Q. Okay. Prior to that what did you do for a living?

8 What was your career?

9 A. I enlisted in the Army when I was eighteen, during the
10 Vietnam War. I served twenty years in the Army. I was in
11 the military intelligence field.

12 When I retired from the Army in 1992 I pursued my
13 master's degree in early education, and I became a teacher
14 for ten years. Somehow I had a calling to be a manager of
15 Wal-Mart, so I was the manager of Wal-Mart for ten years.
16 And then I retired.

17 Q. And, Ms. Hood, we are here today in a case against
18 USAA. Explain to the jury your relationship with USAA.
19 How did you come to know USAA?

20 A. Well, I came to know USAA through the military. But
21 USAA, for many of you who may not know, is not a typical
22 insurance company. USAA members can only be members if
23 they served in the military and they are current
24 dependents. Otherwise, you cannot be part of the insurance
25 company.

1 And, like I said, it is made up of members, not a
2 group of individual people. I have had USAA insurance for
3 over thirty years. In all -- I have home insurance through
4 them and vehicle insurance. In all the thirty years I've
5 had USAA insurance I have purchased the additional U -- UMI
6 insurance.

7 Q. UIM. But that's okay.

8 A. UIM. Which it costs me an additional amount of money
9 to pay for on a monthly basis so that I would be able to
10 recoup any damages I incur and also any of the damages the
11 other people may incur through an accident. My ---

12 Q. Ms. Hood, just to stop you there. Is your -- you
13 mentioned that you have to be a member of the military or a
14 current dependent. Is your husband a member of USAA?

15 A. Yes. He's retired Army also.

16 Q. All right. Did y'all meet in the Army?

17 A. Yes, we did.

18 Q. Okay. As a member of USAA, how do they tell you that
19 you will be treated?

20 A. USAA prides itself on saying that they're always there
21 and that they will always take care of you in any incident.
22 As many of you or some of you may have seen, they have it
23 in their commercials how a satisfied customer says, oh, I'm
24 a member for life.

25 And technically I'm a member for life, as well. But

1 unfortunately in my incident USAA was not there to help me.
2 They betrayed me. And so every time I see that commercial
3 I am reminded that they were not supportive to me in my
4 claim.

5 Q. Ms. Hood, as a member of USAA do you get the report to
6 members on an annual basis?

7 A. Yes, I do.

8 MR. WILLEY: All right. Your Honor, I'm going to mark
9 Plaintiff's Exhibit 1, the report to members.

10 [Whereupon, Plaintiff's Exhibit Number 1, 2017 USAA
11 report, is marked for identification by the court reporter]

12 MR. WHELAN: Your Honor, we object to this.

13 THE COURT: Well, let me see what we've got here.

14 [Whereupon, the Court reviews documents]

15 THE COURT: Can I get you to approach, Mr. Whelan?

16 [Whereupon, an off-the-record bench conference is
17 held]

18 MR. WHELAN: Okay. Your Honor, I don't want to waste
19 the jury's time. This is the first time I've seen this,
20 but I will review it while Mr. Willey talks.

21 THE COURT: And certainly your objection is noted for
22 the record. Thank you.

23 MR. WILLEY: Your Honor, and no speaking objections.

24 THE COURT: I understand. We'll put the grounds on
25 the record as soon as we dismiss the jury.

1 MR. WHELAN: Thank you, Your Honor.

2 MR. WILLEY: May I approach the witness?

3 THE COURT: Yes, sir.

4 Q. Ms. Hood, I'm going to hand you the 2017 USAA report
5 to members, which is marked as Plaintiff's Exhibit 1.
6 You've seen that before; correct?

7 A. Yes.

8 Q. And you receive these on an annual basis from USAA?

9 A. I do.

10 Q. All right. Is that document signed by the chief
11 executive officer of USAA at the bottom?

12 A. Yes, it is.

13 Q. And it is also signed by the chief financial officer
14 for USAA?

15 A. Yes, it is.

16 Q. Will you read -- are you able to read the first two
17 sentences of that? I know you don't have your glasses. If
18 not, that's okay. Just let me know.

19 A. No. I -- for the jury, I was rubbing my eyes when I
20 came in so much that my contact fell out.

21 Q. Okay.

22 A. And I don't have my glasses.

23 Q. All right. Fair enough.

24 Are you able to read the number that says the net
25 worth number at the very top, what's USAA's net worth?

1 A. Yes.

2 Q. And what does it say?

3 A. Thirty billion.

4 Q. Billion with a B?

5 A. B will -- billion with a B.

6 MR. WILLEY: All right. Your Honor, at this time, we
7 would move into evidence Plaintiff's Exhibit 1.

8 THE COURT: Over defendant's objection, yes.

9 MR. WHELAN: Thank you, Your Honor.

10 THE COURT: It is admitted.

11 MR. WHELAN: We do object.

12 [Whereupon, Plaintiff's Exhibit Number 1 is admitted
13 into evidence by the Court]

14 MR. WILLEY: And we will read it to them in closing so
15 the can

16 Q. Ms. Hood, you were involved in an automobile wreck in
17 2014; right; ---

18 A. Yes.

19 Q. --- is that fair?

20 Just because we showed them in opening, and I'm just
21 going to show you two photographs which we're going to mark
22 as Plaintiff's Exhibits 2 and 3.

23 [Whereupon, Plaintiff's Exhibit Number 2, photo,
24 marked for identification by the court reporter]

25 [Whereupon, Plaintiff's Exhibit Number 3, photo,

1 marked for identification by the court reporter]

2 A. I don't

3 Q. I have to just show them to you quickly, okay?

4 A. Okay.

5 Q. Ms. Hood, are the photographs that I just showed you
6 pictures of your vehicle after that wreck?

7 A. Yes, they are.

8 MR. WILLEY: All right. Your Honor, at this time we
9 would move into evidence Plaintiff's Exhibits 2 and 3.

10 MR. WHELAN: No objection, Your Honor.

11 THE COURT: I'm sorry?

12 MR. WHELAN: No objection.

13 THE COURT: They are admitted.

14 [Whereupon, Plaintiff's Exhibit Numbers 2 and 3 are
15 admitted into evidence by the Court]

16 Q. Ms. Hood, I'm not going to talk about the wreck. But
17 after that -- after that wreck, when did you decide to make
18 a claim with USAA?

19 A. I didn't make the claim with USAA. I was in the
20 hospital for a month, transferred to two different hospital
21 trauma centers. And then I was in a nursing home for a
22 month. So my husband retained the attorney and filed a
23 claim in to USAA.

24 Q. All right. And when your husband took care of those
25 matters for you, who was hired on your behalf? What -- who

1 was the attorney?

2 A. Kevin Smith, from Hoffman Law Firm.

3 Q. All right. And when you got out of the hospital and
4 nursing home, did USAA come and say we'll pay you for your
5 expenses, for your medical bills, and your pain and
6 suffering, and we'll pay your claim?

7 A. No.

8 Q. What happened? Tell the jury a little bit about what
9 happened with your claim.

10 A. First of all, I guess, I had to -- I could not walk,
11 and I had to remain in bed for ---

12 Q. We are not -- Ms. Hood, ---

13 A. Okay.

14 Q. --- I don't want you to get into ---

15 A. Okay.

16 Q. --- your injuries from the underlying wreck. I just
17 want you to tell the jury what USAA did with respect to
18 your claim. Okay?

19 A. Okay. I had a -- after three months I had a phone
20 interview deposition with USAA, which five months later was
21 preceded by a deposition with Mr. Daniels and my other USAA
22 attorney, Mr. Nickels.

23 And which at -- at the depositions, and I've had
24 several, I felt that it was always insinuated that I lied
25 in my depositions to the point in one of my depositions Mr.

1 Daniels was questioning my sanity.

2 And so throughout this whole process for five years
3 I've had to look at myself in the mirror every day and see
4 myself as a liar. And I am -- I am not a liar. I'm a very
5 honest and kind person. I'm an open book.

6 And so as this time goes on, and even today, they are
7 still insinuating that I lied.

8 My depositions went from first beginning in 2015 until
9 today. That is a five-year lapse between the depositions.
10 Your memory -- I don't think anybody can remember exactly
11 what they said five years ago.

12 Q. And, Ms. Hood, tell the jury had you ever filed a
13 lawsuit or a claim before this one?

14 A. No. I've never been in a car accident where it had
15 been my fault. I've never been involved with the law.
16 I've never filed a lawsuit. I have a perfect driving
17 record.

18 So this was my first experience with a car accident so
19 severe, and the whole legal process that I had no idea of
20 except for watching Law and Order on TV.

21 Q. And other than your -- you mentioned your -- you're
22 disabled. Other than your claim for disability have you
23 ever been part of any other lawsuit other than this one?

24 A. No.

25 Q. Ms. Hood, eventually you did go to trial in that case?

1 A. That's correct.

2 Q. In the underlying case; correct?

3 A. That's correct.

4 Q. What did -- and you -- that trial was where?

5 A. In Jasper County.

6 Q. And you're not from Jasper County?

7 A. No, I'm from Berkeley.

8 Q. Okay. In that case what did the twelve people on that
9 jury determine your damages from the car wreck to be?

10 A. Two-point-five million dollars.

11 Q. All right. And even after that -- that was reduced,
12 correct, 49 percent?

13 A. Right.

14 Q. All right. After that reduction, that was 1.275
15 million?

16 A. That's correct.

17 Q. Has USAA ever paid you that money, the 1.275 million?

18 MR. WHELAN: Your Honor, objection; ---

19 A. No.

20 Q. Okay.

21 MR. WHELAN: --- USAA doesn't owe her the 1.275
22 million.

23 MR. WILLEY: Well, that's a question for the jury that
24 we'll get to.

25 MR. WHELAN: I object to that. It's not an element

1 of ---

2 MR. WILLEY: Your Honor, may we approach?

3 MR. WHELAN: USAA ---

4 MR. WILLEY: Because we need legal objections, not
5 speaking objections. If he wants to testify, I'll be glad
6 to call him as a witness.

7 THE COURT: Okay. Thank you.

8 [Whereupon, an off-the-record bench conference is
9 held]

10 THE COURT: I'm going to allow it. Thank you.

11 Q. Ms. Hood, the verdict, after it was reduced, was 1.275
12 million; correct?

13 A. Yes.

14 Q. Has USAA ever paid that verdict in full?

15 A. No.

16 Q. USAA, after the verdict, there were some additional
17 motions. Do you recall that?

18 A. Yes.

19 MR. WHELAN: Your Honor, I object to the relevance on
20 this as well.

21 MR. WILLEY: It's a ---

22 THE COURT: I don't know what the -- what the motions
23 were, so it's hard for me to determine whether it's
24 relevant or not.

25 MR. WILLEY: It's background.

1 THE COURT: I'm going to allow the question. If you
2 can be a little more specific so I can determine whether or
3 not I need to sustain or overrule this objection. What was
4 the basis of the motion?

5 MR. WILLEY: Your Honor, can we approach?

6 MR. WHELAN: The motion ---

7 MR. WILLEY: I'm sorry.

8 THE COURT: Sure.

9 [Whereupon, an off-the-record bench conference is
10 held]

11 Q. All right. So, Ms. Hood, and then some time later
12 USAA did make a payment to you; correct?

13 A. Yes, they did.

14 Q. Okay. And that payment was for how much?

15 A. I can't read it.

16 Q. Okay. A little bit more than that right there and
17 just some interest?

18 A. Right with interest.

19 Q. And of that money, after your costs and expenses and
20 bills that you have had to pay, how much did you actually
21 receive?

22 MR. WHELAN: Object to the form, Your Honor. Object
23 to relevance. Your Honor, this was the subject of a motion
24 in limine.

25 THE COURT: That's sustained.

1 Q. Ms. Hood, ---

2 THE COURT: Based on my ---

3 Q. --- did you receive the full million in interest?

4 A. Um, yes.

5 Q. Okay. And when you got your portion of that was it
6 the full million in interest?

7 A. No.

8 MR. WHELAN: The same, Your Honor.

9 THE COURT: That's sustained based on a prior ruling
10 that I made.

11 MR. WILLEY: May we approach at this ---

12 THE COURT: Yes.

13 [Whereupon, bench conference was had]

14 Q. And, Ms. Hood, as part of that, you incurred costs in
15 the litigation; right?

16 A. Yes.

17 Q. Okay. Costs that were separate from attorney's fees;
18 correct?

19 A. Yes.

20 Q. And those costs went to things that had to be done ---

21 MR. WHELAN: Your Honor, object to leading.

22 Q. --- for to to pay for for the ---

23 THE COURT: I'm sorry. Your objection?

24 MR. WHELAN: To the continued leading. It is ---

25 THE COURT: The leading objection is sustained.

1 Q. Ms. Hood, just tell the jury that portion of the
2 costs. Do you recall about how much they were?

3 A. The 500,000 I received, I with that had to pay
4 \$300,000 ---

5 Q. Ms. Hood ---

6 A. --- for medical bills.

7 Q. That's not -- that's not what I'm asking you.

8 A. Okay.

9 Q. I'm asking you specifically about the litigation
10 costs. And I can show you -- I'll show you the document,
11 and that way we're clear. I know you've had a lot, so.

12 [Whereupon, Plaintiff's Exhibit Number 4, Outline
13 Costs, is marked for identification by the court reporter]

14 MR. WHELAN: Your Honor, Ms. Hood testified in her
15 deposition she's never seen this document before. She's
16 not going to be able to authenticate it.

17 THE COURT: This is to refresh her memory? This is
18 not ---

19 MR. WILLEY: Correct.

20 THE COURT: --- for admitting into evidence?

21 MR. WILLEY: Correct. I marked it for identification
22 purposes.

23 [Whereupon, Court's Exhibit Number 7, Hood Deposition,
24 marked for identification]

25 THE COURT: Thank you.

1 Q. Ms. Hood, I'm going to show you the document that Mr.
2 Whelan showed you during your deposition which outlines
3 those costs. Do you recall seeing that?

4 A. Yes, I recall seeing that.

5 Q. Okay. And do you recall the conversation in the
6 deposition that that was an outlining of your litigation
7 costs?

8 A. Yes.

9 MR. WHELAN: Objection to leading.

10 Q. Ms. Hood, ---

11 THE COURT: I'm going to allow that.

12 Q. --- are you able to read the number at the bottom of
13 that?

14 MR. WHELAN: This is not a refreshing recollection.

15 Q. Does that refresh your recollection on what ---

16 A. Yes.

17 Q. --- your litigation costs ---

18 What does that number say?

19 A. Oh, gee. I can't read this.

20 Q. You can't read that?

21 A. I'm sorry.

22 Q. Okay.

23 A. No.

24 Q. I know you lost your contact.

25 MR. WHELAN: Your Honor ---

1 Q. We'll get -- no problem. We'll get Mr. Smith to do
2 it.

3 Ms. Hood, the point is you did have some litigation
4 costs in that underlying case; correct?

5 A. Yes, I did.

6 Q. All right. And will your attorney in that underlying
7 case be able to tell us what those were?

8 A. Yes.

9 Q. All right. Do you recall attending a mediation in
10 that case?

11 A. Yes.

12 Q. Tell the jury, for those that haven't been part of a
13 lawsuit process, what you remember about the mediation.
14 What it is.

15 A. Okay. It was news to me. It turns out that the
16 defendant and the plaintiff attorneys get together and they
17 assign a mediator who's a third party so that you -- they
18 present a certain amount of money for the case and that
19 you -- between the plaintiff and the defendant attorneys
20 discuss as to what actual amount of money should be paid.

21 Q. And do you recall how long that mediation lasted,
22 about?

23 A. The first one?

24 Q. Right.

25 A. Two hours.

1 Q. And what was your experience like at that mediation?

2 A. I was trying to understand the process. The mediator
3 was frustrated because of the lack of communication between
4 the defense attorney and the plaintiff attorney, and it
5 was -- the mediator decided that it was not resolved.

6 Q. Did your attorney and the other attorney have the
7 opportunity to make a representation at that mediation?

8 A. Yes.

9 Q. Were you present for the presentations?

10 A. Yes.

11 Q. What do you recall about the presentations?

12 A. My attorney ---

13 MR. WHELAN: Your Honor, I object to the relevance of
14 the presentations to a mediation.

15 MR. WILLEY: Your Honor, it goes to -- it goes to
16 damages, talking about emotional damages.

17 THE COURT: I'm going to allow it.

18 Q. Ms. Hood, will you tell the jury what you recall about
19 the presentations, how it made you feel?

20 A. The presentations were, you know, very direct,
21 explained the accident in detail. So I had to listen
22 through all that, which was disturbing to me because I
23 was -- I will never be able to put it out of my mind. But
24 I didn't want to be thinking about it.

25 Q. The mediation -- you gave your -- is it true that you

1 gave your attorney authority to settle between three ---

2 MR. WHELAN: Object to leading.

3 Q. --- and four hundred thousand?

4 THE COURT: Sustained. That's leading.

5 Q. Ms. Hood, at the mediation ---

6 A. Uh-huh.

7 Q. --- what amount did you tell your attorney at that
8 point that you would take to be done with the case at that
9 point?

10 A. Near 250,000.

11 Q. Okay. And at that particular time did you think that
12 that was a fair amount for the injuries that you had gone
13 through?

14 A. No.

15 Q. Tell the jury why you decided that that would be a
16 fair amount at that time.

17 MR. WHELAN: Object to relevance, Your Honor.

18 THE COURT: I'm going to sustain that.

19 MR. WILLEY: Okay.

20 Q. Ms. Hood, tell the jury why at that time, although you
21 didn't think it was fair for your damages, that you told
22 your attorney you would resolve the case for that amount?

23 MR. WHELAN: Object to relevance, Your Honor.

24 MR. WILLEY: May we approach?

25 THE COURT: Sure.

1 [Whereupon, an off-the-record bench conference is
2 held]

3 Q. Ms. Hood, at that mediation you were never offered
4 that amount; correct?

5 A. No.

6 Q. Ms. Hood, you understood at that mediation who --
7 which attorney was representing who? That's been confusing
8 at some points; right?

9 A. Yes. Initially because USAA hired the two
10 attorneys, ---

11 Q. Right.

12 A. --- Mr. Nickels and Mr. ---

13 MR. WHELAN: Your Honor, I object to the relevance of
14 this as well.

15 THE COURT: I m going to allow that. Thank you.

16 A. Mr. Daniels and Mr. Nickels they were the
17 representatives who were supposed to represent me. And so
18 that was my understanding of who was going to help me from
19 USAA.

20 Q. And now you understand that Mr. Nickels is -- was
21 representing you in the different case; correct?

22 A. Yes.

23 Q. Okay. And Mr. Daniels was hired by USAA?

24 A. Yes, he was.

25 Q. All right. And then tell the jury why you thought

1 that perhaps he owed some responsibility to you as a result
2 of that.

3 MR. WHELAN: Object to the relevance, Your Honor.

4 THE COURT: I'm sorry?

5 MR. WHELAN: I object to relevance, Your Honor. I'm
6 sorry.

7 THE COURT: That's sustained.

8 MR. WILLEY: Okay.

9 A. This is what I have had to put up with, five years.

10 THE COURT: Ma'am, please just answer the question.
11 Thank you.

12 THE WITNESS: Okay.

13 Q. Ms. Hood, let me just ask you this: Has USAA ever
14 apologized to you?

15 A. No.

16 Q. Have they ever apologized to you for calling you a
17 liar?

18 MR. WHELAN: Objection.

19 A. No.

20 Q. Did they ever apologize ---

21 THE COURT: That's sustained.

22 Q. Have they ever apologized to you for the way they
23 treated you in the underlying case?

24 A. No.

25 Q. Do you still pay your premiums every month?

1 A. I still do.

2 MR. WILLEY: Thank you, Ms. Hood.

3 MR. WHELAN: Good morning, Ms. Hood.

4 THE WITNESS: Good morning.

5 **CROSS-EXAMINATION BY MR. WHELAN OF THERESE HOOD:**

6 Q. You would agree -- I want to see if we can agree on a
7 few things.

8 THE COURT: And, Mr. Whelan, if I could ask you to
9 speak up just a little bit.

10 MR. WHELAN: Thank you, Your Honor. I'm sorry.

11 Q. I want to see if we can agree on a few things.

12 Before the trial occurred, you did not know what the
13 jury verdict would be, did you?

14 A. No.

15 Q. You didn't know what the outcome would be?

16 A. No.

17 Q. Or what a jury would do with it, did you?

18 A. No.

19 Q. Nobody did?

20 A. Nobody.

21 Q. USAA did not?

22 A. I don't know what USAA knew.

23 Q. And you knew that if a jury found that you were
24 primarily at fault, or even 51 percent at fault, that you
25 would not be able to recover anything against Mr. Johnson,

1 didn't you?

2 A. Yes.

3 Q. Okay. And so before the trial there was -- there was
4 risk for you, right, in taking the case to the jury; right?

5 A. Yes. But I thought we weren't supposed to discuss the
6 trial.

7 Q. Well, I'm not ---

8 THE COURT: Ma'am, your attorney will make an
9 objection if we're wandering into territory.

10 THE WITNESS: Okay.

11 THE COURT: Thank you. Just answer the question.

12 Q. So prior to the trial you had negotiations, your
13 attorney had negotiations, with USAA?

14 A. I believe so.

15 Q. All right. And there was risk for you and there was
16 risk for USAA in not coming to an agreement; right?

17 A. I believe so.

18 Q. And it turned out that the cards were in your favor
19 when you went to trial; right?

20 A. Right.

21 Q. Now, I'm going to hand you what's been marked as
22 Plaintiff's Production 2. This is Bates ---

23 THE COURT: You're going to mark this as a Defendant's
24 Exhibit?

25 MR. WHELAN: Yeah, I am.

1 THE COURT REPORTER: Okay. It'll be Defendant's
2 Exhibit Number 1.

3 [Whereupon, Defendant's Exhibit Number 1, USAA Check
4 Copy, is marked for identification by the court reporter]

5 Q. All right. This is Bates stamped Plaintiff's
6 Production 2. Is that a check to you from USAA in the
7 amount of \$1,023,983?

8 A. Yes.

9 MR. WHELAN: Your Honor, I'd offer this into evidence
10 as Defense Exhibit 1.

11 MR. WILLEY: No objection.

12 THE COURT: It is admitted.

13 (WHEREUPON, Defendant's Exhibit Number 1 was admitted into
14 evidence.)

15 Q. And at the bottom left-hand corner of the check there
16 is a USAA number, USAA Number 0110423?

17 A. Yes.

18 Q. That's your policy number, isn't it?

19 A. Right.

20 Q. That's your member number; right?

21 A. That's correct.

22 Q. Okay. And the check went to your lawyer and it was
23 addressed to you and the Hoffman Law Firm; right?

24 A. That's correct.

25 Q. Okay. Now, the trial was a success; wasn't it?

1 MR. WILLEY: Your Honor, I object. Objection. May we
2 approach?

3 THE COURT: Sure.

4 [Whereupon, an off-the-record bench conference is
5 held]

6 THE COURT: Sustained. Thank you.

7 Q. So after the trial you and your attorneys were happy
8 with the result; weren't you?

9 A. I wouldn't use the word happy. I knew that the amount
10 of money was going to help me cover my medical bills. But
11 the most important thing to me in the jury trial was that
12 they found me innocent and I didn't have to look at being
13 called a liar any more.

14 Q. Well, actually, ma'am, that money didn't pay for your
15 medical bills at all. It didn't have to, did it?

16 MR. WILLEY: Your Honor ---

17 A. I'm not sure what my attorney ---

18 MR. WILLEY: Your Honor ---

19 A. --- used the money with.

20 Q. Okay.

21 MR. WILLEY: Objection. May we approach?

22 THE COURT: Sure.

23 [Whereupon, an off-the-record bench conference is
24 held]

25 Q. I think I had asked you, ma'am, that you and your

1 attorneys were happy with the result; and I don't know
2 about your answer. So let me ask you this: Isn't it true
3 that after the trial, you and your attorneys and the
4 witnesses went out in the courtyard and all took a picture
5 together in front of the courthouse?

6 A. We -- yes. We happened to meet in the front of the
7 courthouse.

8 Q. Uh-huh, and the jurors were there and you and David
9 were talking to the jurors; right?

10 A. There was one -- I believe one jury member there.

11 Q. And ---

12 A. And I was numb, to be honest with you. I did what,
13 you know, my attorney and Mr. Willey at that time who was
14 also a part of my attorney got together and someone
15 suggested we have a picture taken. And that's what we did.

16 Q. All right. And that some of the jurors wanted to be
17 in the picture with you?

18 A. I can't speak for them. I don't know.

19 Q. And your friends were there and your witnesses were
20 there --

21 A. I had ---

22 Q. --- for the picture?

23 A. I didn't have friends that were in the picture. I
24 had -- I can't talk about that.

25 Q. All right. And the reason you took this photo was

1 because you were successful at trial; right?

2 A. Sir, I had no idea about that photo and why. It was
3 not something I instigated, thought would be a good idea.
4 I was there.

5 Q. So you just don't really remember why you guys did
6 that?

7 A. No. I honestly, sir, do not know why they decided to
8 do the picture. I honestly do not.

9 Q. Okay. Now, and then everybody went out to eat
10 afterwards; right?

11 A. I'm sorry?

12 Q. You all went out to eat afterwards?

13 A. No, sir. We went our separate ways.

14 Q. Now, Mr. Willey has this case -- the Lawyers Weekly
15 article framed on the wall in his office; doesn't he?

16 MR. WILLEY: Objection, Your Honor.

17 THE COURT: That's sustained.

18 MR. WILLEY: Thank you. And I move to strike.

19 THE COURT: Ladies and gentlemen, that doesn't have
20 any relevance to this case. Please disregard that
21 question. Thank you.

22 Q. All right. Now, ma'am, you have had USAA for over 30
23 years?

24 A. Yes, sir.

25 Q. And you said your cars are insured with them, your

1 home is insured with them?

2 A. Yes, sir.

3 Q. You have your banking; they do your checking and your
4 savings?

5 A. Yes, sir.

6 Q. And your retirement?

7 A. Yes, sir. Well, my husband's retirement.

8 Q. Husband's retirement.

9 And you have, other than this incident, been very
10 satisfied with them over 30 years; haven't you?

11 A. Yes.

12 Q. All right. And you and your husband tell everybody
13 that USAA is a good insurance company; don't you?

14 A. We have.

15 Q. And in your deposition in this case you told me that
16 you and your husband tell everybody USAA is a good
17 insurance company?

18 A. We have.

19 Q. Now, we've talked about the lawsuits. Or I guess we
20 really haven't. But you were sued the first -- the first
21 suit is you sued Antoine Johnson; right?

22 A. That's correct.

23 Q. And then Antoine Johnson counterclaimed back against
24 you?

25 A. Right.

1 Q. And then William Kuck filed a suit against you; right?

2 A. Yes.

3 Q. And then Mary Kuck filed a suit against you; right?

4 A. Yes.

5 Q. And USAA paid for an attorney to defend those three
6 suits against you; right?

7 A. USAA I know was paying to defend me with Mr. Kuck's
8 case. USAA paid Mrs. Kuck. And but I wasn't aware that
9 they hired someone to pay Mrs. Kuck.

10 Q. Well, no, they hired a lawyer to defend you from the
11 plaintiff's attorney's claims in those cases?

12 A. Oh.

13 MR. WILLEY: Objection, Your Honor. It is
14 mischaracterization. May we approach?

15 THE COURT: Sure.

16 [Whereupon, an off-the-record bench conference is held
17 6/26/19, 11:08 a.m.]

18 THE COURT: The objection is overruled. Mr. Whelan,
19 you can ask the question.

20 MR. WHELAN: Thank you.

21 Q. And I believe I had asked you, Ms. Hood, that USAA is
22 paying for a lawyer to defend you in ---

23 A. Mr. Kuck's case.

24 Q. --- Mr. Kuck's case; right?

25 A. Yes.

1 Q. And they have already settled Mr. Johnson's case;
2 right?

3 A. That's correct.

4 Q. They paid him \$10,000 to get you a release and dismiss
5 the case?

6 A. Okay. I didn't know that, but thank you for the
7 information.

8 Q. They paid Mary Kuck even more money to dismiss her
9 case against you; right?

10 A. I believe you mentioned that, yes, sir.

11 Q. Okay. And, now, with respect to USAA, three years
12 before this accident your daughter was in a wreck in the
13 Saturn insured on your policy; right?

14 A. Yes. We had Geico and USAA at the time.

15 Q. Okay. And you retained Kevin Smith to go after USAA's
16 UIM money on that policy in that case; didn't you?

17 A. Yes.

18 Q. All right.

19 A. Sir, may I ask where this is leading?

20 Q. Well ---

21 THE COURT: Ma'am, again, Ms. Hood, ---

22 THE WITNESS: I'm sorry.

23 THE COURT: Thank you.

24 MS. HOOD: I don't ---

25 THE COURT: You have a very capable attorney, and he

1 will object to anything that ---

2 THE WITNESS: Okay.

3 THE COURT: --- he feels has gone astray. Thank you
4 so much. Just answer the question.

5 Q. And in that case USAA paid \$300,000 on the UIM in your
6 daughter's claim ---

7 MR. WILLEY: Your Honor, objection. Relevance.
8 Relevance. It's her daughter's case. It has nothing to do
9 with it.

10 MR. WHELAN: But it's her insurance policy, and she
11 said that ---

12 MR. WILLEY: Thank you.

13 THE COURT: Unless you're getting into some kind of
14 pattern of behavior I'm going to sustain the objection.

15 MR. WILLEY: Thank you.

16 Q. I would like to hand to you what's been marked as ---

17 MR. WHELAN: It hasn't been marked yet.

18 [Whereupon, Defendant's Exhibit Number 2, letter, was
19 marked for identification]

20 Q. This is a letter dated August 3rd, 2015. And this is
21 a letter that you wrote to Mr. and Mrs. William Kuck; isn't
22 it?

23 A. This is (indicating)?

24 MR. WHELAN: Your Honor, I'd move this into evidence
25 as Defendant's Exhibit 2.

1 MR. WILLEY: Your Honor, I object on the basis of
2 relevance, 803; it's hearsay within hearsay; and 403.

3 THE COURT: Your objection is noted pursuant to our
4 previous discussion. I do find that its probative value
5 outweighs any prejudice. Thank you.

6 [Whereupon, Defendant's Exhibit Number 2 admitted into
7 evidence]

8 Q. All right. And the Bates number on this is
9 Plaintiff's Production 2104.

10 So, ma'am, we've established you were in a wreck and
11 the Kuck's -- you hit the Kuck's; and the police officer
12 found you at fault in the wreck, didn't they?

13 A. They did. They weren't there. They didn't get there
14 until ten minutes later, after the accident and I was going
15 in the ambulance.

16 Q. Okay. But you knew that the police officer found you
17 at fault?

18 A. Yes.

19 Q. And as a result of that you wrote a letter to Mr. and
20 Mrs. William Kuck; you typed this up, didn't you?

21 A. Yes, I did.

22 Q. Okay. And you say in the second big paragraph, the
23 one that says, "I'm not sure if you received a copy of the
24 police report"; and you send them a copy of the police
25 report, didn't you?

1 A. [No response]

2 Q. Ma'am, you sent the Kuck's a copy of the police report
3 along with this letter?

4 A. It was a long time ago. I must have. I said I did.

5 Q. Okay. And then if we can look at the paragraph that
6 begins, "the USAA insurance I have", you tell them the
7 insurance you have is valued at a million dollars to all
8 parties?

9 A. Right.

10 Q. Them and you?

11 A. Right.

12 Q. And then you tell them -- now, first of all, you're
13 asking them to get in touch with your attorneys and give a
14 statement to your attorneys; right?

15 A. I didn't ask them to provide it to my attorney. I
16 said, I believe any information you will provide will make
17 you an active participant in this case.

18 Q. Okay. Well, let's go back to the paragraph right
19 before this, then. Okay. And you say, "I know my attorney
20 asked your representative or you to provide a statement",
21 didn't you?

22 A. That's what I was informed by Mr. Smith.

23 Q. Your attorney, Kevin Smith.

24 And then the next line you say, "it's your right to
25 say no but I think it will be profitable for us both",

1 didn't you?

2 A. Yes, I did.

3 Q. If they were to give a statement to your attorney;
4 right?

5 A. Yes.

6 Q. All right. Now let's go to the next paragraph. All
7 right. Then -- well, you had told them that you had a
8 million dollars in coverage. And then you say, "if I am
9 not found at fault" - and you bolded that - "then USAA will
10 give you some money"; and then you say, "however, if I am
11 at fault, then you will be at the mercy of Geico"; and you
12 had told them in the previous paragraph that Geico only had
13 \$25,000?

14 A. Yes, sir.

15 Q. Now, did they ever respond to that letter?

16 A. They did not.

17 Q. Now, USAA, you said -- you said earlier that USAA lied
18 to you and that caused you a lot of emotional stress you
19 said; right?

20 A. Yes.

21 Q. What was the lie?

22 A. They knew for a long period of time that I was
23 innocent, based on their findings; and they continued the
24 case accusing me of the same thing, of not telling the
25 truth about my life.

1 And let me go back a minute about the letter. The
2 letter initially ---

3 Q. No, ma'am, I'm sorry. You need to -- Mr. Willey
4 ---

5 A. Okay.

6 Q. --- can ask you about the letter. It's in ---

7 A. Okay.

8 Q. It's in evidence. But ---

9 A. Okay.

10 Q. --- I was asking you about ---

11 [Whereupon Mr. Willey standing]

12 THE COURT: Stop just one moment.

13 MR. WILLEY: She has the opportunity to explain her
14 answer. I mean, he may not want to hear it; but she can do
15 it.

16 THE COURT: First of all, please don't make speaking
17 objections.

18 And, secondly, I feel certain when you are on
19 redirect you can repoint her to anything that she needs to
20 discuss.

21 Thank you.

22 MR. WHELAN: Thank you, Your Honor.

23 Q. So I am trying to get down to the lie that you say
24 USAA told. And what you just told us is the lie was they
25 knew you were innocent but, what, Jack Daniel defended the

1 suit; is that the lie?

2 A. I cannot say it was solely Mr. Daniels. Because he
3 was an attorney for USAA, and it was a -- he had made USAA
4 aware of the circumstances.

5 And I don't know if I can say this or not. But at my
6 first deposition with Mr. Daniels, in several different
7 ways he ridiculed me, make -- questioning my sanity, do you
8 realize this, do you realize that, did you say this, did
9 you say that, why did you say this, why did you say that.

10 I had -- first of all, I had never had an attorney
11 before. Had no idea what to expect. And then here comes
12 this man, you know, just making me feel stupid in front of
13 everybody.

14 And on the other encounters with this man, he did the
15 same thing.

16 Q. Jack Daniel?

17 A. Jack Daniels ---

18 Q. Okay.

19 A. --- did the same thing.

20 Q. Now, ma'am, at this deposition you are describing,
21 your personal attorney, Kevin Smith, was there?

22 A. He was.

23 Q. All right. This is the man that had been -- had
24 represented your daughter; you had known this man for
25 years, right?

1 A. Right.

2 Q. And you trust Kevin Smith?

3 A. I do.

4 Q. He is a darn good attorney, isn't he?

5 A. He is.

6 Q. Is he aggressive or passive?

7 A. I think he's aggressive when he needs to be.

8 Q. Exactly. Did Mr. Smith -- now, obviously, there is a
9 --- there is a rule of procedure that does not allow
10 attorneys to -- or allows Mr. Smith to terminate the
11 deposition if something improper happens?

12 A. That's correct.

13 MR. WILLEY: Objection, Your Honor.

14 A. I don't -- I don't know but ---

15 MR. WILLEY: He's asking for a legal conclusion.

16 A. Okay.

17 MR. WILLEY: She's not a lawyer.

18 THE COURT: If she knows.

19 Q. Did Mr. Smith do anything to terminate that
20 deposition?

21 A. I know he objected many times. But, like you said, he
22 couldn't speak; he couldn't, you know, talk to me during
23 the deposition.

24 But he did -- I don't remember, but I don't think he
25 stopped the deposition. I think it was Mr. Daniels who

1 stopped it because he said he didn't think I could handle
2 anymore.

3 Q. Okay.

4 A. And that might have been how it ended, is what I
5 believe from five years ago.

6 Q. And obviously that's all in a deposition transcript;
7 right? A court reporter typed down what was said?

8 A. Right.

9 Q. All right. And so let me get back to the what you
10 call the lie. You said that USAA knew you were innocent so
11 USAA -- what you are saying is USAA knew that your
12 headlights were on; right?

13 A. Right.

14 Q. And you were then caused emotional damages because you
15 feel that they knew they were on and they lied about it and
16 said they were off; right?

17 A. That is one thing. The most severe thing is the fact
18 that they kept insinuating and trying me and saying that I
19 lied.

20 Q. By saying that your lights were ---

21 A. Because in one case you chose to say my lights were
22 on, to protect your money, and in the second case you chose
23 to say my lights were off, to protect your money, so you
24 wouldn't have to pay the people involved.

25 Q. Okay. Which is the truth? Were your lights on or

1 were they off?

2 A. They were on.

3 Q. All right. You understand there's a difference
4 between a lie and a disagreement, don't you?

5 A. I do.

6 Q. All right. Now, when the police officer at the scene
7 found you at fault, was that a lie or a disagreement?

8 A. That was a lie.

9 Q. All right. And did the police officer's lie and cause
10 you emotional damages?

11 A. Sir, I was in critical pain. I don't remember.

12 Q. Okay. Now, when Mary Kuck told the officer the day of
13 the accident that your lights were off, was that a lie?

14 A. I don't know what she saw. My lights were on. Mr.
15 Kuck made a statement -- his first statement was that all
16 he could see were bright lights coming at him.

17 Q. Ma'am, was Mary Kuck -- was Mary Kuck's statement that
18 your lights were off, at the scene and every time
19 thereafter, is that a lie or a disagreement?

20 A. If she said they were off, that's a lie.

21 Q. Okay. And when Mr. Tanrath, Kerry Tanrath, who was
22 behind the Kuck's, when he said that your lights were off
23 was that lie as well?

24 A. Sir, I don't have any idea about that. Until you just
25 said his name I didn't even know his name.

1 Q. Okay. Even though he testified at your trial and was
2 deposed in your case you don't know his name?

3 A. He -- I don't recall him testifying at the trial.

4 Q. Okay. Now, when Magistrate Judge Lee testified that
5 your lights were off was that a lie as well?

6 A. It is what he saw.

7 Q. So is that a lie or a disagreement?

8 A. In my opinion, it's a disagreement.

9 Q. All right. And how about Antoine Johnson when he said
10 he took -- looked to the left and did not see you was that
11 a lie or a disagreement?

12 A. He passed the stop sign, didn't even stop at the stop
13 sign, and he caused the wreck. So I'd have to say that's a
14 lie. He didn't -- he didn't see my lights because he was
15 on the phone and he just passed a stop sign.

16 So he wouldn't have seen me, probably regardless of
17 whether I had my lights on or off, because he wasn't
18 looking in my direction.

19 Q. Okay. And when the -- when Woody Poplin, the expert,
20 said that your high beams were on, not your headlights, was
21 that a lie or a disagreement?

22 A. Well, he's an expert; so I can't contest with that.
23 So I'd have to say it was -- that he found -- the findings
24 were true, I guess.

25 Q. Okay. And, of course, your testimony was always that

1 your low beams were on; right?

2 A. No. My testimony were that my lights were on.

3 Q. Well, your automatic headlights, you never turn them
4 off, you said.

5 A. That's correct.

6 Q. Okay.

7 A. It comes -- I've had an Equinox since 2005, and they
8 all come with automatic headlights. And I don't turn them
9 off. I don't even know how to change the switch.

10 Q. Okay. And so when your lights are automatically on
11 they're not on the high beams, are they; they're on the low
12 beams?

13 A. I've never looked at them, sir.

14 Q. All right.

15 A. I don't know.

16 Q. But you would agree ---

17 A. I think lights are on.

18 Q. Okay. So your testimony is you may be driving around
19 with your high beams on all the time?

20 A. No, that is not my testimony.

21 Q. Okay.

22 A. In this particular case I didn't go out in front of
23 the vehicle to check which lights were on. I just knew I
24 had never changed the setting.

25 Q. Now, isn't it true that before Mr. Smith told you

1 about the Poplin report you believed that your low beams
2 were on?

3 A. No, sir.

4 Q. Now, do you remember being deposed in this case?

5 A. In this particular case?

6 Q. Yes, ma'am.

7 A. Yes, I do.

8 MR. WHELAN: Your Honor, can I open the -- unseal her
9 deposition?

10 THE COURT: Yes, sir.

11 [Deposition transcript unsealed in open court and
12 marked as Court's Exhibit Number 8]

13 Q. Now, the deposition happened in your attorney's
14 office, the Anastopoulo Law Firm downtown; right?

15 A. Yes, it did.

16 Q. And Mr. Willey was sitting there next to you the whole
17 time; wasn't he?

18 A. Yes, he was.

19 Q. And you were placed under oath?

20 A. I was.

21 Q. And you swore to tell the truth, the whole truth, and
22 nothing but the truth; didn't you?

23 A. I did.

24 Q. Okay. And did you tell the truth?

25 A. I did.

1 Q. All right. If you'll turn to Page 42.

2 A. Okay. Just read.

3 Q. I'm sorry?

4 A. Just go ahead and read it, because I can't see.

5 Q. All right. I'm going to go to Page 42, Line 20.

6 MR. WILLEY: I need a minute ---

7 THE COURT: Hang on just a minute and let Mr. Willey
8 catch up.

9 [Whereupon pause for plaintiff's counsel]

10 MR. WILLEY: Okay.

11 MR. WHELAN: All right. And, Alex, can you play ---

12 MR. WILLEY: Your Honor, objection.

13 THE COURT: Stop just a minute.

14 MR. WILLEY: May we approach?

15 THE COURT: Sure.

16 [Whereupon, an off-the-record bench conference is
17 held]

18 Q. All right, ma'am. I am going to read what my question
19 was. So I had just asked you ---

20 A. Okay.

21 Q. --- this, just now in this trial right here before
22 this jury ---

23 A. Okay.

24 Q. I said that the -- before Kevin Smith told you about
25 Mr. Poplin you believed that your low beams were on the

1 whole time; right?

2 A. I don't recall using the word low beams; but that was
3 years ago, so ---

4 Q. Okay.

5 A. --- perhaps.

6 Q. Well, in your deposition which was just this
7 February, ---

8 A. Right.

9 Q. --- February 7th, '19, I asked you:

10 (Q) So before you heard what Mr. Poplin found, you
11 knew that your low beams were on; correct?

12 A. And I said:

13 (A) Yes.

14 Q. And you said yes.

15 And then isn't it true also that before you were told
16 about Mr. Poplin by Kevin Smith you had no information that
17 your high beams were on?

18 MR. WILLEY: Objection, Your Honor. Privilege. Can
19 we approach?

20 THE COURT: Sure.

21 [Whereupon, an off-the-record bench conference is held
22 6/26/19, 11:29 a.m.]

23 THE COURT: Thank you.

24 Q. So before Mr. Smith told you about the Poplin
25 report ---

1 A. Uh-huh.

2 Q. --- you had no information that your high beams were
3 on; right?

4 A. That's correct.

5 Q. Okay. And, in fact, you were surprised to find out
6 when Mr. Poplin said your high beams were on; correct?

7 A. That's correct.

8 Q. All right. Now, at the mediation isn't it true that
9 your understanding -- were you involved in the negotiations
10 at all?

11 A. My attorneys handled it.

12 Q. And you told me at your deposition that you didn't
13 know whether or not your attorneys even offered to settle
14 for \$650,000?

15 A. I -- sir, that was years ago; and I don't recall if
16 my -- I trusted my attorney. And he did all the
17 negotiating for me. So I -- I don't know what he looked
18 at, you know, as far as settlements or so forth.

19 But my understanding is that this case is about USAA
20 lying in one case and taking a different position in the
21 other case.

22 MR. WHELAN: Your Honor, I'd object to that and move
23 to -- move to strike.

24 THE COURT: Ms. Hood, again, just answer the question
25 for me, please, without extraneous. Again, you have a very

1 competent attorney. He will object to anything that needs
2 to be objected to.

3 Thank you.

4 Q. And at the mediation you told me in your deposition
5 that USAA's highest offer was \$200,000. Is that your
6 recollection?

7 A. Yes.

8 Q. Okay. Now, you told this jury that you gave a
9 statement to USAA over the phone?

10 A. Yes.

11 Q. And your attorney, Kevin Smith, was on the phone with
12 you when you did that; right?

13 A. Yes.

14 Q. Okay. And at that time, you told USAA that your
15 automatic lights were on; right?

16 A. Yes.

17 Q. Okay. You told the police officer that your automatic
18 lights were on?

19 A. That's correct.

20 Q. You told Jack Daniel, under oath, that your automatic
21 lights were on?

22 A. That's correct.

23 Q. And then you got to trial in that case ---

24 MR. WHELAN: Your Honor, can we approach?

25 MR. WILLEY: Objection, Your Honor.

1 THE COURT: That's sustained.

2 MR. WILLEY: Thank you.

3 MR. WHELAN: Okay.

4 [Whereupon, an off-the-record bench conference is
5 held, 6/26/19, 11:32 a.m.]

6 Q. I want to ask you about Plaintiff's Exhibit 1 that Mr.
7 Willey handed to you earlier. I still haven't read this
8 document. But this is something you said you got in the
9 mail; is that right?

10 A. Yes. It's a generic, I guess, generated letter that
11 tells the members of the financial position of USAA
12 Insurance Company.

13 Q. Okay. And the very first thing it says, that
14 USAA's financial strength allowed it to pay out nearly
15 fifteen-billion dollars in claims that year; right?

16 A. I believe so. I -- to be honest, I can't read it.
17 But your reading it is fine.

18 Q. Okay. And you understand that an insurance company --
19 just like you didn't have a crystal ball at trial, the
20 insurance company doesn't have a crystal ball for what
21 disasters are going to happen in that current year; right?

22 A. Yes. I agree.

23 Q. And so it needs a certain amount of assets to protect
24 it going forward; right?

25 A. Yes.

1 Q. And this says that USAA had paid out 15-billion
2 dollars the previous year; right?

3 A. Right.

4 Q. And then at that moment, it was -- its net worth was
5 30-billion dollars for the next year; right?

6 A. Yes.

7 Q. And it said that keeping at that net worth, it was
8 able to return one-and-a-half billion dollars to the
9 members; right?

10 A. Right.

11 Q. That would be the insured's like yourself; correct?

12 A. Yes.

13 Q. Okay. So they take in what they think they need and
14 then if they -- if they -- what they don't think they'll
15 need to pay a claim, they return to the members like
16 yourselves; right, like you and Mr. Hood?

17 A. Yes, sir.

18 Q. And you guys get a check every year, don't you?

19 A. Yes, sir.

20 MR. WHELAN: Your Honor -- I'm sorry, I've got another
21 question.

22 Q. Now, ma'am, you told USAA in that recorded statement
23 with Mr. Smith that you were going at best 30 miles an
24 hour; right?

25 A. That was right after the accident. Yes, sir.

1 Q. Okay. And then in your deposition with Jack Daniel
2 and Kevin Smith, you told him under oath that you were
3 going 30 miles an hour at the time of the accident; right?

4 A. Yes, sir.

5 Q. And then when your expert looked at your car, it was
6 determined that you were going 62 miles an hour at the time
7 of the accident; right?

8 A. Well, yes --- the report.

9 MR. WHELAN: Just a moment.

10 Your Honor, may we approach for a second?

11 THE COURT: Uh-huh. Mr. Willey?

12 [Whereupon, an off-the-record bench conference is held
13 6/26/19, 11:36 a.m.]

14 Q. Oh, and, ma'am, you're still a member with USAA today?

15 A. Yes, I am, sir.

16 MR. WHELAN: Thank you.

17 THE COURT: Mr. Willey, redirect?

18 MR. WILLEY: Nothing further for this witness, Your
19 Honor.

20 THE COURT: Thank you, ma'am. You may step down.

21 THE WITNESS: Thank you.

22 [Whereupon, the witness exits the witness stand]

23 THE COURT: Okay. Ladies and gentlemen, we've had you
24 in here over an hour and a half. We're going to take about
25 a ten-minute break. Please don't begin discussing the

1 case.

2 [Whereupon, the jury exits the courtroom at 11:38
3 a.m.]

4 THE COURT: Okay. We'll be in recess for a few
5 minutes.

6 [Whereupon, a recess is taken from 6/26/19, 11:38 a.m.
7 to 11:46 a.m.]

8 THE COURT: I wanted to give y'all a chance to put on
9 the record -- I know we had several objections and then
10 conferences at the bench.

11 Mr. Whelan, you objected to Plaintiff's Exhibit
12 Number 1 on the grounds of relevance. If there is anything
13 you want to put on the record with respected to that I just
14 wanted to give you that opportunity.

15 MR. WHELAN: Yes, Your Honor. My objection was based
16 in part on the motion in limine, that it was punitive
17 damages are not a proper aspect in this case. Also, the
18 plaintiff -- no evidence of willful, reckless or wanton
19 conduct. So I believe it was premature and prejudicial to
20 introduce that.

21 Also, it's a document that had never been provided to
22 us before the exam and we didn't have proper opportunity to
23 prepare a witness to respond to that. But it's irrelevant
24 to -- oh, and the other point on that is that South
25 Carolina case law is that the only thing relevant is net

1 worth and, you know, additional information is irrelevant.
2 That throws all this other information that is not relevant
3 to punitive damages. And is prejudicial to USAA.

4 THE COURT: Thank you.

5 Is there anything you want to put on the record, Mr.
6 Willey?

7 MR. WILLEY: Your Honor, yes. Just briefly.

8 As we discussed at side bar, this is a couple of
9 things. It's a letter from the chief executive and chief
10 financial officers of USAA so the statements therein are
11 statements of party opponents.

12 And what the document says is that: Being financially
13 strong enables USAA to better serve our members every day;
14 in 2017, USAA carefully manages financial resources to
15 fulfill our commitments whether that involves helping
16 thousands of members recover from devastating storms,
17 paying claims, or investing in technologies and expertise
18 to keep member transactions convenient and safe.

19 And so -- and there are more statements in here that
20 go to what USAA promises to its members in these annual
21 statements. And I think from the testimony of Ms. Hood
22 it's clear that they did not live up to that with respect
23 to her.

24 In addition, with respect to the net worth, punitive
25 damages is still an element of the case. Their conduct in

1 this case was clearly intentional. They decided what to
2 offer and when to offer it and how to evaluate the claim.

3 And so in any event, I don't think you're required to
4 prove that before it is admissible. I think we're entitled
5 to prove the elements required for punitive damages in any
6 order that we see fit. And so I think net worth is
7 relevant to that.

8 But I actually disagree with Mr. Whelan's statement
9 that that's the only thing that's relevant to punitive
10 damages; because in order to look at the net worth you're
11 also able to look at the overall financial help of the
12 organization, and these top line numbers -- of course, USAA
13 doesn't say, you know, this is how much money we saved by
14 taking two positions in two different cases. They just
15 give top-line numbers, which are the insurance premiums and
16 net losses, et cetera. Which are, of course, relevant for
17 the jury to determine the credibility of that net worth
18 number.

19 Of course, an organization always wants to make their
20 shareholders think that it's worth as much as possible
21 because it increases the value of those memberships.

22 And so in this case we think it's entirely relevant on
23 those grounds.

24 THE COURT: Thank you.

25 Anything else we need to put on the record while the

1 jury is out, with respect to objections made during the
2 trial?

3 MR. WHELAN: Yes, there are a couple of things, Your
4 Honor.

5 One, on that last point, I'd like to mark -- I'm not
6 sure if it was marked yesterday or not, but the transcript
7 of the hearing last week where Mr. Willey said this is a
8 simple negligence case and punitive damages aren't at
9 issue, I'd just like to mark that ---

10 THE COURT: Sure.

11 MR. WHELEN: --- as a court exhibit.

12 MR. WILLEY: I just note, again, I don't have a copy
13 of that transcript. I haven't been provided one. I
14 disagree with the mischaracterization that I said it's the
15 only issue.

16 I think what I -- I said was the advice of counsel was
17 the defense -- allegedly being promulgated as a defense of
18 negligence. And so that was the spirit in which we were
19 talking. I was reading, I believe, from a case at that
20 point. But in any event.

21 MR. WHELAN: Okay. The record speaks for itself.

22 I think that we need to -- Your Honor also objected to
23 the introduction of Ms. Hood's trial testimony that she --
24 that she was mistaken that her lights were on and was no
25 longer contesting the fact that her lights were off, that

1 her attorney Kevin Smith stipulated on the record at trial
2 that her lights were off. And then she testified
3 repeatedly at trial that she was not contesting that
4 fact.

5 I believe that the trial transcript is already a part
6 of the record. If not, I can have that marked as a court's
7 exhibit to proffer that testimony.

8 THE COURT REPORTER: This will be Court's 9.

9 [Whereupon, Court's Exhibit Number 9, 9/5/17
10 transcript, is marked for identification by the court
11 reporter]

12 MR. WHELAN: But we -- you know, we discussed that at
13 the -- at the hearing on the motion in limine yesterday.
14 This witness had said that USAA continues to call me a
15 liar. And I thought Your Honor's ruling was that if she
16 said that, that we could get it in, yesterday. But I
17 understand that, you know, this is -- this is not motions
18 in limine, this is trial.

19 So we just referred to the entirety of Ms. Hood's
20 direct and cross-examination where I would have asked her
21 about her statements concerning the lights, and then Mr.
22 Kevin Smith's statement during the cross-examination of
23 Kerry Tanrath that he stipulated that the lights were off.

24 And Mr. Willey's statements during closing arguments
25 that equated to she -- her lights were off -- or she was

1 not contesting that her lights were off.

2 The other thing I wanted to put on the record - I'm
3 not sure if it was on the record - that I attempted to
4 impeach Ms. Hood with video clips from her deposition. The
5 plaintiff's counsel objected. Perhaps he could restate his
6 grounds for the record.

7 But I disagree that it -- oh, that's right, he said
8 that the video clips for impeachment must be designated
9 twenty-four hours in advance. And I believe Your Honor
10 sustained that objection. So I wanted to make sure that
11 was on the record. We had several video clips for Ms. Hood
12 that we did not play as a result.

13 And then the other thing is I believe I objected to
14 the statement or questions concerning them having two
15 attorneys taking conflicting positions. I think that was
16 on the record though, actually.

17 [Court confers with court reporter regarding exhibits]

18 THE COURT: There were Court's Exhibits marked 3, 4, 5
19 and 6. I don't know if someone took those back with them.

20 THE COURT REPORTER: Three was the complaint. Four is
21 the answer.

22 MR. WHELAN: I think that was during Mr. Willey's
23 argument in response to some objection.

24 MR. WILLEY: It was. And so that would be the
25 complaint and the answer in the Kucks' case. What was the

1 third one, Madam Court Reporter?

2 THE COURT REPORTER: Six, you referenced a case. I
3 just put case.

4 MR. WILLEY: Oh, that's the ---

5 THE COURT REPORTER: The Oklahoma ---

6 MR. WILLEY: --- Oklahoma case.

7 THE COURT REPORTER: Oklahoma case.

8 MR. WILLEY: Which was really just illustrative in
9 nature.

10 THE COURT: And we don't have to stop now. I just
11 wanted to make sure those didn't get too far.

12 MR. WILLEY: We have those, and I will give them to
13 you.

14 THE COURT REPORTER: Okay.

15 THE COURT: Thank you.

16 MR. WILLEY: I apologize for that. I may have taken
17 them.

18 THE COURT: Okay.

19 MR. WILLEY: I am sure I took them, if they are
20 missing.

21 THE COURT REPORTER: Anything with a label needs to
22 stay.

23 [Off the record momentarily, gathering exhibits]

24 MR. WHELAN: Can I just say one other thing on the
25 record?

1 THE COURT: Sure.

2 MR. WHELAN: And I'm 99 percent that you said this,
3 Your Honor; but I just want to confirm that those arguments
4 that we just made at the conclusion of Ms. Hood's
5 statements were to reflect conversations made at side bar
6 when the court reporter was not able to transcribe.

7 Thank you.

8 THE COURT: That's right. Thank you.

9 Okay. We are ready for the jury.

10 [Whereupon, the jury enters the courtroom 6/26/19,
11 11:57 a.m.]

12 [Whereupon, Mr. Hood comes forward]

13 [Whereupon, Mr. Hood is duly sworn by the clerk of
14 court.]

15 THE CLERK OF COURT: You can sit down.

16 [Whereupon, the witness takes the witness stand]

17 THE CLERK OF COURT: For the record, can you please
18 state your full name and spell your last.

19 THE WITNESS: My full name is David Allen Hood.

20 H-O-O-D.

21 DAVID HOOD, Having Been First Duly Sworn, was Examined and
22 Testified as Follows:

23 **DIRECT EXAMINATION BY MR. WILLEY OF DAVID HOOD:**

24 Q. Mr. Hood, will you just introduce yourself to the jury
25 and give them a sense of how you're involved in this

1 matter?

2 A. Certainly. My name is David Hood. I'm Terry Hood's
3 husband. We've been married 44 years. We had our wedding
4 anniversary last week, as a matter of fact.

5 My wife is retired from the military. She spent 20
6 years in the Army. I'm retired from the military. I spent
7 22 years in the Army. While I was in the Army, I spent 5
8 years as an MP. I spent the rest of the time in electronic
9 maintenance in the military intelligence field. Been
10 retired 25 years or so. Worked as a contractor up until
11 March of this year. I'm now fully retired.

12 Q. And, Mr. Hood, you weren't in here for Ms. Hood's
13 testimony?

14 A. No, I was not.

15 Q. All right. And ---

16 A. I have not been in the court for any testimonies of
17 any of this, no.

18 Q. Right. And that's because we've told you the
19 witnesses are sequestered; so you're outside, right?

20 A. Exactly.

21 Q. Just so the jury understands. Okay.

22 There was testimony that Ms. Hood talked about with
23 Mr. Whelan about the suit where the Kuck's are suing
24 Antoine Johnson and Ms. Hood.

25 A. Yes, sir.

1 Q. Do you know about that case?

2 A. Yes.

3 Q. All right. Tell the jury about what you know about
4 what if any personal exposure Ms. Hood has in that case.

5 MR. WHELAN: Your Honor, I object to relevance,
6 hearsay, foundation.

7 MR. WILLEY: May we approach?

8 THE COURT: Sure.

9 [Whereupon, an off-the-record bench conference is held
10 6/26/19, 12:00 p.m.]

11 Q. Mr. Hood, you -- how long have you been a USAA member?

12 A. Over 20 years. But -- and I did -- I guess I should
13 point out that this insurance policy that we're involved
14 with is actually my policy. My wife ---

15 Q. Right.

16 A. --- is on my policy. This is my member account.

17 Q. Right. We got that.

18 A. She has her own separate account. But this is all
19 actually my ---

20 Q. We got that through her.

21 A. Perfect.

22 Q. And you're the one that made the claim and called the
23 lawyer and all of that while she was in the hospital,
24 right?

25 A. Yes, sir.

1 Q. Okay. My only final question for you is what did you
2 learn yesterday?

3 MR. WHELAN: Object to the form. Vague. Do not
4 understand -- I mean that is a vague question. It is an
5 improper question.

6 MR. WILLEY: That's not a legal objection.

7 MR. WHELAN: Yeah, it is. It's an improper question.
8 It's a form objection.

9 THE COURT: Can you give us a little more specificity,
10 please, Mr. Willey?

11 MR. WILLEY: I'm happy to approach.

12 THE COURT: Sure.

13 [Whereupon, an off-the-record bench conference is
14 held]

15 Q. Mr. Hood, yesterday while we were in here and the jury
16 was in the back room some and out here some, you were out
17 in the hallway; right?

18 A. Correct.

19 Q. All right.

20 A. Several times.

21 Q. Several times. And at one point in the hallway did
22 some individuals approach you or approach near you?

23 A. Yes, I was sitting right outside the door. You all
24 apparently took ---

25 MR. WHELAN: Your Honor, I object. Can we approach on

1 this?

2 THE COURT: Sure.

3 [Whereupon, an off-the-record bench conference is held
4 6/26/19, 12:04 p.m.]

5 THE COURT: Okay. Ladies and gentlemen, it's right at
6 noon. We have a couple of matters we're going to take up.
7 I really don't want to dismiss you for lunch quite at this
8 moment. If you'll bear with us for just a few minutes,
9 we're going to take up a legal matter outside of your
10 presence.

11 We will try not to keep you more than about ten
12 minutes, and then we will have a plan for sending you to
13 lunch. I don't want you to think we're just going to keep
14 you in here indefinitely. We are considering the fact that
15 we need to feed you at some point. But we're going to take
16 about a ten-minute break. I'm going to excuse you while we
17 take this matter up.

18 Thank you.

19 [Whereupon, the jury exits the courtroom 6/26/19,
20 12:07 p.m.]

21 THE COURT: Okay. I understand this has to do with
22 something the attorneys to this case said in the corridor
23 yesterday at some point during the break. And so my
24 concern is I just don't want us to have something in front
25 of the jury that's going to end up in a mistrial or one

1 of these attorneys having to get on the stand. So go
2 ahead ---

3 MR. WILLEY: Right.

4 THE COURT: --- and ask your question so we can put
5 this on the record.

6 MR. WILLEY: Right. And I want to point out that not
7 all of the individuals present were counsel of record, so
8 that would not be necessary in any way.

9 THE COURT: Okay. Well, go ahead and ask your
10 question and then we will discern afterward.

11 **PROFFER**

12 **BY MR. WILLEY:**

13 Q. Mr. Hood, tell us what you heard yesterday in the
14 hallway.

15 A. Okay. Like I was -- said earlier, I was sitting in
16 the hallway. Y'all apparently took a break. Mr. --
17 Whelan?

18 MR. WHELAN: That's right.

19 A. ... and his co-counsel and a third individual who I
20 don't know, came out, stood within about five feet from me.
21 And as soon as the three of them got together Mr. Whelan
22 told the other two individuals we have to show that Mrs.
23 Hood is lying.

24 When he said that, I immediately spoke up and I said:
25 That's my wife you're talking about. If you're going to

1 have these conversations, please have them someplace other
2 than in front of me.

3 THE COURT: And how would that be relevant in this
4 particular case, Mr. Willey?

5 MR. WILLEY: Well, it's relevant because what he said
6 was we have to show that she's a liar, not that we have to
7 discover facts and figure out what actually happened.

8 And that's what we just saw with the whole charade
9 with the deposition. She never answered her question
10 differently. She never lied. And we have this charade
11 trying to make her look like a liar.

12 And it goes to the heart of the matter. It's still
13 USAA today in this courtroom doing the same thing that
14 they've done all along. And, in fact, not only that, but
15 out in the hallway individuals talking about doing it in
16 front of her husband, who's still a member.

17 It -- all damages ---

18 THE COURT: That objection is sustained. We've
19 already talked about the trial transcripts not coming in,
20 litigation conduct -- the case law says litigation conduct
21 is not admissible in this bad faith case. If the
22 litigation conduct is not admissible then what happened
23 yesterday in the hallway is not admissible. So that
24 testimony is not coming in front of this jury.

25 MR. WILLEY: Well ---

1 THE COURT: That was your motion in limine that we
2 keep out post-mediation ---

3 MR. WILLEY: Right.

4 THE COURT: --- conduct. And so that covers
5 throughout this trial.

6 MR. WILLEY: Well, I -- but I -- but I think what it
7 does is it goes to the credibility of Ms. Hood. And so
8 understanding ---

9 THE COURT: I don't think that his statements could
10 possibly go to her credibility.

11 MR. WILLEY: Well, let me -- let me say it a different
12 way. If Mr. Whelan went out in the hallway after this and
13 said to Ms. Hood, I know you were telling the truth in
14 there, I just had to make you look like a liar, that would
15 be admissible and it would be admissible because it would
16 go to her credibility for what he did on the stand.

17 This is the same thing. It just happened yesterday
18 when they were planning to do it as opposed to after they
19 have done it.

20 THE COURT: I understand your position, ---

21 MR. WILLEY: Okay.

22 THE COURT: --- and I'm not going to allow that.

23 MR. WILLEY: All right.

24 May we take a brief break, for two reasons; one, so --
25 can you tell him -- I mean, I'm happy to tell him that just

1 make sure that he doesn't go into that, because I don't
2 want him to go into it after you have told him not to.

3 Do you understand?

4 THE COURT: Yes, sir.

5 THE WITNESS: I do. Perfect.

6 MR. WHELAN: I thought that was the one -- you said
7 you just had one question for him.

8 MR. WILLEY: Yeah, well, I'm not going to end on that.
9 It's not rocket science.

10 [Whereupon, counselors confer]

11 MR. WILLEY: All right. We're ready.

12 THE COURT: Okay. If you'll bring the jury back in,
13 please.

14 [Whereupon, the jury enters the courtroom 6/26/19,
15 12:13 p.m.]

16 THE BAILIFF: The jurors are all seated, Your Honor.

17 THE COURT: Thank you, sir.

18 Yes, sir.

19 Q. Mr. Hood, you indicated that yesterday you were
20 sitting out in the hall?

21 A. Correct.

22 MR. WHELAN: Your Honor, I object to this.

23 THE COURT: Well, I don't have anything to sustain
24 thus far.

25 Q. And ---

26

1 MR. WHELAN: Relevance. I'm sorry.

2 THE COURT: Thank you. Go ahead.

3 Q. Mr. Hood, you were sitting out there all day?

4 A. I was in and out, depending on what was going on here
5 in court. But I've been ---

6 Q. Now ---

7 A. --- I've been in here all day, yes.

8 Q. You've been out there ---

9 A. Yes.

10 Q. --- all morning? And when Ms. Hood came to my office
11 and sat for several hours for this deposition were you
12 there?

13 A. Yes, I was downstairs.

14 Q. All right.

15 A. I wasn't in the deposition. I was in your office.

16 Q. And have you been by her side for the entire duration
17 of this ordeal?

18 A. Since the accident. And it like took me three hours
19 to drive down to Hilton Head from Charleston where we live,
20 or Goose Creek where we live; and I've been by her. Of
21 course.

22 Q. Have you noticed an impact on her from what USAA has
23 done?

24 A. It's been devastating to her.

25 MR. WHELAN: Your Honor, I object to this based on

1 lack of foundation, personal knowledge. Must be based on
2 hearsay. I mean ---

3 THE COURT: He can testify as to his personal
4 observations. Thank you.

5 MR. WHELAN: But as far as the emotional damages
6 that they asked for in the last trial versus this trial,
7 that ---

8 THE COURT: I understand.

9 Again, he can testify as to his personal knowledge to
10 any relevant material, yes.

11 Q. Mr. Hood, tell the jury based on USAA's actions how
12 they treated you and your wife, what you've noticed about
13 how it's affected her.

14 A. We've been married 44 years. I know Terry better than
15 anybody else on this planet. I know that this has been
16 tearing her up since day one, since they first started this
17 whole thing about were her lights on, were her lights off
18 and where they're going back and forth with, you know, is
19 she telling the truth, is she not telling the truth. And
20 her credibility is more important to her than anything
21 else.

22 And to be honest with you, this whole thing is getting
23 to a point where it's bothering me as well. I can't
24 protect her from this. I can't protect her from the
25 company that I've been paying premiums to for 20 years, a

1 company that I thought was on our side, that we expected to
2 represent us.

3 They have taken a police report and have turned it in
4 15 different directions, depending on who they're talking
5 to and when they're talking to them about it.

6 They did the same thing with the whole lights thing.
7 I heard Mr. Whelan yesterday say ---

8 MR. WHELAN: I ---

9 MR. WILLEY: Thank you, sir.

10 THE WITNESS: And I apologize for being a little ---

11 MR. WILLEY: That's okay.

12 **CROSS-EXAMINATION BY MR. WHELAN OF ROBERT HOOD:**

13 Q. Mr. Hood, you would -- we can agree, can't we, that
14 USAA has a right to defend itself when it is sued?

15 MR. WILLEY: Objection. Calls for a legal conclusion.

16 MR. WHELAN: I mean ---

17 THE COURT: I'm going to allow it. Thank you.

18 A. I have absolute perfect understanding that it's USAA's
19 right to behave responsibly and to look after their
20 shareholders, including me. I am a shareholder of USAA.
21 My wife is a shareholder.

22 Yes, the company has a right to defend. And no
23 argument from me at all. The company does not have a right
24 to lie or to mischaracterize.

25 Plus, in the course of trying to affect the outcome of

1 a bunch of different cases that we have really no clue as
2 to what's going on. We're not legal experts. My wife is
3 not some super lawyer or -- she doesn't know what all these
4 processes are. I don't understand any of them. The stuff
5 that's going on here now, most of this I don't understand.
6 Every time it happens, I have to go back to Mr. Whelan --
7 or Mr. Willey and ask him what just happened.

8 Q. Exactly.

9 A. We're not -- I do believe, though, that USAA has an
10 absolute right to defend its interest. And its interest in
11 this case is not us. We are the people who have been
12 paying you guys, but you are not representing us.

13 Q. Right.

14 A. I can -- and we can see that right now. You're
15 sitting on the opposite side of the court from us.

16 Q. Correct.

17 A. Even though we're still paying you.

18 Q. Because your wife has sued USAA in this suit.

19 Now, you said ---

20 A. There's a reason for that.

21 Q. And of course USAA gets to defend itself.

22 Now, you said that you don't know what's going on and
23 you're not lawyers. But you have very good lawyers; and
24 you have for years, in Kevin Smith and Roy Willey; true?

25 A. Lawyers that we hired to protect us from our insurance

1 company.

2 Q. Well, you hired -- you hired Kevin -- she hired Keven
3 Smith two or three days after the accident.

4 A. She sure did.

5 Q. All right.

6 A. And she had that -- she had a -- she had a previous
7 legal -- well, she didn't; my daughter did, had a previous
8 legal arrangement with Kevin Smith.

9 Q. Right.

10 A. Yeah. We knew the Hoffman Law Firm. We knew they
11 were reputable. We knew what they were doing.

12 Q. And you hired them before anybody talked to USAA;
13 didn't you?

14 A. No. I talked to US of A -- USAA right after the
15 accident.

16 Q. Okay.

17 A. I called them and told them that she's been in an
18 accident and she was in a hospital and all this stuff was
19 going to happen, yes.

20 Q. Right. Okay.

21 A. All before I talked to Kevin Smith.

22 Q. Sure. But you would have reported the claim right
23 after the accident; ---

24 A. Correct.

25 Q. --- hey, there's been an accident; and then you go to

1 Mr. Smith after that?

2 A. Exactly.

3 Q. Okay. Now, I guess my last question is you're a USAA
4 member today?

5 A. Yes.

6 MR. WHELAN: Thank you, sir.

7 THE COURT: Anything further, Mr. Willey?

8 MR. WILLEY: No, Your Honor.

9 THE COURT: Thank you, sir. You can step down.

10 THE WITNESS: Thank you, ma'am.

11 [Whereupon, the witness exits the witness stand]

12 MR. WILLEY: And, Your Honor, may Mr. Hood now stay
13 inside since he's testified?

14 THE COURT: Any objection, Mr. Whelan?

15 MR. WHELAN: No, Your Honor.

16 THE COURT: Thank you.

17 Okay. Ladies and gentlemen, I think this might be a
18 good point for us to send you to lunch. It's 12:19. I'm
19 going to ask for you to be back in the jury room at 1:45,
20 please, and we'll take up. Please don't begin discussing
21 the case. Thank you.

22 [Whereupon, the jury exits the courtroom 6/27/19,
23 12:19 p.m.]

24 THE COURT: Let me just mention Julie has been nice
25 enough to sit with me. I don't have my own law clerk to

1 speak of, and she's been nice enough to help me. I don't
2 know where we're going to stand at the end of the day. I
3 don't get the feeling that we're going to be charging this
4 jury today. But anything that you can provide for me in
5 the way as jury charges, you know, as far ahead of time as
6 possible so we can be getting that together.

7 [Court confers with law clerk for email]

8 THE COURT: All right. Thank you.

9 MR. WHELAN: Your Honor, can I just make one
10 housekeeping matter?

11 THE COURT: Sure.

12 MR. WHELAN: So Ms. Mellen was nice enough to answer
13 my call on Friday when I realized we were going to be
14 trying this case to help me out. She is -- has an out-of-
15 town wedding that she's leaving for tomorrow. I did not
16 think we would be here until Thursday. And I just ask --
17 she's really just assisting me. She hasn't asked any
18 witnesses any questions. I just wanted to make the Court
19 aware of that and make sure she can be excused from
20 attending certainly tomorrow.

21 THE COURT: I don't have any objection to that.

22 [Off the record momentarily]

23 THE COURT: That would absolutely be fine.

24 MR. WHELAN: Thank you, Your Honor.

25 THE COURT: Thank you for bringing that to my

1 attention.

2 Okay. We'll be at recess until 1:45.

3 [Whereupon, a recess is taken 6/26/19 for lunch 12:22
4 p.m.]

5 [Whereupon, resume 6/26/19, 1:48 p.m.]

6 THE COURT: Okay. Anything before we bring the jury
7 in?

8 MR. WHELAN: We do have a matter for the Court, Your
9 Honor, that I think would make sense to address now.

10 So we listed on our trial briefs just a few exhibits,
11 the vast majority of which are about the Jack Daniel
12 letters which we've been talked about. My understanding is
13 the plaintiff objects to those -- the letters coming into
14 evidence in their entirety.

15 My understanding also is that he has -- if they do
16 come into evidence - and I think Your Honor has already
17 ruled on that yesterday or indicated a ruling is that they
18 would come in prior to the bad faith suit being filed - he
19 is objecting to certain parts of those letters as well.
20 And what I would like to do is to have him identify what
21 those parts are, get a ruling from Your Honor, so that if
22 there is anything that's going to be excluded it can be
23 redacted.

24 I mean I think the letters should come in in their
25 entirety. But I think we ought to address that.

1 THE COURT: Okay. If y'all can hand me up the letters
2 you're referring to. And bear with me for just a minute,
3 because my -- I have got to go under here and plug in my
4 computer.

5 [Pause for the Court]

6 MR. WHELAN: These are them.

7 THE COURT: Thank you.

8 [Whereupon, Mr. Whelan proffers documents to the
9 Court]

10 [Whereupon, the Court reviews documents]

11 THE COURT: Okay. Mr. Willey, do you want to tell me
12 what your position is, sir?

13 MR. WILLEY: Sure.

14 Your Honor, we have already argued the advice of
15 counsel. It was denied. Relevant evidence is evidence that
16 makes any claim or defense in the case more or less likely.
17 It's not a defense. So anything that Mr. Daniel gave as
18 far as advice would be irrelevant.

19 In addition to that we have agreed and had rulings on
20 several motions in limine. And this morning, when I was
21 mistaken and thought that the mention of the fractured
22 ankle, for example, was in the letter from Ms. Hood to the
23 Kuck's, it's not. It's actually in the letter that Mr.
24 Daniel sent forwarding the Kuck's letter to USAA.

25 And so, for example, that mention of her specific

1 injuries in the case would need to come out because we have
2 a motion in limine on that.

3 Anything that would violate the other motions in
4 limine -- and I have not -- I've had these letters in
5 discovery, of course; but I was just handed what he intends
6 to introduce. I have not had a chance to look through them
7 and redline them or anything like that. But I think that
8 is the basis of it.

9 And, for example -- I'll just give an example of
10 advice. So some of the advice is what he thinks the case
11 should be valued at. Well, his valuation of the case is
12 not at issue. The valuation that is at issue in the case
13 is the valuation made by USAA. And so that, for example,
14 would be advice but not an act taken by USAA or anyone else
15 that would make any claim or defense more likely. And at
16 some points his value is actually higher than USAA's. And
17 so that, you know, sort of -- sort of shows that.

18 So the injuries, anything that would -- that would do
19 with advice of counsel would have to be redacted.

20 I do think that if his letters were the only source of
21 some of the information about what was happening in the
22 underlying case -- for example, the first letter he's
23 handed me is the deposition of William and Mary Kuck. And
24 in this section, Mr. Daniel gives some factual information.
25 He says, William Legare Kuck has lived in Orangeburg, South

1 Carolina, since he was eight years old; he's sixty-four
2 years old; he has three children.

3 If that were the only source of that information and
4 USAA only had that from this letter I would agree that the
5 facts on the underlying matter relative to that, to the
6 acts, should come in. They have it elsewhere, and so all
7 we're doing is muddying the waters. They have the
8 transcript. They have access to the transcript. The
9 transcript can be put into evidence, redacted for the
10 motions in limine, if it's relevant to the claims and
11 defenses.

12 I don't know that where Mr. Kuck lived and how old he
13 is and how many kids he has has anything to do with the
14 case of Hood v. Johnson. But that's what they're
15 attempting to admit into evidence. There's a whole lot of
16 information about Ms. Kuck and Mr. Kuck and their
17 deposition in that case. It's irrelevant how old they are,
18 where they live, what they do, how many kids they have.

19 But if in these letters there are some things that say
20 I did X or I did Y and USAA doesn't have that from any
21 other piece of information, that may be admissible.

22 I don't know, however, that the letter has to come in.
23 I think Ms. Moats can just testify to that. Because what
24 we end up having is a letter, this initial one which is
25 several pages long, where based on the motions in limine

1 all of the objections and them losing the advice of counsel
2 defense we would have to redact the vast majority of the
3 letter and be left with just a few sentences.

4 I've not looked at -- I've not looked at the remainder
5 of these. I just flipped through that one. I'm happy to
6 do so and make those specific objections. But they're all
7 along those lines.

8 You know, and the other thing that I would say is I
9 don't know that there's any benefit for these letters to be
10 used during our case in chief.

11 I mean, if, for example, tomorrow -- we go through the
12 redactions this evening, we argue it in the morning,
13 there's some ruling that some of them comes in, they can
14 just be put in at that time, you know. And I don't -- I
15 don't know why we need to necessarily address this now
16 without me having had the benefit of going through them
17 specifically, but that would be our position.

18 THE COURT: Mr. Whelan, are you proposing to use these
19 during the cross-examination of one of the plaintiff's
20 witnesses?

21 MR. WHELAN: Well, yes, Your Honor. If -- I'm not --
22 they haven't told me who they're going to call. But Your
23 Honor ruled on this yesterday as far as advice -- you know,
24 he says this case is about USAA's evaluation. The source
25 of USAA's information was Jack Daniel's letters. They

1 don't have the depo- -- these came out of the claim file.
2 The deposition of William Kuck isn't in the claim file. It
3 wasn't sent -- Jack Daniel collects the information, Jack
4 Daniel talks to Mr. Willey and Mr. Smith, Jack Daniel does
5 the investigation, and then his report is in these five
6 letters.

7 And, you know, I think our trial exhibits, we listed
8 these five letters. I think we listed the check. We
9 listed the UIM statute and the Kuck letter. And I think
10 that's it. So this is certainly no surprise to Mr. Willey.

11 THE COURT: Tell me what your position is with respect
12 to the discussion of injuries.

13 MR. WHELAN: Well, as I stated earlier, that I think
14 that that was the basis of USAA's evaluation, so I think
15 that part -- I think that comes in.

16 And, Your Honor, Mr. Willey is right there are some
17 things in here that are bad for our case. Or I shouldn't
18 say that. There are some things in here that -- you know,
19 an evaluation letter discusses pros and cons. So, you
20 know, Jack says, you know, on this hand -- this hand, this
21 witness says X, on this hand this witness says Y. You
22 know, Jasper County is a dangerous venue. On the other
23 hand, you know, Mr. Johnson lives there and Ms. Kuck -- I
24 mean, Ms. Hood doesn't.

25 So, you know, there is some good and there is some bad

1 in here. And if I had my druthers, I'd love to go in and
2 highlight things that -- or redact things that aren't --
3 that favor Mr. Willey more than me. But if this is a
4 search for what USAA based its evaluation on and what
5 information it had, the answer is in these five letters.

6 MR. WILLEY: And, Your Honor, to the extent he wants
7 to make that argument, that's the standard advice of
8 counsel argument which he has already lost.

9 In this case Jack Daniel is a direct agent of USAA.
10 So anything that Jack Daniel did in the underlying suit,
11 USAA did it. So any letter writing back about his analysis
12 based on those things has already been lost. Judge
13 Culbertson ruled on that.

14 THE COURT: I understand. But I've also ruled that
15 although it cannot absolve them of any liability, that the
16 letters are relevant to what their evaluation was, whether
17 they were reasonable in the evaluation that they made on
18 the claim and whether their actions were reasonable both at
19 mediation and in taking their respective positions at
20 trial.

21 MR. WILLEY: And I am in agreement with you on that as
22 to the facts that ---

23 THE COURT: I don't know that you are.

24 MR. WILLEY: Well, I am. I'm in agreement on that as
25 to the facts and the actions taken in the underlying case.

1 But when it crosses over into Mr. Daniel giving advice or
2 his opinion through these letters about the case, that goes
3 to the advice of counsel defense.

4 Any act he took doesn't go to the advice of counsel
5 defense because he's an agent of USAA. Any advice he gave
6 does.

7 THE COURT: And I understand. And we covered this. I
8 think you covered all of that very well in the motions in
9 limine. But I've already made a ruling on that.

10 Again, I think the letters are relevant to whether the
11 insurance company was acting in a reasonable fashion.

12 I'm looking at the section with respect to her
13 injuries because I think it was a defense motion in limine
14 to keep out testimony regarding her injuries.

15 MR. WHELAN: If I can clarify that, Your Honor.

16 THE COURT: Uh-huh.

17 MR. WHELAN: Yeah, as I said earlier, the relevance of
18 USAA's evaluation of her injuries is relevant to their
19 theory, this exigent evaluation theory, our motion was to
20 keep the plaintiff from arguing -- you know, telling the
21 jury about what her injuries were that she should be
22 compensated for in this suit, as opposed to what USAA knew
23 about her injuries.

24 MR. WILLEY: Respectfully, Your Honor, that wasn't the
25 motion. It was any mention of injuries, which I said I

1 would agree to because I didn't think anything that
2 happened at trial or in the underlying, with respect to
3 that, was relevant.

4 MR. WHELAN: Well, if that is true that's been
5 violated by them referring repeatedly to her injuries that
6 were ---

7 MR. WILLEY: We have not said a specific injury.

8 THE COURT: Well, there's been -- there's been
9 testimony about \$300,000 worth of medical bills. I don't
10 see anything in this -- I'm looking at this paragraph here
11 that's -- I don't know how I identify which letter I'm
12 looking at.

13 MR. WHELAN: There's a Bates number at the bottom
14 right-hand corner, I believe.

15 THE COURT: This is 135.

16 MR. WHELAN: Okay.

17 THE COURT: I see on page -- on the top of Page 3 I
18 see a paragraph that looks fairly innocuous to me. Refers
19 to injuries to her neck, right leg, and right ankle.

20 MR. WILLEY: Right. And I think the basis of that is
21 it makes her injuries seem far less severe than they were.
22 And this was the whole part about not litigating the
23 underlying case. If they're allowed to get in evidence
24 that just says she had a fractured ankle, then we would
25 have to get in evidence about what were the actual

1 injuries.

2 Because that is not -- what Mr. Daniel represents as
3 the injuries is not all-inclusive, let's just say. USAA
4 knew what they were. They weren't relying on him for that
5 anyway because they had her medical bills and records.

6 But ---

7 MR. WHELAN: Actually, those aren't in the claim file.
8 And, again, what's relevant, according to Mr. Willey ---

9 MR. WILLEY: Well, ---

10 MR. WHELAN: What's relevant according to Mr. Willey
11 is how USAA evaluated a claim. So what's relevant is what
12 were the injuries that they knew about when they offered
13 the 200 instead of the 250.

14 MR. WILLEY: And, Your Honor, just to be clear, that's
15 still not relevant because even taking into account
16 everything they knew, they evaluated it at 250 and they
17 just didn't offer it. And that's really the crux of the
18 argument is there's no argument in this case otherwise.

19 I mean, if that was the basis of the motion in limine,
20 that's already been decided. And we agree. I mean, we
21 agree on that.

22 And I -- I mean, I'm happy to read the motion in
23 limine. But it's pretty broad.

24 MR. WHELAN: So now the -- and this is what I've been
25 trying to wrap my hands around for two days, is the exact

1 act that they're claiming is the subject of this suit. And
2 now Mr. Willey is back to the act, the only thing that's
3 relevant is their failure to offer 250. And if that's the
4 only thing that they're complaining about, then he might be
5 right.

6 THE COURT: I'm looking at the next one that I have
7 which is Bates stamped 160 -- I'm sorry -- the beginning of
8 Bates stamp 156, there's a fairly significant section here
9 regarding severe injuries.

10 MR. WILLEY: Your Honor, I'll just give you another
11 sentence from that one that elucidates - this is on 159 -
12 what I as saying. It says: Plaintiff started deposition
13 by stating she worked undercover while she was in the Army.
14 She was cryptic about this. Based on her testimony, it's
15 likely she was trying to seem important with this
16 statement.

17 Well, if that's Mr. Daniel's advice to them, or his
18 observation, that doesn't bear in any way on the
19 evaluation. And if it does, then what we're going to
20 have -- end up happening is Mr. Daniel is going to have to
21 come in here and answer for all of this. And so it's going
22 to become a trial. We're going to be trying the lawyer.
23 Which I was trying to avoid because ---

24 THE COURT: I think we are going to be trying the
25 lawyer.

1 But, again, the whole crux of this is what did they
2 know at the time that they made their determinations, what
3 information was available to them, and did they act
4 reasonably.

5 Just from my cursory look at this it looks like
6 there's some things in this that helped both sides and some
7 things in this that hurt both sides. And so I think it's
8 fair game at this point.

9 MR. WILLEY: Including the violative information
10 regarding the motions in limine?

11 THE COURT: Well, again, this is the information --
12 we've already had the jury know what the amount of the
13 verdict was and that it was for personal injuries, ---

14 MR. WILLEY: Right.

15 THE COURT: --- the amount of her medical bills. So I
16 don't see how this is going to prejudice your client in any
17 way regarding injuries.

18 MR. WILLEY: The medical bills was a sustained
19 objection. So, you know, I -- okay. I mean, I feel like
20 if that's the case, we have to get more into injuries.
21 But, you know ---

22 THE COURT: We'll see what happens.

23 MR. WILLEY: Okay.

24 THE COURT: Thank you.

25 Okay. Let's bring the jury in.

1 [Whereupon, the jury enters the courtroom 6/26/19,
2 2:09 p.m.]

3 THE COURT: Okay. Mr. Willey?

4 MR. POULIN: Your Honor, at this time we would like to
5 publish the excerpted designations from the Kathy Moats
6 deposition to the jury. I have Elizabeth, from my office,
7 here to do the read with me on the publication.

8 But of course with Ms. Moats being here if she would
9 like to read her answers, that would be fine with me as
10 well. I suppose that's her option.

11 MR. WHELAN: Your Honor, that's not proper under the
12 rules. Can I approach?

13 THE COURT: Sure.

14 MR. WHELAN: Sorry.

15 [Whereupon, an off-the-record bench conference is held
16 6/26/19, 2:09 p.m.]

17 THE COURT: Okay. Ladies and gentlemen, we do have an
18 issue of law we're going to need to take up outside of your
19 presence. If you'll be patient with us, we'll be back with
20 you in about ten minutes. Please don't begin discussing
21 the case. Thank you.

22 [Whereupon, the jury exits the courtroom at 2:15 p.m.]

23 THE COURT: Mr. Whelan, do you want to state your
24 objection?

25 MR. WHELAN: Yes, Your Honor.

1 So the -- they are trying to present a deposition
2 transcript -- or, excuse me. They're trying to present
3 testimony through the use of a deposition transcript under
4 Rule 32(a)(2). And they're trying to introduce the
5 testimony of Kathy Moats.

6 Kathy Moats was deposed with two other adjusters in
7 Tampa, Florida. It was noticed as a personal deposition.
8 Correspondence concerning those depositions specifically
9 indicate Mr. Willey saying he was going to take their
10 deposition first and then do a 30(b)(6) deposition later.

11 I asked Mr. Willey to go ahead and bring me the
12 30(b)(6) topics so that we could prepare these witnesses
13 and go ahead and do a 30(b)(6) deposition at the time.

14 He said, no, he wouldn't do that, he wanted to depose
15 them first. He did that. No 30(b)(6) deposition was ever
16 taken. And as we've discussed before, and it's noted in
17 the transcripts that's a Court Exhibit from last week, Mr.
18 Willey said that he wanted to go ahead and try this case
19 this week without additional discovery.

20 The rule allows for the use of a deposition for
21 anyone -- excuse me -- allows for the use of a deposition
22 of a party or anyone who at the time of taking the
23 deposition was an officer, director, or a managing agent or
24 a 30(b)(6) at the time.

25 There is no dispute Ms. Moats is not an officer,

1 director, or managing agent. She is a litigation manager,
2 which means that she -- that the attorneys, like Jack
3 Daniel, report to her. I

4 She's certainly none of those things. She's here at
5 trial. There's no reason to waste the jury's time reading
6 her testimony when she's here and can testify live.

7 Also, we do have or we would have counter-designations
8 and objections. And contrary to what Mr. Poulin says, if
9 you look at Rule 32(a)(5), that says excerpts from
10 depositions to be offered at trial. It says at least one
11 day prior to offering excerpts from a deposition in the
12 case in chief, the plaintiff - or whoever's going to offer
13 it, here the plaintiff - shall give us the pages and lines.

14 Then, the next sentence: When the deposition excerpt
15 is offered at trial, counsel for the adverse party - that's
16 us - shall furnish to the trial judge and at the same time
17 and by the same means furnish to opposing counsel any
18 objections and any additional excerpts which we expect to
19 be read with the deposition.

20 So now is the time for us to do this. They did serve
21 these on us Monday night, I think at 9:30 p.m. on Monday
22 night. Ms. Moats was here first thing in the morning on
23 Tuesday. They have known she's a witness. They've had
24 well over 24 hours to prepare an examination for her. And
25 I'm quite sure that they have.

1 So reading the deposition is improper under Rule
2 32(a)(2). If the Court were to allow them to read the
3 deposition, then we have the right to make objections at
4 this time and have counter-designations for them to read at
5 the same time with their designations.

6 THE COURT: Let's jump ahead. You said that you also
7 intended to introduce the depositions of the other adjuster
8 who is not present; is that correct?

9 MR. POULIN: Yes, Your Honor. And that would be, of
10 course, under Subsection 3, which is a witness that's a
11 hundred miles away. Which we thought was going to apply to
12 Ms. Moats too based on his earlier representations.

13 But her --- Missy? Missy Howard?

14 Missy Howard would be the other one.

15 THE COURT: And ---

16 MR. WHELAN: Well, first of all, there's no -- I've
17 never -- the representation thing is just not true.

18 And second of all, I agree that Missy -- it would be
19 proper for Missy Howard. And we do have counter-
20 designations and objections for him. And we're happy to
21 provide those to the Court when Mr. Poulin gets done. But
22 Ms. Moats should not -- that would not be proper.

23 THE COURT: Okay. I'm looking at Rule 32(2), which
24 does say the deposition of the party or anyone at the time
25 of taking the deposition is an officer, director, or

1 managing agent.

2 I understand she's a litigation manager, which I do
3 not think falls under the auspices of officer, director, or
4 managing agents.

5 It wasn't a 30(b)(6) deposition. It wasn't noticed as
6 a 30(b)(6) deposition.

7 She's present, so you can call her as a witness. You
8 certainly have her deposition to be able to impeach her
9 with the deposition if that is an issue. And then we're in
10 agreement that Missy Howard, it looks like clearly under
11 the rules, that you can publish her deposition testimony.

12 MR. POULIN: And, Your Honor, again, I'd like to put
13 our position on that on the record.

14 THE COURT: Okay.

15 MR. POULIN: As an additional matter, we would argue
16 that clearly she is a managing agent. She's an agent of
17 USAA. She is -- her title is manager, litigation manager;
18 and she's managed the entire case.

19 The -- as we discussed in the side bar earlier,
20 there's a policy reason for this rule. And that's because
21 generally when you've got a party on the other side that
22 has -- that has made important decisions on behalf of the
23 company, or even on behalf of themselves, sometimes their
24 testimony is necessary to be presented in the plaintiff's
25 case in chief. And what that leaves the plaintiff with is

1 a difficult situation.

2 They have basically two choices without this rule.
3 They cannot put that party up, in which case they may not
4 have the evidence they feel like they might need at a later
5 time to argue their directed verdict motion. Or if they
6 put that party up, it puts them at a distinct disadvantage
7 and prejudice because what that means is that then that
8 party's own counsel can stand up in cross-examination and
9 lead their own witness.

10 And so we've decided as a matter of law that when you
11 have a witness like this that is clearly their witness,
12 they -- they say that she is the face of the company, she
13 controlled the entire litigation. They've had ample
14 opportunity to prep her and meet with her. It's not fair
15 that I -- so I have to put her on the stand. I don't
16 really have a choice about that because I need her
17 testimony. And it's not fair to the plaintiff that because
18 I have to do that, that then he should be able to get up
19 and lead her through all of her testimony. So that's the
20 initial public policy consideration.

21 But there's further prejudice in this case with
22 respect to the fact that when we were making the motion to
23 sequester witnesses Mr. Whelan stood up and said that in
24 fact she was basically the company, she was the client --
25 or the party.

1 I think a rule that sequesters witnesses only would
2 have an exception for a party. Parties are allowed to stay
3 when witnesses are sequestered.

4 So another layer of prejudice is that she's now been
5 in here and heard of all this other testimony when she
6 should have been sequestered. And that's not that big of
7 an issue with her testimony that's already been locked
8 down, is in place in the transcripts that we want to
9 publish.

10 The last thing I would say, Your Honor, on the issue
11 of prejudice is that there's no prejudice whatsoever to the
12 defendants if we do this.

13 We are not taking the position that only the
14 deposition transcript can be published, or anything like
15 that. When we rest our case they can call any witness they
16 want. We won't take the position that she's already been
17 called or anything like that. They can call her and they
18 can appropriately not lead her through her direct
19 examination and introduce any evidence they want through
20 her and get her to say whatever they want.

21 The last thing I would mention, Your Honor, is that we
22 complied with the rules. Originally we served the
23 subpoenas for these people on Mr. Whelan. The discovery
24 responses said care of Robbie Whelan. And they've taken
25 the position all along that they represent all these

1 people, which I think is a reasonable position.

2 So we served the subpoena. Mr. Whelan wrote back and
3 said, you know, these people live in Florida and you can't
4 necessarily compel them to be here, and basically gave us
5 the impression that they probably weren't going to be here,
6 which is when we did our designations under Subsection 3.

7 So we served these designations on Monday night. And
8 this is the first time we're hearing like -- at some point
9 when Mr. Whelan got our designations and understood that we
10 were going to designate or attempt to designate these to
11 the jury, that would have been a good opportunity for Mr.
12 Whelan to raise his object instead of waiting until this
13 very last minute.

14 And, in fact, it probably would have been a good time
15 for him to raise that objection while he -- before we made
16 a decision on who could stay and who had to leave during
17 the sequestration.

18 Because, really, what's happened now is we've got Ms.
19 Moats in here, who for purposes of sequestration is a party
20 and is allowed to stay in here and hear everything, but
21 then when we try to get good, clean testimony from her into
22 the record that hasn't been tainted from everything that's
23 she's heard, they've objected to that. And so that's our
24 position on that, Your Honor. And I feel like the rule
25 allows it, clearly.

1 There's also another application of the rule, Your
2 Honor, is that regardless of two -- so if Your Honor finds
3 in Subsection 2 that she's not an officer, director or
4 managing agent, which we would disagree with, under
5 Subsection 3 we can still do this in Your Honor's
6 discretion. If you find that weighing the prejudice back
7 and forth, and the fact that they've taken a different
8 position on her as to sequestration, Subsection E says upon
9 application and notice, which is what we've done -- I'm
10 sorry, I believe there's another section, as well.

11 But Your Honor has discretion, as well. Even if you
12 find that Subsection 2 doesn't apply, based upon the
13 prejudice and based upon -- okay, it is Subsection E.

14 THE COURT: It is Subsection E.

15 MR. POULIN: Yeah, (3)(e), Your Honor. So we would
16 make that argument, as well, that even if you find that
17 Subsection 2 doesn't apply, because of the sequestration
18 reason and the compelling prejudice toward us, that would
19 be no prejudice then, we would ask you to allow us to do it
20 under that subsection.

21 THE COURT: I certainly understand your position. I
22 mean, of course you always have the option that you can
23 notice a 30(b)(6) deposition and then you're assured you
24 can use that just in a manner that you seek to use it.

25 But, again, she's here in person to testify. You've

1 got her deposition available if you need to use that for
2 impeachment purposes. I mean I think that's the best
3 evidence for this jury is the live testimony. So that
4 would be my ruling.

5 MR. WHELAN: Okay.

6 THE COURT: And ---

7 MR. WHELAN: Your Honor, I'm happy to hand up our
8 counter-designations and objections to Missy Howard's
9 deposition.

10 Is that -- are you guys going ---

11 MR. POULIN: That's going to be our next witness. So
12 we probably -- how many objections do you have?

13 MR. WHELAN: A decent -- a decent amount.

14 [Whereupon, Mr. Whelan reviews documents]

15 MR. POULIN: May I approach, Your Honor?

16 THE COURT: Yes.

17 MS. POULIS: As to Missy Howard -- and, again, it
18 probably would have been easier if we had dealt with this
19 before it came up. But we actually -- we have the script
20 of what -- basically, these are our designations with
21 actually what's said. We did it like this so we could read
22 straight through it.

23 So as we're looking at objections, this gives us an
24 opportunity to not have to be flipping back and forth
25 through the transcript. Although it appears that they

1 objected to just about every line and page.

2 So -- this is --

3 [Pause for counselors to confer]

4 [Documents provided to the Court by Mr. Poulin]

5 MR. POULIN: I gave you the full transcript too.

6 THE COURT: Okay.

7 MR. POULIN: Just because part of my argument is going
8 to be that I believe he didn't object contemporaneously to
9 a lot of these form objections, such as foundation.

10 And just the excerpt I gave you, I just want to make
11 sure that my team didn't selectively edit out the
12 objections. I don't want it to look like I'm misleading
13 the Court.

14 From the excerpts, the way we put them together, it
15 looks like a lot of these were not objected to
16 contemporaneously. But I don't want it to look like ---

17 THE COURT: I gotcha.

18 MR. POULIN: --- I'm misleading the Court with that.

19 THE COURT: Thank you.

20 MR. POULIN: But one of my arguments will be that any
21 objection that's based on lack of foundation would have had
22 to have been -- that is a form objection, the type of
23 objection that you can cure at the time of the deposition,
24 which is the type that's required. So any of these
25 objections now that are based on lack of foundation, one of

1 my arguments will be that if they weren't objected to
2 contemporaneously at the deposition that they've been
3 waived.

4 THE COURT: Okay, whenever you're ready.

5 MR. WHELAN: Okay. Thank you, Your Honor.

6 And we -- we have -- I'm sorry, but we need -- we have
7 a copy of the full deposition with the plaintiff's
8 designations highlighted in green and our counter-
9 designations highlighted in blue.

10 We needed -- we just made a mistake and didn't bring
11 another copy for the opposing counsel, so I'm having
12 somebody run to get one. So I will be able to hand that to
13 you shortly with our counter-designations.

14 THE COURT: Sure.

15 MR. WHELAN: With respect to the -- I guess our first
16 objection is on Page 15, Line 15. The question was:

17 (Q) USAA's purpose is to protect its insured's?

18 Which is an argumentative question without a
19 foundation, which I objected to. And so that was certainly
20 preserved and we'd ask that that be excluded.

21 MR. POULIN: And, Your Honor, at that point in the
22 deposition Mr. Willey is actually asking her about company
23 practices and policies and they're actually discussing the
24 practices and policies of the company.

25 I believe were actually hanging on the wall in the

1 conference room that they were taking the deposition on.

2 So the -- she -- it's not a misleading question. He
3 asked if one of their internal purposes was to protect and
4 take care of their insured's, and she agreed with that.

5 THE COURT: I'm going to allow it. I think it's a
6 fair question.

7 MR. WHELAN: Okay. Our next objections are at 54
8 through 56, basically those three pages. And our objection
9 is just to the relevance of preserves in the case.

10 MR. POULIN: And, Your Honor, again, I believe we've
11 already kind of talked about that and dealt with that in
12 the motion in limine.

13 This is -- the reserve is the 250,000-dollar internal
14 evaluation that they set for themselves. This is where
15 they kind of explain what that means and that that's their
16 evaluation of it.

17 So and I think we've probably already argued this.
18 But I think based on the posture of the case now, that for
19 explaining to the jury what those are would be relevant.

20 MR. WHELAN: And the only things that I say, as I
21 noted in the counter-designations, that Page 155, Line 9
22 through 12, where the testimony is corrected, and I ask
23 her:

24 (Q) All right, Ms. Howard, are reserves a reflection
25 of -- he's also said they're a reflection of exposure as

1 opposed to value?

2 And she said:

3 (A) Yes.

4 So we just ask that ---

5 THE COURT: I think that the section on reserves is
6 relevant.

7 Do you have any objection to 155, 9 through 12, just
8 the counter-designation, what he just read?

9 MR. POULIN: 155, 9 through 12?

10 THE COURT: Uh-huh.

11 MR. POULIN: I don't know what -- I mean, it's not
12 clear what question she's answering. It says:

13 (Q) He's also said they're reflection of exposure as
14 opposed to value?

15 And her answer is:

16 (A) Yes.

17 That Roy had said that I guess earlier in the
18 deposition. I mean, I don't -- I don't think the question
19 is, is it your position or are you telling us that USAA
20 takes the position that they were a reflection of exposure.

21 I think the question is Roy said earlier in the
22 deposition that they are a reflection of exposure as
23 opposed to value, and she says yes. So I don't think
24 that's relevant, what different questions that Roy had
25 asked earlier in the deposition.

1 THE COURT: Well, I mean the inference I got from it
2 was that she was answering the question that they're a
3 reflection of exposure. So I'm going to allow 155, 9
4 through 12.

5 MR. WHELAN: And then, Your Honor, I think your ruling
6 on Page 56 also extends to my objection to Page 57, because
7 my objection was the same on Page 57.

8 THE COURT: That's correct.

9 MR. WHELAN: And on Page 59 there is an argumentative
10 question, misleading question, assumes facts not in
11 evidence. The question:

12 (Q) And the person handling the UIM claim, what are
13 they protecting?

14 And then all the answer. We think those designations
15 on 59 are proper for that reason.

16 THE COURT: Okay. Well, you've got -- the first
17 objection you've got is 59, 1 and 2, misleading question,
18 facts not in evidence. But I think what you mean is
19 probably 59, 1 through 6, because there's no answer; that
20 59, 1 through 2, is just a question.

21 But I think 59, 1 through 6, is fair.

22 And then we have a second line of questioning that
23 starts with Line 7 through Page 60, it looks like Lines 21.
24 It talks about if you hid a fact from the insured.

25 I'm just not aware that there's been any allegations

1 at this point of hiding facts. You know, we've got the two
2 main issues of was the settlement offer reasonable and were
3 they acting in bad faith when they made the different
4 designations regarding the headlights. So tell me what --
5 what that could possibly be relevant to.

6 MR. POULIN: Well, Your Honor, and I guess this
7 is -- we've already kind of touched on this in the motion
8 in limine as well. But what they were discussing in that
9 section of the deposition, I believe as far as facts being
10 hidden, is the fact that at that point USAA had hired the
11 consulting expert, Mr. Black, who had agreed with Woody
12 Poplin's report and, you know, they did not disclose that
13 to Mr. Smith or to Ms. Hood.

14 You know, I think -- that's what they were discussing
15 in that portion of the deposition.

16 MR. WHELAN: You've ruled on that, Your Honor.

17 THE COURT: Yeah. That portion, which would be it
18 looks to me like starting at Page 59, Line 11, through Page
19 60, Line 21. I don't believe that's relevant.

20 MR. WHELAN: Your Honor, we're about ---

21 MR. POULIN: I'm sorry, 59, Line 11, through 60,
22 Line ---

23 THE COURT: Well, it looks like actually 60 -- Page
24 60, Line 2 through 5:

25 (Q) It's your understanding USAA does not have the

1 goal of preventing its insured from collecting as much of
2 the UIM coverage as possible?

3 I think that question and answer is okay.

4 I think the question at Line 9 and answer are okay.

5 It's specifically the portion at Line 15 through
6 Line 21.

7 MR. WHELAN: Okay. So, Your Honor, can I make sure I
8 have it straight?

9 THE COURT: Yes, sir.

10 MR. WHELAN: Okay. So on Page 60 we are not reading
11 Line 50 through 21. And then on Page 15 we're not reading
12 -- excuse me, on Page 59 we are not reading Line 11 through
13 Line 15?

14 THE COURT: Through 19.

15 MR. WHELAN: Yes, 11 through 19. Thank you.

16 And we're also not reading -- now, what about 59, Line
17 1 through Line 10?

18 THE COURT: I think those are fair.

19 MR. WHELAN: All right. So on 59 they'll read 1
20 through 10 and then go to 60, 2 through 14?

21 THE COURT: Correct.

22 MR. WHELAN: All right. Thank you.

23 THE COURT: And that takes us to 103.

24 MR. WHELAN: Well, Your Honor, this 103 through 105,
25 this is talking about this issue that I believe is -- the

1 Court is excluding as not part of what they're complaining
2 about in the case. It's something where they're trying to
3 confuse the jury about the evaluation on the liability side
4 versus the evaluation on the UIM side. And it's not
5 relevant. And it's prejudicial. And it's confusing to the
6 jury.

7 THE COURT: Well, tell me what -- the question -- so
8 based on this note, what it's referencing is the suit being
9 handled under your loss report. So what note is that
10 referring to?

11 MR. WHELAN: Well, that's another problem is
12 they're -- you know, they're handpicking things out of the
13 claim file. And, in fact, so Missy Howard was the claims
14 handler on the -- on the liability side, and this is
15 referring to notes on the UIM side.

16 Hold on just a second, Your Honor. Let me make sure
17 I'm straight on something.

18 [Whereupon, counsels confer]

19 MR. POULIN: Well, it's hard to see whether she's
20 referring to looking in at these -- looking at these
21 designations. I'll just give you an example. On Page 105,
22 1 through 7, the question is:

23 (A) And at this point we're just waiting for records
24 and bills for the evaluation of the UIM claim?

25 I object to the form. And she says, that's what I see

1 here from the manager.

2 So she's -- this isn't coming from her personal
3 knowledge, and it's not relevant.

4 THE COURT: Okay. Well, let's start with 103, 15 --
5 starting at 15 through 18. How is the jury going to know
6 what on earth we're talking about here when she says based
7 on this note what we're referencing was the suit being
8 handled under your loss report -- tell me what that's
9 relevant to and how that's going to mean anything to the
10 jury.

11 MR. POULIN: Well, first of all, the -- Mr. Whelan
12 obviously has the opportunity to counter-designate or put
13 that note into evidence. It would have been referenced
14 earlier in the deposition.

15 But what that note actually is -- and the jury should
16 know this, because this is going to be published after we
17 do Ms. Moats live here in a minute. This is actually
18 referring to Ms. Moats' note that she wrote to Jack Daniel.
19 It's the basically the claim assignment note where she
20 sends the case to Jack Daniel, she said here's what we know
21 about, we've got about 10,000 in meds right now as far as
22 we know, we've evaluated at 80 -- 80-percent liability on
23 Ms. -- on Mr. Johnson, 20 percent on Ms. Hood, we're
24 waiting for more medical bills, et cetera.

25 And then -- so that's her letter to Jack Daniel.

1 And then Jack, once he gets the assignment, what they
2 want to put in, that we've already argued about, is then
3 he's going to start sending letters back to them.

4 So that's what we're talking about here is her letter.

5 MR. WHELAN: I'm sorry. Mrs. Moats' letter?

6 MR. POULIN: Yes.

7 MR. WHELAN: Okay, so he's asking a different witness
8 about Ms. Moats' letter?

9 MR. POULIN: Right, another adjuster on the file,
10 somebody who was involved in the file. We said look at
11 what other adjusters on the file have said.

12 And that's what I understand they do, from all these
13 depositions, is that they have an electronic claims file
14 and then an electronic I think they call it an AIAS file,
15 or something to that effect; and they go back and forth.

16 And they did. You know, they have two -- so when
17 there is a BI claim and a UIM claim they generally will
18 open two separate files for that. But in this instance all
19 of the information was being shared back and forth between
20 the two files, the Poplin reports and the witness
21 statements and whatnot were being transferred back and
22 forth.

23 MR. WHELAN: So he can ask Ms. Moats about her letter.
24 But especially to read this in, I mean it's not clear at
25 all what's being discussed. I mean I just found out from

1 Mr. Poulin that this is discussing a letter that Ms. Howard
2 didn't write and wasn't involved in. It's just not
3 relevant.

4 MR. POULIN: And, actually, I might have misspoken
5 about that, Your Honor.

6 I believe this is the file -- we're talking about
7 Missy's file, the person who is in this transcript, that
8 she sent that then went to Ms. Moats who used that to draft
9 her report to Jack Daniel.

10 So essentially what Roy is questioning Missy on at
11 this point -- and we can go back and find exactly where it
12 was referenced in the transcript and we can probably enter
13 it into evidence if it doesn't violate any of the other
14 motions in limine. Basically, Missy has prepared this
15 report on the BI claim. Because the BI claim was made
16 first. They start the investigation on the BI side. Then
17 the UIM claim is made. Missy gets -- puts this report in
18 that Ms. Moats then -- basically, when Ms. Moats gets the
19 UIM assignment she goes to the BI file, because that's a
20 bit older, to see what's going on.

21 And that's what we're referencing is Missy's report,
22 this lady's -- a letter that she had written into the BI
23 file that Ms. Moats then references later.

24 And I do apologize, Your Honor. Roy did these
25 depositions so he might be able to color in better than me.

1 He's trying to jump up out of his chair.

2 MR. WILLEY: Just one point of clarification. I want
3 to be clear there. Is that when the UIM claim was reported
4 it came to Missy, because the BI claim was already opened.

5 And what happens in their system is then a UIM file is
6 created, which is a separate file. It goes to Ms. Moats.
7 And so what we're talking about here is that initial note
8 where that file went over.

9 And it says: Missy has evaluated the BI claim at
10 80-20, which of course is relevant because that was USAA's
11 allocation of liability based on what they knew at that
12 time.

13 And, in fact, it didn't change for the entire time
14 that they had the claim. They always evaluated it as 80
15 percent Johnson, 20 percent Hood, even up to trial. So
16 that's what this is. This is the initiation, basically, of
17 the UIM file that we're discussing. And we can put it in.
18 I mean, it's a one-page thing but.

19 MR. POULIN: Why don't we just put it into evidence?

20 MR. WHELAN: Your Honor, my problem is them -- I think
21 if we're -- if they're going to talk about the evaluation
22 they can say, well, you evaluated it 80-20, Kathy did.

23 But for them to say that the liability adjuster did
24 one thing in one file and the UIM adjuster, who's handling
25 it differently, did another thing in another file, does not

1 go to the issues that we're trying in this case.

2 It doesn't go to the issues of whether her lights were
3 on or off or whether we had a reasonable ground to
4 determine whether her lights were on or off. And it's
5 extremely preju- --- extremely confusing for the jury.

6 So I just think it's really complicating the issues.
7 I don't think it's okay to ask Missy Howard about a letter
8 written by Kathy Moats when Missy Howard was not involved
9 in it.

10 MR. POULIN: Again, this is a letter written by Missy
11 Howard. I misspoke earlier. I didn't -- this is a note
12 written by Missy Howard.

13 THE COURT: All right. I'm going to allow in 103, 15
14 through 18, through -- I think that set of objections was
15 for through 104, 1 through 20. All of those are okay.

16 MR. WHELAN: Okay. And, Your Honor, I'll just --
17 while they're on this page, the -- one of our counter-
18 designations is this section in the middle that they've
19 omitted, which is 104, 21 through 25.

20 MR. POULIN: Your Honor, I think it would probably be
21 best if we took up their counter-designations when we
22 receive them and have reviewed them. And I -- they're
23 certainly not going to get to their case in chief today, so
24 I don't think there's really any hurry to get to that.

25 MR. WHELAN: Well, no, the counter-designations have

1 to be read with their -- their ---

2 THE COURT: That was my understanding.

3 MR. WHELAN: That is according to the rule.

4 MR. POULIN: That's not what the rule says.

5 MR. WHELAN: All right, so Rule 33 ---

6 MR. WILLEY: So what it -- what it says is when the
7 deposition excerpt is offered at trial counsel for the
8 adverse party shall furnish the trial judge and at the same
9 time and by the same means furnish to all opposing counsel
10 any objections to opposing counsel's deposition excerpts
11 and any additional excerpts from the depositions by page
12 and line number which counsel expects to be read pursuant
13 to SCRC(a) (4).

14 And they may do that. They may do that in their case
15 in chief and read that. But we're not required to
16 introduce evidence that we don't want to put in. And I
17 think that gets to the part of (a) (4) where it says any
18 party may introduce any other parts.

19 They may -- they may do that as long as they're not
20 otherwise objectionable. But they have to do it. They
21 can't make us do it in our case in chief. And we've had
22 this argument ---

23 THE COURT: Well, the problem is though if -- it's
24 just going to be completely out of context for them to now
25 read one little piece. We're going to have to -- and for

1 this to have any context they're going to have to reread
2 all of the excerpts that you've already read. I mean
3 otherwise it's not going to make any sense whatsoever to
4 this jury.

5 MR. POULIN: But the rule simply doesn't permit that.
6 I mean it doesn't -- it doesn't require ---

7 THE COURT: The rule does not say that they will later
8 read during their case in chief.

9 MR. WHELAN: Judge, the rule is very clear. It
10 says -- it's (a)(4). So what he just read refers to
11 (a)(4). And if you look at (a)(4), it says if only part of
12 the deposition is offered into evidence by a party - Mr.
13 Willey - an adverse party - us - may require to him to
14 introduce any other part which ought in fairness to be
15 considered with the part introduced.

16 MR. POULIN: And any part -- party may introduce any
17 other parts.

18 These are the parts they want to introduce, which they
19 may introduce.

20 MR. WHELAN: Yeah, because in fairness -- like this is
21 a great example. I mean -- I disagree ---

22 THE COURT: We are going to do it at the same time.
23 Otherwise, I mean, it's just not going to make any sense
24 whatsoever to this jury to then read in other little pieces
25 and excerpts from the same deposition.

1 MR. POULIN: Well, Your Honor, can we at least get --
2 Do you have another copy for us now, Robbie; did that
3 come in yet? I mean, we don't know what their designations
4 are at this ---
5 MR. WHELAN: Well, we handed you our designations.
6 THE COURT: I mean, I'm looking at the designations.
7 MR. POULIN: Oh, okay. We just don't have them.
8 [Whereupon, counselors confer]
9 THE COURT: On the last page of the objections,
10 there's also designations. If you look at the bottom of
11 Page 3 and into Page 4, if you're looking at the same thing
12 I've got.
13 MR. POULIN: Oh, I understand, Your Honor.
14 MR. WHELAN: I'm sorry. Those got -- that copy has
15 not come in yet. But we have a couple of other objections
16 to ---
17 THE COURT: Do you have a copy for the court reporter,
18 as well?
19 [Off the record momentarily]
20 THE COURT: Okay. Let's continue with -- I think
21 you've got several other objections here, and then we'll
22 address your designations.
23 115, 2 through 14?
24 MR. POULIN: I'm fine with that one, Your Honor.
25 THE COURT: It looks okay to me.

1 And then 117 -- I'm sorry -- 120, 7 through 25? Or
2 actually it's just 7 through 16, I believe, is what you've
3 included, Mr. Poulin.

4 MR. POULIN: I think that's right, Your Honor.

5 MR. WHELAN: Yes, Your Honor.

6 And, again, here we were talking about reserves, which
7 I think is relevant. But I understand your rule that that
8 is coming in.

9 THE COURT: Yeah, I think that's okay.

10 And then 121, 3 through 5?

11 MR. WHELAN: Yeah, here he's asking the question and
12 she answers the question with a question; and he doesn't,
13 you know, follow up.

14 So he says, is that accurate. And so he asks a
15 question that is confusing. So 120, 22 through 1. Yeah,
16 Line 22, starting at 120, through Line 21, Line 5. So, you
17 see he asks a -- he asks a question and says -- Roy says,
18 I'm going to have a short conversation about medical
19 claims.

20 THE COURT: I'm sorry. I'm not -- tell me again what
21 you're -- where you're reading from.

22 MR. WHELAN: All right. If you start at 120, Line 22,
23 there's a question. Sort of -- it's actually not a
24 question. Mr. Willey makes a statement. He says, I'm
25 going to have a short conversation about medicals claimed

1 versus medicals allowed. Then Mr. Willey makes another
2 statement: Medicals allowed is the amount that USAA agrees
3 is actually compensable.

4 I object to the form.

5 Mr. Willey then says, is that accurate.

6 The witness then asked him a question: That they feel
7 it is owed or they feel is related.

8 Then Mr. Willey doesn't answer. Doesn't -- it goes on
9 to ask another question that he hasn't designated ---

10 MR. POULIN: I think -- I think based on -- so we're
11 talking about 121, 3 through 5, is kind of out of context
12 the way we've got it designated? Is this -- I think I
13 agree with that.

14 MR. WHELAN: Hold on a second.

15 THE COURT: Yeah, it doesn't ---

16 MR. POULIN: Where we skip from here to -- I'm okay
17 with taking 121, 3 through 5, out.

18 MR. WHELAN: So you are not designating 120 -- what
19 are you designating on Page 120?

20 MR. POULIN: 120 goes 7 through 16.

21 MR. WHELAN: Okay.

22 MR. POULIN: And then ---

23 MR. WHELAN: So you stop at 16?

24 MR. POULIN: Right.

25 MR. WHELAN: I just had that wrong. Okay. So you're

1 not reading ---

2 MR. POULIN: Yeah, I think we took the other part out
3 because of the medical bill exception or something. But
4 I'm okay with also taking 1 -- with taking 1 through 5 --
5 or 3 -- Page 121, 3 through 5, or whatever we designated
6 there, can come out. I'm okay with that.

7 Is that accurate? They feel ---

8 THE COURT: All right. So 121, Lines 3 through 5 are
9 out.

10 122, 10 through 19? That looks okay to me.

11 MR. WHELAN: Yes. I -- well -- I mean, here, 121,
12 lines -- starting with Line 14, and then 122 starting at
13 10, they're talking about Missy Howard about a reserve that
14 was set in a claim handled by Cathy Moats. The reserve was
15 never set at that amount during the time that Missy Howard
16 was handling the -- handling the case.

17 MR. POULIN: But here she's just confirming that
18 that's the reserve that was set. I mean I don't think
19 there's any argument in the case that the reserve was set
20 on the UIM claim at 250; right? And it's ---

21 THE COURT: Yeah, 122, 10 through 19 is okay.

22 And I think that goes through all of your objections,
23 Mr. Whelan.

24 Which takes us to your designations.

25 MR. POULIN: Well, Your Honor, this first one, 54, 21

1 through 55, 6, appears to be going into injuries at least
2 as far as the -- so 54 -- basically starting on the top of
3 Page 55, they're talking about treating and release, find
4 out later it's an ankle fracture, blah, blah, blah. It's
5 going into the injuries. It looks like they designated 54,
6 21 to 55, 6, which is exactly a discussion on injuries.

7 MR. WHELAN: This isn't Mrs. Hood's injuries. She's
8 explaining her answer. She's explaining the answer that
9 they, you know, cut out.

10 THE COURT: Yeah. I mean, I -- it's just general
11 information. I think that comes in.

12 And then are you still asking for 57, 7 through 58,
13 25?

14 MR. WHELAN: Yes, Your Honor.

15 MR. POULIN: I think -- I think I'm okay with that.

16 THE COURT: It looks okay to me.

17 MR. POULIN: I have no objection to that, Your Honor.

18 MR. WHELAN: So that was 57, 5 through 58, 25?

19 THE COURT: Correct.

20 MR. POULIN: Yes.

21 MR. WHELAN: Okay. We're going to withdraw the 66, 8
22 through 67, 25. So we don't need to do that one.

23 In fact, the next three lines -- the next three
24 entries we don't need. We don't need Page 66, Page 71, or
25 Page 77.

1 Which takes us to Page 82.

2 THE COURT: Okay, and I'm sorry, I -- when I looked at
3 your designations, for some reason ---

4 MR. POULIN: I think we did skip some.

5 THE COURT: --- I only was looking at the ones that
6 had ---

7 MR. WHELAN: Oh, oh, okay.

8 THE COURT: --- notations next to them. I don't know
9 why.

10 So, I'm sorry. You're withdrawing 66, 8 through 67,
11 25?

12 MR. WHELAN: Correct.

13 THE COURT: And which other ones?

14 MR. WHELAN: The next one, 71, 16 through 72, 4.

15 THE COURT: Okay.

16 MR. WHELAN: The next one, 77, 12 through 78, 2.

17 THE COURT: Okay.

18 MR. WHELAN: Also, going back up to the top, we don't
19 need that Page 7, Line 25 through 8, 8.

20 And there was -- we had a typo on Number 11. That
21 should actually be 11, 1 through 4, through 6.

22 MR. POULIN: Rather than 1 through 6?

23 MR. WHELAN: Yeah, in fact, that 1 through 6, you --
24 Mr. Willey is asking her about meeting with me. So it is
25 certainly not relevant. So that's -- that should be 11, 4

1 through 6.

2 THE COURT: Okay. What -- I'm sorry, I probably
3 muddled this by starting in the middle. But if we can go
4 to your first counter-designation, 4, 7 through 11. Any
5 objection to that?

6 MR. POULIN: Her name, no.

7 THE COURT: All right. Moving to 10, 4 through 7.

8 MR. WHELAN: Yeah, we don't need that, Your Honor.
9 We'll withdraw -- we'll withdraw that, too.

10 THE COURT: Okay, 11, 4 through 6?

11 MR. POULIN: I have no objection to how long she's
12 worked at USAA.

13 THE COURT: Okay, 15, 5 through 10?

14 MR. WHELAN: And I guess we need his question in
15 there, too.

16 THE COURT: I would think so.

17 MR. POULIN: Well, that's a question that Mr. Whelan
18 objected to that we didn't designate. I don't -- I don't
19 think he can object to a question and then -- and then
20 designate just the answer that she gives after because he
21 likes the answer.

22 I mean, that's -- we didn't -- obviously, if we had
23 designated the question, then, you know, we -- the answer
24 would come in, too. But we didn't designate the question.
25 Mr. Whelan objected to it contemporaneously. So I think

1 that's just out.

2 MR. WHELAN: I've certainly never heard that rule that
3 -- this is in -- this is to try -- this is a portion that
4 he has left out. In fact, I think that this section that
5 they cut out of here from 24 to 14 needs to come in.

6 MR. WILLEY: It's not designated.

7 THE COURT: Well, ---

8 MR. POULIN: Well, you know what; that's -- you know
9 what; that's okay. She says that it's not against USAA's
10 policy for them to take different positions. So I'm
11 perfectly okay with that question and that answer coming
12 in, actually.

13 THE COURT: All right. So that's going to be Page 14,
14 Line 24 through Page 15, Line 10; is that correct, Mr.
15 Whelan?

16 MR. WHELAN: Yes. Yes, Your Honor.

17 THE COURT: All right. I'm not understanding -- oh,
18 16, Line 1 through 12?

19 MR. POULIN: I think I'm okay with that, too, Your
20 Honor. We should have designated some of these.

21 THE COURT: Okay. Page 17 ---

22 MR. WHELAN: And, Your Honor, excuse me. I think it
23 needs to go -- that -- I'm sorry, I don't think that we
24 finished. That answer should finish itself. It should go
25 through 17, to just sort of close up what they cut out.

1 MR. POULIN: Now we're trying to talk about things
2 that neither side has designated. They cut their
3 designation off at 12; we picked back up at 18. I think
4 that's how it needs to read.

5 MR. WHELAN: I mean, this is -- this is at the time
6 of -- the counter-designations are made at the time you
7 tender the witness, which is right now. And we're slicing
8 and dicing -- or you're slicing and dicing, and I think
9 that the answer needs to conclude. You have got the ---

10 THE COURT: All right, Page 16 ---

11 MR. WHELAN: Just the whole page.

12 THE COURT: --- Lines 1 through 17, the designation of
13 the defendant is okay.

14 MR. WHELAN: Thank you.

15 THE COURT: That's coming in.

16 MR. WHELAN: And, you know, here, I think that, again,
17 all of 17 should come in just to close up the gap of what
18 was left off ---

19 MR. POULIN: Well, ---

20 MR. WHELAN: --- and then this little portion of 18.

21 MR. POULIN: Well, the problem with what they
22 designated as 17, Your Honor, which --

23 So you want to start at Line 9 now, Robbie?

24 MR. WHELAN: Yeah, I think that makes more sense.

25 MR. POULIN: Well, I guess 9 doesn't need to come in

1 if 16 through the rest doesn't come in.

2 But, Your Honor, from 17 -- Page 17, Line 16, through
3 Page 18, Line 12, is basically just a hypothetical that Roy
4 is walking through with her that actually doesn't apply to
5 this case.

6 So he's trying to get her to admit that an insurance
7 company can't take two different positions, and she's kind
8 of pushing back on that.

9 And then she says, it might be okay in certain
10 circumstances.

11 And Roy says, well, what circumstance would that be.

12 She said, if one adjuster had more information that a
13 different adjuster didn't have, or different additional
14 information.

15 That's not the case here. I mean, we've never -- I
16 don't think there's ever been any defense from USAA that
17 the information Mr. Nickels was working off of in the Kuck
18 case was any different than the information that was going
19 off on the UIM case.

20 So I think, you know, it's a hypothetical sort of
21 thing that they walk through. And I just don't think it's
22 relevant to the case either way.

23 MR. WHELAN: This is exactly what -- I -- this is an
24 aside when he talks about the evidence Mr. Nickels was
25 working on in one case versus the evidence that Mr. Daniel

1 was working on in another case. That should not be a
2 subject of this case. That is ---

3 MR. POULIN: It's not. That's what I'm saying.

4 MR. WHELAN: All right. But this is something
5 different. He's asking over and over about, you know,
6 there's one true set of facts and an adjuster can take one
7 position and another adjuster take another position; and
8 she's explaining that.

9 So this certainly goes to the rest of this. It's just
10 completing their -- I mean, before -- so what he designated
11 right before this is, you know, any given car wreck only
12 happened one way, it only happened one day -- one way.

13 MR. POULIN: And she agrees with that.

14 MR. WHELAN: That's right. And then she explains
15 herself.

16 MR. POULIN: No. It's a different question. Starting
17 on Line 16. The next question after it can only happen one
18 way, is that:

19 (Q) If two different adjusters say that it happened
20 two different ways is that is one of the adjusters making a
21 mistake?

22 And she says:

23 (A) Not necessarily.

24 And the next question is:

25 (Q) Okay, would you explain that?

1 And her answer is:

2 (A) Well, you know, maybe one of the two adjusters
3 had additional information that the other one didn't have.

4 Answer:

5 (A) Okay.

6 Question:

7 (Q) That, you know, that led to one decision versus
8 the other decision.

9 Now, I think we probably all agree on that. I mean,
10 that's -- you know, that's a reasonable thing for her to
11 say. But that's walking through a hypothetical that is not
12 the issue in this case.

13 MR. WHELAN: Well, he had just asked the two questions
14 before:

15 (Q) All right. And sometimes multiple adjusters at
16 USAA investigate the same wreck.

17 And then he says:

18 (Q) And in any given wreck there can only be one set
19 of true facts.

20 So she's explaining that.

21 THE COURT: All right. I'm going to allow it in.

22 Okay. Page 22, 6 through 9. Her title is examiner.

23 MR. POULIN: I'm okay with that.

24 THE COURT: Page 33, Lines 13 through 15?

25 MR. WHELAN: Your Honor, what does her forgetting the

1 code of ethics -- two -- so the question at 33, 4 through
2 12 is:

3 (Q) What is -- does USAA have a code of ethics?

4 And she says:

5 (A) Integrity, honesty. I know there's two more.

6 I'm sorry. Those are the ones I can remember.

7 How is that relevant to anything? It's -- whether she
8 can remember a code of ethics, sitting in a deposition,
9 asked that out of the blue, is irrelevant and prejudicial.

10 MR. POULIN: Well, we've already gone through the
11 objections to our designations, Your Honor. But it -- I
12 mean, it is -- it's the ones that she can remember that is
13 important here. It's not necessarily the fact that she
14 forgot them.

15 It's a relevant question to ask her what the code of
16 ethics are. And she says that they are integrity and
17 honesty.

18 And even -- in fact, when we add Mr. Whelan's
19 designation to this and basically read it straight through
20 from 33 -- Page 33, Line 4 through 34, Line 2, I think it
21 makes it very clear. Because Roy -- the next thing Roy
22 says is:

23 (Q) That's -- you know, I'm not trying to trick you.
24 It's okay you forgot some. I'm just trying to get you to
25 list the ones that you know.

1 THE COURT: All right. Well, 33, 13 through 15 is
2 coming in, in addition to 33, 4 through 12.

3 MR. WHELAN: Your Honor, will you note my objection to
4 Page 33, Line 4 through 34, Line 2, based on relevance and
5 Rule 403?

6 THE COURT: Yes, sir.

7 MR. WHELAN: Thank you.

8 THE COURT: Okay. Moving on to Page 39, Line ---

9 MR. WHELAN: Well, that's -- we're going to withdraw
10 the next four designations, Judge.

11 THE COURT: Okay. For the record, that's Page 39,
12 Lines 24 through Page 43; 40, Line 3, that's withdrawn.
13 Page 40, Lines 14 through 16 is withdrawn. Page 42, Lines
14 17 through 20 is withdrawn. And Page 46, Lines 4 through
15 25, are withdrawn.

16 We've already discussed the next one, two, three,
17 four, five. That brings us to Page 82, Line 25.

18 That looks okay to me.

19 MR. POULIN: We're at 82, 25 through 83, 12?

20 THE COURT: Correct.

21 MR. POULIN: I'm okay with that.

22 THE COURT: Okay. That's good. And then Page 83,
23 Line 25 through 84, Line 4.

24 MR. POULIN: I'm -- I think that's fine.

25 THE COURT: It looks good to me. Page 86, Lines 9

1 through 19?

2 MR. WHELAN: We'll withdraw that.

3 THE COURT: Withdrawn. Page 95, Line 1 through Page
4 96, Line 8?

5 MR. POULIN: I think I'm okay with that, Your Honor.

6 THE COURT: It looks okay to me.

7 And Page 98, Line 11?

8 MR. WHELAN: And we're withdrawing 98.

9 THE COURT: So 98, Line 11 through 99, Line 7, is
10 withdrawn.

11 And, I'm sorry. Were you withdrawing or you are
12 keeping the next one, Page 104, Lines 21 through 25?

13 MR. WHELAN: Keeping that one.

14 THE COURT: That looks okay to me.

15 MR. POULIN: I mean, I -- I'm okay with that coming
16 in. But, I mean, I think -- so, you know, we have tried to
17 streamline this trial a little bit. And I'm not sure that
18 USAA would want us to go into this. But I believe what
19 happened was there was actually a property damage
20 arbitration, too, which is kind of where this 20-80 number
21 came from in the property damage claim that Antoine Johnson
22 made back against Mrs. Hood. And we've kind of stayed away
23 from that because it's, you know -- this trial could -- if
24 we literally went into everything this trial could take
25 weeks.

1 But if that part comes in, then, I mean, I've got to
2 flesh that out a little bit more probably with Ms. Moats
3 when I put her on the stand.

4 And I think Roy probably would love to argue in his
5 closing that actually a judge or an arbitrator looked at
6 this and also found 80-20.

7 So I'm not quite sure why you would want that in
8 there, Robbie. But, I mean, we can. I'm okay with it.

9 MR. WHELAN: Well, actually, we already objected to
10 104 on the basis of relevance where he talks about the
11 arbitration. So he says -- I mean, if you look at 103
12 though 104 of what he's designated, it's talking about the
13 arbitration and the position of the 80-20.

14 So that's why we -- I mean, I agree with him; it's
15 irrelevant, and I've objected to it. And I don't think it
16 should come into evidence. So, I mean, maybe we could
17 agree to take out 103 through 104; because Mr. Poulin is
18 absolutely right, it's confusing, it's irrelevant, and it's
19 prejudicial.

20 THE COURT: I didn't realize that we had moved into
21 the property damage arbitration, which I don't think is
22 relevant. That's not part of the lawsuit; right?

23 MR. WHELAN: Right.

24 THE COURT: But I don't know at what point we are
25 going into the ---

1 MR. POULIN: Well, that's the thing. It's the
2 same ---

3 THE COURT: --- property damage arbitration.

4 MR. POULIN: So basically what happens is after the
5 property damage arbitration of 80-20, USAA adopts that same
6 percentage and applies it to the BI claim and the UIM
7 claim. So that's where it came from.

8 And we -- I don't -- I wouldn't mind going into where
9 it came from with the jury. But I don't think we need to
10 go there. I mean, I think the fact that they had an 80-20
11 evaluation in the UIM claims file is important. And we've
12 already argued that and decided that.

13 I just -- I think just the lines that deal with -- I
14 think any one of these lines that says, well, that came
15 from the arbitration, probably should and could come out.

16 MR. WHELAN: Well, the thing about it, Judge, is this
17 whole liability file versus UIM file is so confusing to the
18 jury. And it's true that Missy Howard testified that the
19 80-20 came from a property damage arbitration. And so I
20 guess if they're allowed to get into this determination by
21 Missy Howard that she determined that the -- or got the 80-
22 20 from the arbitration, I guess the arbitration has to
23 come in at that point. So ---

24 THE COURT: Well, my feeling is that it looks -- going
25 back -- I'm trying to put the two designations together.

1 Plaintiff's designation of Page 104, Line 1 through 20, is
2 starting to get into that arbitration.

3 MR. POULIN: Correct, Your Honor. And that's what I
4 was just saying. I think at least probably 5 -- 5 through
5 7 needs to come out of my designation; 104, 5 through 7.

6 MR. WHELAN: And, Your Honor, let me just clarify my
7 earlier statement. I mean, I do agree that this whole
8 arbitration thing is prejudicial to USAA. But if they are
9 going to get into where the liability handler -- why the
10 liability handler said the --- the fault at 80-20, the
11 answer was because that's what the property arbitration
12 found.

13 So I think we've got to go there if that evidence
14 comes in. I don't -- I still -- none of that is relevant
15 to the issues in the case, which is do they have a
16 reasonable basis to say that her light -- or to dispute
17 liability, number one; and, number two, did they have a
18 reasonable basis not to offer 250.

19 THE COURT: Well, I guess I need to know what is your
20 position, that it needs to come in or it needs to be kept
21 out.

22 MR. WHELAN: Well, if you're allowing him to get into
23 the 80/20 split ---

24 THE COURT: No, we're not going to piecemeal it.
25 Either we're -- I'm going to allow both discussions of the

1 arbitration, or neither. We're not going to piecemeal it.

2 So we're either going to delete the talk about 80
3 percent on Johnson and 20 percent ID based on arbitration;
4 correct -- that's Page 104, Line 5 through 7. And I'm
5 looking to see if there's any other reference to the
6 arbitration.

7 MR. WHELAN: Well, they're going -- they've already
8 told you they're going to ask Kathy Moats about the 80-20.
9 So my point is ---

10 MR. POULIN: But we're -- I might be able to help you
11 and clarify this for you. We -- I don't care why they came
12 to 80-20. We're not going to go into -- what's important
13 is that they internally had it set at 80-20. I guess is --
14 if that helps.

15 I mean I want to ask Cathy what was your -- your
16 evaluation; it was 80-20, wasn't it.

17 And she is going to say yes. I

18 And that's kind of going to be it.

19 So I do agree. I mean, I think even where I did --
20 even in my designations, I think 104, 5 through 7, probably
21 just needs to come out.

22 MR. WHELAN: Well, the problem is, is he's getting
23 into the liability claim investigation in -- you know, this
24 is what Missy Howard -- I mean, Missy Howard's testimony
25 essentially was the client came in, I had to assign a

1 number, the property damage arbitration was 80-20, I set it
2 at 80-20, and that's how the UIM file was set up.

3 So that's the explanation for it. And if they're
4 getting into this 80-20 thing, the source of that 80-20
5 thing is -- needs to come out. So I mean if it needs to --
6 the jury needs to hear about that.

7 So I do think that -- I mean, Mr. Poulin said he's
8 going to make that argument; so I think that this needs to
9 stay in, needs to be ---

10 THE COURT: All right. Well, 104, Lines 1 through 20
11 will stay in, along with 104, Lines 21 through 25.

12 MR. WHELAN: Okay. Thank you, Your Honor.

13 THE COURT: Okay. And I think we've already talked
14 about 155, 9 through 12.

15 MR. POULIN: Is that the one we did when we were going
16 through mine that was okay?

17 THE COURT: I think so.

18 MR. WHELAN: Yes.

19 THE COURT: that would be about -- talking about the
20 reserves being a reflection of exposure as opposed to
21 value. But I already said that was okay.

22 MR. POULIN: All right. Robbie, do you have -- can
23 we -- if you don't mind, Your Honor, I'd like to just recap
24 my understanding of exactly what needs to happen when we
25 read this so that I can get somebody working on it so ---

1 THE COURT: Sure. I ---

2 MR. POULIN: I'd just like to make sure we're all on
3 the same page.

4 THE COURT: I was going to say let's break and let
5 y'all put it together, but I'm ---

6 MR. POULIN: Okay. We can do that.

7 THE COURT: But I'm glad to go ---

8 MR. POULIN: I think we can probably just handle it
9 between ourselves, I would hope.

10 MR. WHELAN: I'm not sure what he's talking about; but
11 I hope so, too.

12 THE COURT: We're going to take a break. You guys are
13 going to put those two designations together, and hopefully
14 we'll be ready to bring the jury back in.

15 MR. WHELAN: Hope so. Thank you.

16 THE COURT: All right.

17 [Whereupon, a recess is taken 6/26/19, from 3:35 p.m.
18 to 3:51 p.m.]

19 MR. WHELAN: While we are waiting, had an issue with a
20 couple of the plaintiff's witnesses that weren't disclosed.
21 Before -- I don't know that they are going to call them or
22 not. I just thought while we've got a minute ---

23 THE COURT: I think we're ready now; is that correct??

24 MR. WHELAN: Well ---

25 PLAINTIFF'S ASSISTANT: They're replicating just one

1 thing.

2 MR. POULIN: Well, that's going to be next. And I am
3 starting with Kathy. So she can keep replicating while I'm
4 going. If I could just have one moment while I organize my

5 THE COURT: Sure.

6 MR. POULIN: --- things.

7 MR. WHELAN: But I was going to ask about Kevin Smith
8 and Woody Poplin who they have put on their trial brief on
9 Monday night as witnesses.

10 They weren't listed as witnesses. I don't think they
11 have any relevant testimony. I'm not sure whether they
12 intend to call him or not, but I thought I'd go ahead and
13 address that.

14 THE COURT: So your objection is that you -- they were
15 not listed as witnesses previously?

16 MR. WHELAN: That's right. They weren't listed as
17 witnesses in discovery. Kevin Smith is the plaintiff's
18 attorney in the underlying case.

19 I, actually, at one point thought about deposing him
20 and asked Mr. Willey to get me days. And his response was,
21 we haven't listed him as a witness, if you want him, you go
22 through him.

23 Said, well, if you are not using him -- if you are not
24 listing him as a witness and he's not a witness I don't
25 need his deposition.

1 And had they listed him as a witness then I would have
2 insisted on his deposition before this case went to trial.
3 So I think that would be prejudicial. And I'm not sure --
4 I think he should be excluded.

5 The same thing with Woody Poplin. He wasn't listed as
6 a witness. He is the expert in the -- in the underlying --
7 was the expert in the underlying case. He testified in the
8 underlying case. I'm not sure why Mr. Willey would have
9 him testify in this case.

10 THE COURT: Yes, sir?

11 MR. WILLEY: Happy to take it up at the time. Having
12 looked at who listed who in under discovery, my
13 recollection is they listed Mr. Smith and asked him for his
14 deposition.

15 And what I said was, he's not my witness, you'll have
16 to work through him, meaning you'll have to work through
17 his office to subpoena him, I'm not going to coordinate it,
18 just figure it out.

19 I'm happy to look into that issue. I don't think it
20 matters, in any case. There's no surprise. The entire
21 basis of the case obviously is what happened in the
22 underlying case. Mr. Daniel was in the underlying case.
23 Mr. Poplin was in the underlying case. His report is what
24 it's all, you know, sort of about at some nexus.

25 And Mr. Smith was involved in the underlying case. I

1 mean, he was the lawyer. He was a witness. That's why we
2 were hired to handle the bad faith case, because the
3 underlying lawyer in the case is a witness and you can't be
4 a witness and counsel. Or at least it's not preferred.

5 I take the position you can be witness and counsel
6 under some circumstances. But in this case he opted to
7 bring this in, so I don't ---

8 THE COURT: Okay. Well, let me just stop you at this
9 point because we've got a jury waiting.

10 MR. WILLEY: Right.

11 THE COURT: We've got enough to keep us busy I think
12 until the end of the day, it looks like. And we've kept
13 them waiting for a while. My preference is let's bring
14 them back in ---

15 MR. WILLEY: Okay.

16 THE COURT: --- and get moving with them.

17 MR. WILLEY: Agreed. Thank you, Your Honor.

18 MR. POULIN: I'm ready, Your Honor.

19 THE COURT: Thank you. You can bring them in.

20 [Pause awaiting jury]

21 MR. WHELAN: Are they coming in right now? I was just
22 going to pre-mark these letters.

23 THE COURT: I think he's bringing the jury in.

24 [Whereupon, the jury enters the courtroom 6/26/19,
25 3:58 p.m.]

1 THE BAILIFF: All the jurors present, Your Honor.

2 THE COURT: Thank you, sir.

3 Mr. Poulin?

4 MR. POULIN: Thank you, Your Honor. We're going to
5 call Kathy Moats to the stand.

6 [Whereupon, Ms. Moats comes forward]

7 [Whereupon, Ms. Moats is duly sworn by the clerk of
8 court.

9 THE CLERK OF COURT: Please be seated.

10 [Whereupon, the witness takes the witness stand]

11 THE CLERK OF COURT: Please state your name and spell
12 your last name for the record, please.

13 THE WITNESS: Kathy Jean Moats. M-O-A-T-S.

14 MR. POULIN: Ms. Moats, good afternoon. How are you?

15 THE WITNESS: I am fine. Thank you.

16 KATHY MOATS, Having Been First Duly Sworn, was Examined and
17 Testified as Follows:

18 **DIRECT EXAMINATION BY MR. POULIN OF KATHY MOATS:**

19 Q. Now, what is your current position at USAA?

20 A. I am a litigation manager.

21 Q. Okay. And you've been in that position for the last
22 six to seven years?

23 A. Yes, sir.

24 Q. And before you became a litigation manager at USAA you
25 were a claims examiner with them; is that correct?

- 1 A. That's correct.
- 2 Q. Okay. And you did that for maybe six to eight years?
- 3 A. Yes, sir.
- 4 Q. And before you were a claims examiner you were a
- 5 claims adjuster for USAA?
- 6 A. Correct.
- 7 Q. Okay. And basically, I guess if I've done the math
- 8 right, you've been at USAA for how long?
- 9 A. Twenty-four-and-a-half years.
- 10 Q. And basically all on the claims side?
- 11 A. No. Three -- the first three years, I was in policy
- 12 services.
- 13 Q. Customer service rep ---
- 14 A. Yes, sir.
- 15 Q. --- for first three years, right? Talk to us a little
- 16 bit about what it means to be a litigation field adjuster.
- 17 What are -- what's your responsibilities?
- 18 A. I have a little bit different position than most
- 19 litigation managers because I do -- I am a field adjuster.
- 20 So the majority of my work is to go -- attend mediations on
- 21 behalf of USAA. I am the person that actually goes to the
- 22 mediation with the authority and I'm there with the defense
- 23 attorney. That's the biggest part of my job.
- 24 Q. Okay. And in your role, do you handle -- adjust
- 25 liability claims as well as UIM claims?

1 A. I do.

2 Q. Okay. Do you handle the UIM claims any differently
3 than you handle the liability claims?

4 A. I do not.

5 Q. You are based out of somewhere in Florida, right;
6 Tampa area?

7 A. I work out of the Tampa office. But I'm a
8 work-at-home employee.

9 Q. Okay. But you live in Tampa?

10 A. Lutz. Yes, sir.

11 Q. Okay. And I guess the majority of these mediations
12 you're traveling around to are in the central Florida area?

13 A. That's where I am mostly, in central Florida.

14 Q. Okay. Now, you said you go through a lot of the
15 mediations on behalf of USAA. Is it also part of your job
16 to -- well, let me just ask you this. The underlying claim
17 that we're here about today, Terry's UIM claim against
18 USAA, you were the litigation manager on that case; is that
19 correct?

20 A. I am, yes.

21 Q. Okay. And you still are on the case?

22 A. I still am, yes.

23 Q. Okay. And there were no other litigation managers
24 that were ever responsible for this particular UIM claim;
25 correct?

1 A. No, when it came to litigation it came to me.

2 Q. So I guess probably for the rest of your testimony
3 here when we're talking today, when I talk about the claim
4 I'm talking about this UIM claim that Terry's made, unless
5 I specify otherwise, okay.

6 Now, have you ever handled a litigation claim and a
7 UIM claim -- or, sorry, a liability claim and a UIM claim,
8 the same file at the same time?

9 A. No, sir.

10 Q. Okay. So what usually happens when there are two
11 different claims arising out of the same wreck?

12 A. They're assigned to two different litigation managers
13 and they go to two different defense attorneys.

14 Q. And but that's all still under the auspices of USAA,
15 correct, if USAA insures both the UIM and the liability?

16 A. Correct.

17 Q. Okay. And would you agree with me that an insurance
18 company shouldn't be able to take two different factual
19 positions on two different sides of the same claim?

20 A. No, I don't agree with you.

21 Q. Okay. What -- so you think it's okay for an insurance
22 company to take two different factual positions on the same
23 issue?

24 A. I didn't say that. The claims are handled by two
25 different litigation managers and two different attorneys.

1 We do not comingle the investigation. The investigations
2 are done completely separate of each other. It would not
3 be common for me to pick up the phone and ask the other
4 adjuster what was going on in their file.

5 Q. Well, that's not entirely true because in this case
6 the UIM file and the BI file did get comingled; right?

7 A. I don't know what you're talking about.

8 Q. Did the Woody Poplin report make its way from the BI
9 file into your UIM file?

10 A. It did not make its way from the BI file into the UIM
11 file. It made its way to my attorney, who was Jack Daniel;
12 and Jack Daniel sent it to me, and that's how it got to my
13 file.

14 Q. Okay.

15 A. I didn't ---

16 Q. Are you sure about that?

17 A. To the best of my recollection, that's the way it
18 happened.

19 Q. So it's not your recollection that Kevin Smith,
20 Terry's attorney, disclosed Woody Poplin to Jack and Jack
21 told you that Woody Poplin had been disclosed and then
22 y'all went and found Woody Poplin's old report in the BI
23 file?

24 A. If that's what occurred, I do not remember it that
25 way.

1 Q. So you just don't remember?

2 A. I just don't remember.

3 Q. Okay.

4 A. You're right.

5 Q. So in any event, going back to my initial question, do
6 you or do you not think it's okay for an insurance company,
7 USAA, to have its people out here taking two different
8 factual positions in two different claims regarding the
9 same incident?

10 A. It's two separate investigations. I'm doing my
11 investigation, they're doing their investigation. Just
12 because they make a decision doesn't mean that I have to
13 accept it. Everyone has an opinion based on what they have
14 in their file.

15 Q. It's the same wreck; right?

16 A. Same wreck, right.

17 Q. Okay. So let's just talk about some things that would
18 be true in a wreck. In any given wreck -- well, let's talk
19 about this wreck. In this wreck, Terry's lights were
20 either on at the time of the impact or off at the time of
21 the impact; right?

22 A. Yes.

23 Q. Okay. And your -- we talked about Jack Daniel
24 earlier. He's the attorney that you hired and oversaw to
25 deal with the litigation on Terry's claim; right; is that

1 right?

2 A. Right.

3 Q. Okay. And so your attorney, Jack Daniel, filed
4 official court documents, RTAs, signed with his name on
5 them, saying that Terry's lights were off. Do you
6 understand that; that was in your file; right?

7 A. Yes.

8 MR. WHELAN: Your Honor, I object to that. That
9 mischaracterizes what the request to admit does and is.
10 It's a mischaracterization of the evidence.

11 THE COURT: Well, it's something you can straighten
12 out, I'm sure, on cross.

13 Go ahead. Thank you.

14 Q. Mr. Daniel, Jack Daniel, signed the document denying
15 that Terry's lights were on; right?

16 A. I don't know that. I mean, I ---

17 Q. A document, called and requested -- are you not copied
18 on the discovery in the -- in the case?

19 A. We're not copied on everything in the case, no.

20 Q. Okay. But it's your understanding that Mr. Daniel
21 denied the request to admit stating that Terry's lights
22 were on?

23 A. I know that he denied that her headlights were on. I
24 don't know what paperwork he filed in ---

25 Q. Okay. And then the other attorney USAA hired, Chris

1 Nickels, filed an answer in the Kuck case saying that
2 Terry's lights were on. You understand that; right?

3 A. I understand that's what you're telling me. I don't
4 know that to be the case.

5 Q. Okay. And so it's your position, you're telling the
6 jury ladies and gentlemen of the jury here today, that you
7 think that's okay that different people paid by USAA take
8 completely different positions in official court documents
9 in separate lawsuits?

10 MR. WHELAN: Your Honor, I object to this. Chris
11 Nickels was Ms. Hood's attorney, are paid by USAA. So I
12 think we addressed this in the motions in limine. I mean,
13 this system is set by law.

14 MR. POULIN: Your Honor, can we approach instead ---

15 THE COURT: Sure.

16 MR. POULIN: --- of speaking objections?

17 [Whereupon, an off-the-record bench conference is held
18 6/26/19, 4:09 p.m.]

19 MR. POULIN: I'm sorry about that, Ms. Moats.

20 Q. So you're sitting here and telling the jury right now
21 that you think it's okay that Jack Daniel took one position
22 in one case in official court documents and that Chris
23 Nickels took a different position in a different case in
24 official court documents?

25 A. I can't answer for Chris Nickels and what Chris

1 Nickels did. I can only say that in my case, in my
2 investigation, I determined that she had no headlights on.
3 I agreed with Jack on that decision.

4 Q. Okay. But you're on -- you're here on behalf of USAA
5 here today; right? You're the face ---

6 A. I -- I am

7 Q. --- of the company?

8 Okay. I'm asking you, as the face of the company,
9 does the company think it's okay to have two different
10 lawyers doing two different things regarding the same
11 factual issue?

12 A. It happens.

13 Q. It happened -- it's happened more than the time it
14 happened here?

15 A. Well, I'm sure it has. I mean, I can't give you a
16 specific. But we do two separate investigations. They --
17 you know, I guess my biggest -- maybe this hasn't happened,
18 but maybe the percentage to liability changes from file to
19 file. I don't tell them what to do in their case, they
20 don't tell me. We conduct separate investigations and we
21 make separate decisions.

22 Q. Okay. But I'm not asking about a decision. I'm
23 asking about a factual position. Was it your testimony
24 just a minute ago that you can recall other cases where
25 different attorneys from the same insurance company have

1 taken different ---

2 A. And I will correct myself on that. I shouldn't have
3 made that reference. I'm talking more in terms of
4 comparative liability.

5 Q. Sure. Okay. Right. So ---

6 A. Two different files, two different comparative
7 liabilities have happened.

8 Q. Sure. So going back to Mr. Whelan's -- actually his
9 opening statement and some of his questions with Terry,
10 there are some things that are just reasonable
11 disagreements; right?

12 A. Yes.

13 Q. Sometimes you're going to look at things and
14 reasonable people are going to disagree about that; right?

15 A. Correct.

16 Q. And different adjusters throughout USAA might have a
17 reasonable disagreement about different things; so that's
18 what you're saying?

19 A. Yes.

20 Q. Okay. But then there are some facts that are just
21 either true or they're not true; either the lights are on
22 or the lights are off, right; can't be anywhere in between?

23 A. All's I can tell you is what my determination was.

24 Q. That wasn't -- that wasn't my question. My question
25 is you'll agree with me that at the time of this wreck,

1 either Terry's lights were on or they were off?

2 A. They were on or they were off.

3 Q. Okay. Now, we talked -- you started talking about
4 your investigation and your evaluation, and so I want you
5 to have a chance to be able to talk about that. Let's
6 first talk about -- and --

7 Well, let me ask you this: As the litigation manager
8 on this case it was your responsibility to try to ascertain
9 the value of the case and set a reserve on the case in your
10 claims system; right?

11 A. Yes.

12 Q. Okay. And so as a part of that, it's your
13 responsibility to look at various different evidence and
14 facts that exist; correct?

15 A. Yes, sir.

16 Q. Okay. And you, early on in the case had a copy --
17 well, that's probably a bad question.

18 At some point in the case prior to the mediation you
19 had a copy of Woody Poplin's report; right?

20 A. To the best of my knowledge I don't remember when I
21 got the Woody Poplin report.

22 Q. But you did at some point get a copy of Woody Poplin's
23 report?

24 A. I did.

25 Q. Okay. And you believe that that was at least when --

1 well, you had a copy of Woody Poplin's report, yes?

2 A. I -- yes.

3 Q. Okay. And you'll admit that Woody Poplin did a lamp
4 filament analysis; right?

5 A. Yes.

6 Q. You'll admit that he was hired by Chris Nickels?

7 A. Yes.

8 Q. You'll admit that Chris Nickels was being paid by
9 USAA?

10 A. Yes, sir.

11 Q. And you'll admit that Woody found, in his lamp
12 filament analysis, that Terry's lights were on at the time
13 of impact; correct?

14 A. Terry's high beams were on.

15 Q. And you admit that that's what his findings said?

16 A. That's what his findings said.

17 Q. Okay. Now, did you accept or did you disregard
18 Woody's scientific findings?

19 A. I took it in consideration, but I did not -- I --
20 based on the fact that I had four or five witnesses that
21 all said she did not have her headlights on, I did not
22 accept the fact that he said that her high beams were on.

23 And let me clarify that. I knew that she had been
24 making the statement all along, all those years, that she
25 had never touched the headlight switch. She even admitted

1 today that she didn't know how it worked, that her car was
2 always on automatic headlights, and that they would have
3 come on when it got dark enough.

4 We did an investigation that determined that those
5 headlights, when they come on in the automatic position, do
6 not come on at high beam. They come on at low beam.

7 Q. Okay. And then -- and as part of that investigation,
8 USAA hired Woody Poplin and he did his test; right?

9 MR. WHELAN: Object to the form, Your Honor. Chris
10 Nickels, Hood's attorney hired Woody Poplin.

11 MR. POULIN: I'll rephrase it.

12 THE COURT: Thank you.

13 Q. USAA hired Chris Nickels; right?

14 A. The litigation ---

15 Q. USAA hired Chris Nickels; right?

16 A. The litigation manager and the attorney, Chris
17 Nickels, for Ms. Hood ---

18 Q. This is not my question.

19 A. --- hired -- USAA did not directly hire Mr. Poplin.

20 Q. One question at a time. USAA hired Chris Nickels;
21 right?

22 A. We hired Chris Nickels, yes.

23 MR. WHELAN: To represent Ms. Hood, Your Honor.

24 A. To represent Ms. Hood in the ---

25 MR. WHELAN: It's mischaracterizing ---

1 MR. POULIN: Your Honor, ---

2 THE COURT: Stop. Stop. Stop.

3 MR. POULIN: May we approach?

4 A. In the liability, yes.

5 [Whereupon, an off-the-record bench conference is held
6 6/26/19, 4:15 p.m.]

7 Q. All right. Ms. Hood -- so Woody Poplin did a
8 scientific test; right?

9 A. Yes.

10 Q. Okay. Are you -- you're sitting here today and
11 telling the jury that you believe that the results of his
12 tests were wrong?

13 A. I believe science is not perfect, yes.

14 Q. Okay. So ---

15 A. And I should clarify that. I did make the statement
16 in my deposition that science is not perfect. I do believe
17 that Mr. Poplin's report was correct in that he evaluated
18 her high beams on. That does not mean that believe that I
19 think that his report was correct.

20 Q. I don't quite ---

21 A. He evaluated it. He said that he did -- he inspected
22 that vehicle and that he determined her high beams to be
23 on. I did not believe that to be correct because I had
24 four or five witnesses that said she did not have her
25 headlights on.

1 Q. Okay. Now, we'll talk about your witnesses in a
2 minute.

3 But so you don't believe science is perfect; right?

4 A. Correct.

5 Q. Okay. And you agree with me that memories aren't
6 perfect?

7 A. Correct.

8 Q. Okay. And would you even go so far as to agree with
9 me that witnesses, who have a stake in the litigation, that
10 their memories and testimony is even -- maybe should be
11 given even less weight than a normal witness?

12 A. No. I believe you have to evaluate all the testimony
13 that you receive equally and try and make a reasonable
14 determination about what is correct.

15 Q. Okay. Let me -- right. So I'm asking you about how
16 we weigh different things; right; you have to -- you have
17 to weigh everything; right?

18 A. Yes, you do.

19 Q. Okay. So you've got Antoine Johnson, the guy who ran
20 a stop sign and is getting sued by Terry. He says Terry --
21 he didn't see any lights on Terry's car; right?

22 A. Correct.

23 Q. That's one of the things you relied on?

24 A. Correct. But I ---

25 Q. Okay.

1 A. But I --- you are correct. I don't believe that he
2 ran the stop sign. He stopped at the stop sign and he ---

3 Q. How do you know that?

4 A. Because he testified to that.

5 Q. Okay.

6 A. And I believe the police report said that.

7 Q. Well, let's talk about the police report while we're
8 at it. The -- first of all, you didn't rely on the police
9 report. Well, let's go back and talk about -- let's go
10 back all the way.

11 When we talk about an evaluation of the claim, that
12 you had to evaluate the claim and set a reserve on a claim,
13 what that means is that you're looking at all the evidence
14 that you're able to look at and you're trying to determine
15 what a jury would do with that evidence if the case went to
16 trial; right?

17 A. I'm making a review of all the evidence, trying to
18 determine what I believe to be correct.

19 Q. Right. But at the end of the day, it doesn't matter
20 what you believe is correct?

21 A. Correct.

22 Q. What you're trying to figure out is what would a jury
23 do with this if this case went to trial; right?

24 A. I do consider that, yes.

25 Q. Well, that's the only thing that matters; because USAA

1 takes the position that they don't have to pay until a
2 jury ---

3 A. Not every -- not every case goes to trial. So I'm not
4 always thinking in terms of what a jury's going to think.

5 Q. Okay.

6 A. I'm making a reasonable evaluation based on what I'm
7 looking at, all the evidence that I look at.

8 Q. And you would agree with me that, at least with
9 respect to the case going to trial -- I mean, you know that
10 a police report is not admissible in a trial, right?

11 A. I do know that, yes.

12 Q. Okay. And so all along you knew that if this case
13 went to trial, that jury was not allowed to see the police
14 report; right?

15 A. Yes.

16 Q. Okay. And that's because you know that that officer
17 did not witness the wreck; right?

18 A. Correct.

19 Q. And that's because you know that the officer did not
20 take any measurements or do any -- because he's not an
21 engineer; right?

22 A. Right.

23 Q. As far as you know.

24 A. Yes, sir.

25 Q. That's just his opinion; right? That's what a police

1 report is, it's just an officer's guess about what
2 happened; right?

3 A. It's their opinion, right.

4 Q. Okay. And they're historically unreliable; right?

5 A. I don't agree with that.

6 Q. Okay. Well, let's talk about the police report in
7 this case. The police report in this case was actually
8 wrong, wasn't it?

9 A. In what respect?

10 Q. Did the -- did the drawing on the police report show
11 Terry t-boning Mr. Johnson?

12 A. You'd have to show me a copy of the police report. I
13 haven't looked at it in years.

14 Q. You relied on the police report and you can't even
15 remember what it says?

16 A. This case has been going on since 2014. No, I do -- I
17 do not remember everything about this case. I handle
18 hundreds of cases.

19 Q. Well, you would agree with me that if the police
20 report was drawn such that it had Terry t-boning Antoine
21 Johnson, that would be wrong; right?

22 A. Correct.

23 Q. Because she didn't t-bone Antoine Johnson?

24 A. Not to my knowledge.

25 Q. Antoine Johnson T-boned her?

1 A. He hit her right-front fender.

2 Q. Okay. Well, he hit -- the front of his car hit the
3 side of her car?

4 A. I don't -- I don't call that a t-bone. But he hit her
5 right-front fender, yes.

6 Q. The front of his car hit the side of her car?

7 A. [No response]

8 Q. Okay. Here's a copy of the police report. So you
9 would agree with me that the cop drew that wrong?

10 A. No, I don't disagree that this is wrong. It's showing
11 his left-front fender impacting her right-front fender.

12 Q. Do you remember what the cars looked like after the
13 wreck? Did you get photos of the cars as a part of your
14 investigation?

15 A. Yes, I did.

16 Q. Okay. And you're telling us that the damage to the
17 cars is consistent with what's drawn on that police report?

18 A. I'm telling you that I remember the damage to her car
19 being the right-front fender. I would have to see his car.
20 I haven't seen his car in a while.

21 [Mr. Poulin confers with court reporter regarding
22 exhibit numbers]

23 MR. POULIN: May I approach the witness, Your Honor?

24 Q. All right. I'm going to show you what's been marked
25 as Plaintiff's Exhibit 3. Do you recognize that car?

1 A. I do.

2 Q. Okay. And is that a picture of Therese Hood's car?

3 A. Yes, it is. I assume it is. I mean, it appears to
4 be, yes.

5 Q. Okay. Can I have that back, please?

6 A. Uh-huh.

7 [Exhibit returned to counsel]

8 Q. And looking at this picture of Terry's car, do you see
9 damage all up along the side of the car?

10 A. Yes.

11 Q. Okay. And that's damage related to the wreck?

12 A. I assume it is, yes.

13 Q. Okay. And would you consider any part of this car the
14 right-front fender of Terry's car?

15 A. The impact was to the right-front fender. She was
16 going at a high rate of speed, so her car scraped along his
17 car.

18 Q. Uh-huh. Okay. So the impact -- that's not an impact,
19 the dent?

20 A. I don't -- in my experience, the impact is to the
21 right-front door and that fender.

22 Q. Okay.

23 A. And then the scraping was caused by her continuing.

24 Q. All right. Let's also look at -- I am going to show
25 you this, Plaintiff's Exhibit Number 4.

- 1 A. Okay.
- 2 Q. What is that a picture of?
- 3 A. His -- I'm assuming his vehicle.
- 4 Q. Okay. And damage to his vehicle is where?
- 5 A. The entire front. The bumper is pulled off.
- 6 Q. The entire front of the vehicle is all dented up;
- 7 right?
- 8 A. Uh-huh.
- 9 Q. Okay. And on the police report, again, it doesn't
- 10 show the entire front of his vehicle hitting her car; does
- 11 it?
- 12 A. No. It shows the left of his vehicle hitting the
- 13 right of her vehicle.
- 14 Q. Okay. So the police report shows him -- shows her
- 15 t-boning him, and in reality he T-boned her; right?
- 16 A. I don't look at this police report and see -- look at
- 17 it as her t-boning him.
- 18 Q. So that ---
- 19 A. I see a left -- left-front to a right-front collision.
- 20 That's what I see when I look at the police report.
- 21 Q. But in any event, we can all agree the cop didn't see
- 22 the wreck; right?
- 23 A. No, he ---
- 24 Q. He has no idea what ---
- 25 A. --- did not see the wreck.

1 Q. He has no idea what happened in the wreck?

2 MR. WHELAN: Objection. Mischaracterization.

3 Q. He has no personal knowledge of what happened in the
4 wreck; correct?

5 A. He or she - it was she in this case - goes by what she
6 is told at the scene by ---

7 Q. And at the ---

8 A. --- the individuals.

9 Q. And the only person she would have talked to at the
10 scene was Mr. Johnson, right, since Terry was in the
11 hospital?

12 A. It's my understanding she did not talk to the police
13 officer.

14 Q. Okay.

15 A. I would only -- I mean, without sitting here reading
16 the whole report, I would assume that Antoine Johnson gave
17 a statement and I would assume the Kuck's gave a statement,
18 and I would ---

19 Q. I'm not asking -- I'm not asking you to assume.

20 MR. WHELAN: Your Honor, ---

21 Q. I'm asking you whether you know ---

22 MR. WHELAN: --- he should not interrupt her answer as
23 she's explaining the -- I mean, he asked her did she talk
24 to anybody else.

25 THE COURT: Well, I mean we're asking her to speculate

1 as to what somebody else might or might not have done; and
2 I don't think that's appropriate.

3 MR. POULIN: Right. Okay.

4 Q. So do you know -- and if you don't know, your answer
5 is I don't know.

6 Do you know whether the officer talked to Terry on the
7 scene?

8 A. Only because I heard that she -- no, I do not know
9 that Terry was talking to at the scene.

10 Q. Okay. Do you know -- I'm not asking you to speculate,
11 and if you don't know you can say I don't know.

12 A. Okay.

13 Q. Do you know who the officer did speak with on the
14 scene?

15 A. No, I do not. Without looking at the police report
16 and reading it, I do not.

17 Q. Do you agree with me that it would be relevant to
18 know -- for you to know whose story the officer was relying
19 upon when they put together -- she put together her police
20 report?

21 A. And what I can tell you is that case was in 2014. I
22 got it in 2015. The trial was in 2017. I have not looked
23 at the information in that file since 2017.

24 Q. Okay. But that wasn't the answer to my question.

25 A. I -- you're asking. I don't remember, but I'm

1 telling -- what I'm trying to tell you is that at the time
2 I did my investigation I would have read this police report
3 from one end to the other. I don't discard that
4 information.

5 You're asking me to remember something that happened
6 years ago after I have handled at least hundreds of other
7 files in the meantime. I can't remember every single thing
8 that I looked at or read in this report. If that's the
9 case, then every question you ask me I'm going to have to
10 say I don't know.

11 Q. Well, you're still -- you're still the current claims
12 adjuster on this case; right?

13 A. For me -- yes, I am still the adjuster assigned to
14 this case. But for me, this case ended at the trial. And
15 after I issued the check to her I had no reason to go back
16 into that case and look at it again.

17 Q. You didn't think it would be important to prepare to
18 come in here and testify in front of the jury today to make
19 sure you could give them truthful and accurate answers?

20 A. It's my understanding that you don't have the -- a
21 copy -- you didn't get a copy of the Alice notes. That's
22 where all my notes are. I did not think that it was going
23 to be relevant that I look at that file.

24 Q. So you didn't ---

25 A. You didn't have a copy of it. You don't know what's

1 in that file. It's my investigation.

2 Q. So you didn't even think it would be important before
3 you came in here and testified about your investigation
4 today to look at your notes, refresh your recollection?

5 A. I -- you know what I did? I tried to rely on what I
6 do remember about the case and not go in and practice what
7 I was going to say here.

8 Q. Okay. And these notes that would have helped you rely
9 on your memory, I don't have these notes either, right, so
10 I can't go through them with you?

11 A. Correct.

12 Q. Okay. Now, luckily, going back to my question -- I
13 wasn't asking you necessarily to remember. I was asking
14 you just to agree with a very basic premise of mine.

15 Do you agree with me that before you give significant
16 weight to a police report it's important to figure out how
17 the officer came to their conclusions?

18 A. I would have looked at what statements he -- they gave
19 on the police report, yes.

20 Q. Okay.

21 A. And then I would have tried to talk to -- I would have
22 looked at any recorded statements we had.

23 Q. And we're going to talk about the recorded statements
24 in a little while. But you just agree with me, in general,
25 that it would be important to know how the officer reached

1 their opinion?

2 A. It would be important to know, yes.

3 Q. Okay. And you can't remember how the officer in this
4 case reached their opinion; right?

5 A. No.

6 Q. Okay. Now, how would you have known back then if you
7 don't know now; that would all be in your -- did you ever
8 talk to the officer?

9 A. I did not talk to the officer, that I -- that I
10 remember.

11 Q. Okay. So how would you at that time have known what
12 the officer relied on if you never asked the officer what
13 they relied on?

14 A. I would have looked at the police report, read the
15 police report.

16 Q. You have the police report right in front of you ---

17 A. Correct.

18 Q. --- though, ma'am. Would you like to take a ---

19 A. Do you want me to sit here and read it? I can sit
20 here and read it.

21 Q. I mean, I would like to know what part -- what part of
22 the police report would you rely upon to determine what
23 all -- who all the officer talked to. I'm specifically
24 interested in who the officer talked to.

25 [Whereupon, the witness reviews documents]

1 A. I mean just looking at this right -- without reading
2 every word I don't see where she mentions who she talked
3 to.

4 Q. Okay. Thank you. Can I have that back, please?

5 [Whereupon, document returned to Mr. Poulin]

6 A. It gives a brief description of the accident.

7 Q. Okay. Of her opinion of the accident?

8 A. [No response]

9 Q. And then -- and you never talked to her -- what -- are
10 you aware of any other documents we might be able to look
11 at to determine who the officer talked to informing her
12 guess about what happened?

13 A. I believe that we deposed her or -- I mean that would
14 be the only thing I could think of right offhand. Or when
15 we talked to the witnesses we would have asked them if they
16 gave a statement to the police officer.

17 Q. Now, in addition -- so let's -- all right, let's move
18 on to something slightly different here.

19 [Whereupon, Plaintiff's Exhibit Number 5, poster
20 board, marked for identification by the court reporter]

21 (Whereupon, Plaintiff's Exhibit Number 6, poster
22 board, marked for identification by the court reporter]

23 MR. POULIN: Thank you.

24 Q. All right. Ma'am, before I get to Exhibit 5, we
25 already looked at Exhibits 3 and 4. And these were

1 pictures that you would have obtained as part of your
2 investigation you relied upon; right?

3 A. Yes.

4 MR. POULIN: Your Honor, at this time we would move
5 Plaintiff's Exhibits 3 and 4 into evidence.

6 THE COURT REPORTER: Okay. Before you do that, I need
7 to make a correction on the exhibit numbers because I gave
8 you the exhibit number for the plaintiff's side. So those
9 need to be relabeled. We already had a three ---

10 MR. POULIN: Got you.

11 THE COURT REPORTER: --- and four. Four was the
12 outline of the cost that was marked for ID. So these
13 boards will be five and six.

14 MR. POULIN: Got you.

15 THE COURT REPORTER: And then that will be seven.
16 Sorry about that.

17 [Whereupon, Plaintiff's Exhibit Number 7, History
18 Reserve, is marked for identification by the court
19 reporter]

20 THE COURT: Any objection, Mr. Whelan?

21 MR. WHELAN: No, Your Honor.

22 THE COURT: Okay. And I'm sorry. Tell me what --
23 those are Defendant's Exhibit ---

24 MR. POULIN: Plaintiff's. I'm sorry.

25 THE COURT: --- sorry. Plaintiff's Exhibits 4 and 5?

1 THE COURT REPORTER: Five and six will be the boards.
2 And is that what you're ---

3 MR. POULIN: Yes. So Number 5 was Ms. Hood's car.
4 Number 6 was Mr. Johnson's car. And then Number 7 will be
5 what I have just marked.

6 THE COURT: Thank you.

7 [Whereupon, counsel confer]

8 THE COURT REPORTER: Let me make sure I have these
9 right.

10 MR. POULIN: Okay.

11 THE COURT REPORTER: Five and six. Which board was
12 first?

13 MR. POULIN: I believe that Ms. Hood's car was first.
14 So that should be -- this bottom board should be
15 Plaintiff's Exhibit -- what we were referring to as three
16 is I guess now five. And what we were referring to as four
17 is now six.

18 THE COURT REPORTER: Uh-huh. And the last one is
19 Number 7.

20 MR. POULIN: Thank you.

21 [Whereupon, exhibit numbers are corrected]

22 [Whereupon, Plaintiff's Exhibit Number 5, photo board,
23 was admitted into evidence]

24 [Whereupon, Plaintiff's Exhibit Number 6, photo board,
25 was admitted into evidence]

1 Q. Ms. Moats, I want to show you what we've marked as
2 Plaintiff's Exhibit Number 7. Can you tell us what that
3 is?

4 A. Yes. It's a history of the reserve.

5 Q. Okay. Let's talk a little bit about what reserves
6 are. So reserve, that is USAA's reasonable evaluation of
7 the value of the claim; right?

8 MR. WHELAN: Your Honor, I just want to note for the
9 record my objection to this subject. Your Honor has
10 already ruled.

11 THE COURT: Yes, sir.

12 MR. WHELAN: Thank you.

13 Q. Correct?

14 A. It is our value of a claim at any given time based on
15 the information we have in the file at that time, yes.

16 Q. Okay. And so one of the things that you do is the
17 additional -- as additional information comes into the file
18 that would change your reasonable evaluation of the claim,
19 you would adjust the reserve amount; correct?

20 A. I should adjust the reserve amount. Do I do it all
21 the time? No. I'm not perfect.

22 Q. But you're supposed to; right?

23 A. You're supposed to, yes.

24 Q. Okay. And actually in this case you never adjusted
25 the reserve amount?

1 A. I did not. You are correct.

2 Q. Okay. So let's talk about the reserves a little bit.
3 So when this case first came in to you, you didn't know
4 much about what had happened; right?

5 A. Correct.

6 Q. Okay. And, in fact, when you first got the claim you
7 really didn't know -- you hadn't seen any of the witness
8 statements, you didn't know anything about Terry's
9 injuries, or anything like that; right?

10 A. I did not.

11 Q. Okay. And you set the initial reserve at \$100,000?

12 A. I did not set the initial reserve at \$100,000.
13 Someone else did.

14 Q. Okay. So somebody else set the reserve ---

15 A. Right.

16 Q. --- at \$100,000? Then you hired Jack Daniel and you
17 send it off to him with the report telling him what you
18 know about the case at that point, which is very little,
19 and off it goes; right?

20 A. Yes.

21 Q. Okay. So since the time that the claim reserve is set
22 at \$100,000, I guess you get a copy of this police report
23 that we just spent a long time talking about; right?

24 A. It would be in the file, yes.

25 Q. And there's witness statements that we're going to

1 talk about in a minute that you would have reviewed?

2 A. Right.

3 Q. Photographs?

4 A. Correct.

5 Q. Woody's report?

6 A. It wasn't in the file when it came over to me, no.

7 Q. I understand that. None of this was in the file when
8 it came over to you; correct?

9 A. What do you mean none of it?

10 Q. When you first opened the file, none of this stuff was
11 in the file; right? That's what your initial report to
12 Jack says, we know very little about the claim, we need to
13 investigate it?

14 A. When a -- when a file is sent over to me, a UIM file
15 was split out from the BI file. The liability file is the
16 BI file. When we recognize that there's a UM exposure we
17 automatically split out a separate claim.

18 There are certain pieces of evidence from the BI file
19 that will be transferred to me with the UM file. Those
20 general things are police reports, appraisals, and any
21 statements that have been taken.

22 Q. Okay. But not Woody Poplin's report?

23 A. Well, I -- we didn't know about Woody Poplin's report
24 in -- I believe I got this case in June of '15. I don't
25 believe we knew about Woody Poplin's report until like

1 August of '16 when Kevin told us about it.

2 Q. Okay.

3 A. To the best of my recollection - don't quote me on
4 every date - but to the best of my recollection that's the
5 way it happened.

6 Q. Okay. But when it comes to you, like the first minute
7 you get this thing, reserve is set at \$100,000 by somebody
8 else; right?

9 A. Yes.

10 Q. And if you believed that that reserve was wrong you
11 could -- you had the authority to change it?

12 A. I have authority to change it.

13 Q. And, in fact, you have a responsibility to change it;
14 that's what you're supposed to do as part of your job;
15 right?

16 A. But I would not change it unless I discussed it with
17 my manager, because this is above my authority.

18 Q. Okay. But you know -- you testified in your
19 deposition that you have the authority to set reserves
20 above your authority; is that right?

21 A. I can, right. But in this case of this size, I would
22 discuss it with my manager.

23 Q. Okay. Now, when was the reserve first set at
24 \$100,000?

25 A. This says 5/21/15, because that's obviously when the

1 UIM file was set up.

2 Q. Okay. So that ---

3 A. I'm assuming that would be when the suit was filed.

4 Q. That's the first day that you get the claim in 2015?

5 A. I don't believe I got the claim on that date. I
6 didn't get the claim until it looks like 6/22/15.

7 Q. Okay.

8 A. No, wait a minute. Yeah, 6/22/15 it looks like when I
9 got it. Maybe -- maybe July 1st. I can't tell exactly.

10 Q. Okay. And then you did all this investigation and
11 looked at all these different things; right?

12 A. I would have looked at what was in the file, yes, sir.

13 Q. Okay. And you never once, from 2015 to the date that
14 her first case went to trial, you never once re-evaluated
15 the reserve amount; is that right?

16 A. No, that's not correct.

17 Q. Did you ever change the reserve on it?

18 A. I did not change the reserve. It doesn't mean that I
19 didn't value the case differently. It means that I did not
20 change the reserve.

21 Q. So you will admit that you never once changed the
22 reserve at any point from the time you got the file all the
23 way until the case went to trial?

24 A. That is correct.

25 Q. But the reserve did go up; right?

1 A. It did.

2 Q. Okay. And we think -- well, we can actually tell who
3 changed it, right, because there's initials on there?

4 A. There's not initials. His employee ID number is here.

5 Q. Okay. And who -- based on the employee ID number, who
6 changed the reserve?

7 A. I'm going to tell you Ron Vestal, because we've
8 discussed this before and we determined that that was his
9 employee ID number.

10 THE COURT REPORTER: I'm sorry, I didn't hear the last
11 name. Ron ...?

12 THE WITNESS: Vestal. V-E-S-T-A-L.

13 THE COURT REPORTER: Thank you.

14 Q. Okay. So it was -- so it was Ron Vestal that changed
15 the reserve?

16 A. Yes.

17 Q. Okay. And, now, Ron -- so we talked earlier about
18 separating out the BI and the UIM file; right?

19 A. Yes, sir.

20 Q. And has two different people that maybe should be
21 allowed to go up and make two different decisions; right?

22 A. It's two different people.

23 Q. Okay. Now, this Ron, Ron Vestal that had the
24 authority to change the reserve on your UIM case, he was
25 also the guy that was overseeing the BI file; right?

1 A. I believe he -- I believe --- at that time, yes.

2 Q. Okay. So you were reporting to Ron about what was
3 going on with the UIM case?

4 A. Correct.

5 Q. So you were reporting to Ron about positions that Jack
6 Daniel was taking about the lights being off and RTAs,
7 court documents that he was signing, you were -- you were
8 reporting all that to Ron; right?

9 A. I don't recall exactly what I reported to Ron. But I
10 would have reported to Ron, yes.

11 Q. Okay. And at that same time, the adjuster from USAA
12 handling the Kuck case who had hired Mr. Nickels and who
13 had had -- and Mr. Nickels had got the Poplin report and
14 Mr. Nickels had filed an answer in the Kuck case saying the
15 lights were on, that adjuster would have also been
16 reporting to Ron; correct?

17 MR. WHELAN: Objection, Your Honor. Facts not in
18 evidence. Lack of personal knowledge.

19 THE COURT: If she knows.

20 A. I can't say definitively. Dena was in my unit at one
21 time. I want to say she was in the unit at that time, but
22 I cannot say definitively.

23 Q. Okay. And Dena was the adjuster handling the ---

24 A. Dena was the ---

25 Q. --- Kuck case?

1 A. --- litigation manager that initially handled the Kuck
2 file.

3 Q. Okay. And if she was in your unit at that time, she
4 would have also been reporting to Ron?

5 A. Yes, she would have.

6 Q. Okay. Now, do you -- why don't you go ahead and tell
7 us what the date is where Ron changed the reserve from
8 \$100,000 to \$250,000.

9 A. It was August 24th of 2016.

10 Q. August 24th, 2016. Okay.

11 And do you know how soon after Woody's report was
12 generated that you got a copy of it?

13 A. I do not recall.

14 Q. Okay. Was it relatively -- was it around the same
15 timeframe?

16 A. I do not recall.

17 Q. Okay. Let's just go ahead ---

18 [Whereupon, Plaintiff's Exhibit Number 8, Poplin
19 report, is marked for identification by the court reporter]

20 THE COURT REPORTER: Plaintiff's Number 8, Poplin
21 Report, marked for identification.

22 MR. POULIN: Thank you.

23 And, Your Honor, before we move on to Number 8, I
24 would move Plaintiff's Exhibit Number 7 into evidence.

25 THE COURT: You already stated your objection.

1 MR. WHELAN: That's right, Your Honor.

2 THE COURT: It is admitted.

3 [Whereupon, Plaintiff's Exhibit Number 7 is admitted
4 into evidence by the Court]

5 Q. I'm going to show you what we've marked as Exhibit 8.
6 What is that?

7 A. That is Woody Poplin's report.

8 Q. Okay. So this is the -- this is the report we've been
9 talking about all this time. We got it marked, we've got
10 it in your hands; right, Exhibit 8?

11 A. Yes, sir.

12 Q. Okay. And what is -- I think you've got to flip maybe
13 to the second page here. What is the date of this report,
14 the date that Woody generated ---

15 A. August 12th, 2016.

16 Q. Okay. So Woody generates his report August 12th, 2016
17 and then on August 24th, 2016, the -- your boss, Ron, who's
18 also handling maybe the BI claim, increases the reserve
19 from 100,000 to \$250,000. Is that the accurate timeline?

20 A. That's a timeline, yeah.

21 Q. Okay. And Ms. Poplin's report eventually -- we've
22 already established did make it into your file. And you've
23 read it before; right?

24 A. Yes, I have.

25 Q. Okay. And that's a copy of his report that I've shown

1 you?

2 A. Yes.

3 MR. POULIN: Your Honor, we would move Exhibit Number
4 8 into evidence.

5 MR. WHELAN: No objection.

6 THE COURT: It is admitted.

7 [Whereupon, Plaintiff's Exhibit Number 8 is admitted
8 into evidence by the Court]

9 Q. All right. Now, let me ask you this question. Would
10 it -- the fact that Ron changed the reserve in your case
11 and not you, would that be atypical; would it be -- would
12 it be abnormal for Ron to go into one of your files and
13 change your reserves?

14 A. It was very rare for Ron to change my reserves. But I
15 can probably give you an explanation as to why. We had a
16 mediation scheduled on this case in August. It was normal
17 procedure on a case of this size for me to meet with Ron,
18 go over all the information in the file, determine what the
19 reserve should be set at -- set at, and how much I should
20 ask for in my request for authority.

21 We were preparing for that mediation. I did not find
22 out about this report until -- you're assuming that I got
23 this report around August 12th and before August 24th. I
24 can't say definitively that I did. Because I would have
25 gotten -- the best of my recollection, the first time I

1 heard about this was when Kevin Smith canceled the
2 mediation because he said that he found more -- he had more
3 evidence.

4 And I don't even believe -- I don't believe that
5 evidence was disclosed to us at that time. He just
6 canceled the mediation for that reason.

7 Q. Okay. Well, let's go back and unpack all of this
8 again, okay.

9 The mediation, in fact, did not happen in August,
10 right?

11 A. It did not happen.

12 Q. That's what we're talking about.

13 A. Because Kevin canceled it.

14 Q. Right.

15 Okay. So when you say I don't know whether I got
16 this -- Woody's report before mediation, you meant before
17 what was supposed to be the August mediation; right?

18 A. Right.

19 Q. We know for a fact that you had that report when the
20 actual mediation took place?

21 A. In December.

22 Q. In December.

23 A. Correct.

24 Q. Okay. And we know for a fact what date the report was
25 made and what date the reserve was increased to \$250,000;

1 right?

2 A. We know that.

3 Q. Okay.

4 A. But you're making an assumption that you don't have
5 any fact on it. We don't know that that's why Ron changed
6 the reserve.

7 Q. I never said that that's why Ron changed the reserve.
8 I'm simply establishing the timeline.

9 Do you believe that that would be reason to change the
10 reserve?

11 A. I will -- I will repeat this again. I don't know the
12 date that I got this report. To the best of my
13 recollection -- this report was written August 12th. That
14 doesn't mean that Dena even had it on August 12th.

15 Many times when we hire experts, those experts go out,
16 they do their investigation, we may not get that report for
17 30 days. So he may have done this report on August 12th.
18 I don't know when Dena got it. I know that Kevin obviously
19 heard about it or got a copy of it before the mediation,
20 because that's why he canceled the mediation. But I don't
21 know that I had it before Ron changed that reserve on
22 August 24th.

23 Ron changed that reserve on August 24th because we
24 were still preparing this case to go to file -- to
25 mediation, because we didn't know at that time the

1 mediation was going to be canceled.

2 Q. Okay. So we've got a lot to unpack here. So what
3 you're telling me is it's possible you didn't even know
4 about the report when you -- when Ron ---

5 A. I'm telling you that it's possible.

6 Q. Okay. So what that also means is that whenever you
7 did get that report, you never changed the reserve again?

8 A. No, we never changed the reserve again because we
9 believe that she was -- we believe that she had comparative
10 negligence; whether they were going to find her to be a 100
11 percent because she was the proximate cause of the
12 accident, whether they were going to find her 49 percent
13 like they did, whether they were going to find her 51
14 percent, which would have bar her from recovery, or maybe
15 they were going to find her zero percent.

16 Q. But you didn't actually believe any of that, did you;
17 because your internal claim note showed that your internal
18 evaluation was that she was only 20 percent at fault in the
19 wreck and ---

20 A. That was not my ---

21 Q. --- Mr. Johnson was 80 per- ---

22 A. That was not my decision; 80-20 was not my decision.
23 The file came over to me at 80-20.

24 Q. That was USAA's decision? That's what was in the
25 file?

1 A. That was the claims adjuster's decision, based on a
2 property damage arbitration that had been done. We are
3 bound by arbitration rules. So when arbitration is done
4 and an 80-20 split is determined, we are required to put
5 that in the file.

6 That does not affect my bodily injury investigation.
7 That's a totally different issue. I am not bound by that
8 80-20 rule.

9 Q. So you're not bound by the 80-20 rule; correct?

10 A. Correct.

11 Q. Okay. You're not bound by science; correct? Yes?

12 A. I'm not bound by science.

13 Q. Okay. You're not bound by any actions that USAA takes
14 through any of its other employees, including the employees
15 that are working on the Kuck claim?

16 A. The bottom line is I don't know what's going on in
17 that Kuck claim. I don't sit there and pick up the phone
18 and say, hey, what's going on, tell me about it.

19 Q. Okay.

20 A. I do my own investigation. I gather my own
21 information and make -- I make my determination. The other
22 adjuster does the same thing. If they are different ---

23 Q. You're not bound by it?

24 A. They're different.

25 Q. If they're different, you're not bound by it; right?

1 Is that what you're saying?

2 A. No, I can make a decision in my file based on the --
3 on the evidence that I have in my file.

4 Q. Okay. Let's talk about this 80-20 rule. What is an
5 arbitration?

6 A. It's where one -- we send a file, or the other party
7 sends a file, off to an independent person. And I will
8 tell you that sometimes that's just an adjuster from
9 another insurance company. One person looks at that file
10 and makes a decision based on the evidence they are sent.

11 Q. So in addition to you and Ron and everybody at USAA
12 that had looked at this file, and in addition to the
13 conclusions that Woody came up with, y'all actually sent
14 all this evidence to some independent third party and they
15 also came back and told you that they thought Terry was no
16 more than 20 percent at fault?

17 A. The evidence ---

18 MR. WHELAN: Your Honor, that mischaracterizes the
19 testimony. That's not ---

20 Q. Okay, why don't you characterize it ---

21 A. The evidence that they are seeing -- that they see is
22 minimal. It is not what is in the litigation file.

23 [Pause for plaintiff counselors to confer]

24 MR. POULIN: Sorry about that.

25 Q. So -- so an independent other third person looked at

1 at least some of this and determined a percentage of fault;
2 correct?

3 A. They probably got a police report, the recorded
4 statements, and the appraisal. That's generally what is
5 sent.

6 Q. Okay. Well, that's everything that you relied on,
7 too; right?

8 A. No. I -- we -- in litigation we have access to
9 subpoenas. We can get more information. We can take
10 deposition. They don't do that in the claims file. They
11 have limited information.

12 Q. But your evaluation of this case never -- never
13 changed from the first day you got it? You never changed
14 the reserve; right?

15 A. I -- I did not change the reserve; and I did not
16 change the liability at that point in time, no.

17 Q. Okay. So regardless of all these other tools and
18 other evidence that you had the ability to go get, none of
19 that ever changed your evaluations?

20 A. I didn't change the physical claims file. I go
21 into -- I use a claims file typically for three things: I
22 diary in it. The liability is in there. And the reserve
23 is in there.

24 That doesn't mean that it equals what is in my
25 litigation file. My litigation file wouldn't have

1 indicated that if I had changed the value of the claim in
2 any way, if I had changed the liability in any way.

3 My not going in and changing the claims file doesn't
4 mean that my evaluation in the case had not changed.

5 Q. So this litigation file, your evaluation of the case
6 that we could look at to see if it changed, that's the one
7 that I've never seen before; right?

8 A. My understanding ---

9 MR. WHELAN: Your Honor, you've ruled on this, as
10 well, that this is irrelevant. They chose to push this
11 case to trial at this time.

12 MR. POULIN: It has been pending for ---

13 THE COURT: Y'all approach, please.

14 [Whereupon, an off-the-record bench conference is held
15 6/26/19, 4:54 p.m.]

16 Q. So there's a whole set of notes that you have that
17 would refresh your memory on all of this; right?

18 MR. WHELAN: Your Honor, I object to this.

19 THE COURT: And I've sustained that. Move on to your
20 next question, please.

21 Q. You did nothing to refresh your memory about ---

22 A. I ---

23 Q. --- all these questions I've been asking you, before
24 you came in here?

25 A. I know that the value of the claim changed based on

1 the reports that Jack Daniel sent me.

2 Q. Okay. It changed from 100,000 to 250,000? Or it
3 changed more?

4 A. No, it changed -- to 90 to 245 ---

5 Q. Actually ---

6 A. --- is its value range.

7 Q. Actually, Jack sent you one letter saying that his
8 value was up to 275,000; right?

9 A. He prefaced that by saying that discovery was ongoing
10 and that was subject to change; something to that effect.

11 Q. Well, let me try -- we've been talking for a long
12 time, and I've still got more for you; but let me just try
13 to cut to the chase on some things, okay.

14 Y'all -- all this evidence that you say you reviewed
15 and -- at some point you reviewed everything, right, ---

16 A. Yes ---

17 Q. --- that was available to you; right?

18 A. Everything that was available to me.

19 Q. Okay. And y'all -- you and Ron placed a valuation on
20 the case of \$250,000; right?

21 A. Prior to mediation, yes.

22 Q. Okay. Well, oh, and that never changed ---

23 A. It never changed.

24 Q. --- in the claim file?

25 A. Right.

1 Q. Okay. And you've got Jack Daniel telling y'all that
2 the case is worth between 245,000, maybe even up to
3 \$275,000; right?

4 A. His initial report, the earliest report he gave,
5 mentioned 275; but he prefaced it by saying that it wasn't
6 definitive - I don't remember his words - that discovery
7 was ongoing, that we were still trying to gather
8 information.

9 Q. Okay. Well, in any event, Jack works for you; you
10 don't work for him, right?

11 A. Jack works for me.

12 Q. Okay. So you're not bound by his evaluation of the
13 case?

14 A. I'm not bound by his evaluation.

15 Q. Okay. Now, but your other evaluation was 250; right?

16 A. I agreed -- I agreed with his evaluation of the case,
17 yes.

18 Q. Okay. The case eventually goes to mediation. Did
19 USAA ever offer \$250,000?

20 A. I was not present at the mediation. I can only speak
21 to what I was told by Jack. No, we did not offer the 250.

22 Q. Okay. Did USAA ever offer \$245,000?

23 A. No, we did not.

24 Q. Did USAA ever offer one penny over \$200,000?

25 A. To my knowledge, we did not.

1 Q. Okay. Now, we also know, based on your notes from
2 what Jack told you about the mediation, where the plaintiff
3 was at in mediation; right?

4 A. \$650,000.

5 Q. Was there a firm demand?

6 A. A firm demand.

7 Q. And then they had spoken with Jack and there was a
8 note in there. And what did that note say about where the
9 plaintiff might be able to go?

10 A. That they would consider something between three and
11 four hundred thousand.

12 Q. Okay. So -- and I actually kind of want to back up to
13 this too, because this is -- I thought your job was to
14 travel around and go to mediations.

15 A. It is.

16 Q. But you didn't go to this mediation?

17 A. No, because it was up here in South Carolina. I was
18 not allowed to travel.

19 Q. You weren't allowed to -- who -- like are you not
20 legally are not allowed to cross state lines or ---

21 A. We have -- we have -- we have -- we depend on our
22 attorneys up here that if we can't go to a trial or a --
23 excuse me, a mediation, that they have outside adjusters
24 that they can attend -- they can hire to take with them to
25 represent USAA. So that outside adjuster was there as my

1 substitute.

2 Q. But what -- I guess what I'm asking is why wasn't it
3 you if you were the one with all this knowledge about the
4 case?

5 A. Well, I mean, I have the knowledge; but Jack is the
6 one that -- you know, Jack gathers the discovery and Jack
7 gives me his opinions and shares with me the information
8 that I need.

9 So Jack is probably more up to date on the file than I
10 am. So as long as Jack is there with all the necessary
11 information, the mediated case, it's not necessary for me
12 to be there.

13 Q. You wanted to go to this mediation, didn't you?

14 A. I did want to go to this mediation, yes.

15 Q. You asked to go the mediation?

16 A. I did ask to go.

17 Q. And USAA told you no?

18 A. Ron told me I could not go, yes.

19 Q. Because he didn't want USAA to pay for your plane
20 ticket from Tampa to South Carolina?

21 A. He did not see the need for the travel.

22 Q. Okay. So instead, y'all sent some random third-party
23 adjuster that had never worked on the claim prior to
24 getting your assignment; right?

25 A. We sent a third-party adjuster. We did not send a

1 random third-party adjuster. We sent someone that -- I
2 didn't even talk to the adjuster. Jack set all that up.
3 It was someone that Jack was familiar with, that Jack
4 worked with on a regular basis, and someone that he trusted
5 to be present at this mediation in my place.

6 That happens -- I can't possibly attend every
7 mediation that USAA has in central Florida. When I cannot
8 attend a mediation, we hire an outside adjuster. But we
9 know that adjuster. We trust them to do the right thing
10 for us.

11 Q. But you didn't know this adjuster; you had never
12 talked ---

13 A. I did not know ---

14 Q. --- to this adjuster; right?

15 A. --- this adjuster. Jack did.

16 Q. Okay.

17 A. I -- I -- yes.

18 Q. Okay. So you're -- this was one of the biggest files
19 that you had; right?

20 A. Yes. That is correct.

21 Q. In fact, I think you might have testified in your
22 deposition that this was the biggest claim you had?

23 A. This was -- yeah, I believe at that time it was
24 probably the biggest.

25 Q. And that you very rarely, even in your whole eighteen

1 years or so at USAA, that you very rarely have -- you don't
2 handle many cases a year that might involve ---
3 A. I don't, ---
4 Q. --- a million or more dollars?
5 A. --- because I've been in the litigation department.
6 Q. Okay.
7 A. Correct, because of my job doing the mediations.
8 Q. Okay. So this -- so this is -- at the time, this was
9 your biggest file; yes?
10 A. Yes.
11 Q. Okay. And it's actually your kind of job duty at USAA
12 to travel around and attend mediations on their behalf;
13 right?
14 A. Locally in central Florida, yes.
15 Q. And, in fact, I think you testified you do maybe like
16 20 -- like close to 25 a month or so?
17 A. Twenty, twenty-five. It depends on the month.
18 Q. Okay. So basically almost every day you're out doing
19 mediation?
20 A. I work four days a week on -- out doing mediations,
21 generally, yes.
22 Q. Okay.
23 A. One to two a day.
24 Q. And then you tell your boss this is my biggest file
25 and it's my job to do mediations anyway, I want to go to

1 this mediation; right?

2 A. I did tell him that.

3 Q. And he said, I don't want to buy you a plane ticket?

4 A. He told me that he did not see the necessity that I
5 go, that Jack would take -- have the authority, that Jack
6 would do a good job and be able to do it.

7 It's not uncommon for us not to -- for -- the Tampa
8 office handles South Carolina. The Tampa litigation
9 managers do not travel to every South Carolina mediation.
10 It's just not done.

11 Q. And, I mean and so -- I mean ---

12 A. We're always available by phone. I'm always -- like
13 when I send an outside adjuster to a mediation, I'm always
14 available by phone if I'm needed.

15 Q. Do y'all handle Florida cases differently than South
16 Carolina cases?

17 A. No.

18 Q. I mean, it sounds like the people in South Carolina
19 don't quite get the same attention from you and the in-
20 house adjusters as the folks down in Florida.

21 A. That's not true.

22 Q. Okay.

23 A. I am the -- there are a limited number of people like
24 me that attend mediations. I would say somewhere probably
25 in the 10 to 20 in the whole organization. They only have

1 us in the heavy traffic areas. That's why I do central
2 Florida.

3 I don't -- I don't -- I do go -- on occasion, I will
4 go somewhere else. But like when somebody has a mediation
5 in Jacksonville or Pensacola or down in South Florida, I
6 don't typically attend those and neither do they. We hire
7 these outside adjusters that we know and that we trust and
8 that we ---

9 Q. Okay. So they hire an outside adjuster, and you never
10 spoke to that adjuster at any point leading up to the
11 mediation?

12 A. To the best of my recognition, I never -- or
13 recollection, I'm sorry, I never spoke to that outside
14 adjuster.

15 Q. Okay. And did you ever speak to that adjuster after
16 the mediation?

17 A. To the best of my recollection, no.

18 Q. Okay. Now, so you didn't travel up for that, for the
19 mediation. You did, though, travel up to the first trail
20 in this case in Jasper County, right?

21 A. I did.

22 Q. Okay. And, I mean you're not -- insurance adjusters
23 are never a witness in a trial, right, in an underlying --
24 in a car wreck case?

25 A. Correct. Correct.

1 Q. I mean, you didn't travel ---

2 MR. WHELAN: Your Honor, what's the relevance of this
3 line of questioning? I understand ---

4 MR. POULIN: Well, the point that she traveled -- that
5 she didn't travel to the mediation when she would have had
6 a purpose to be there, and that she did travel to ---

7 THE COURT: I'm going to allow the question. Thank
8 you.

9 Q. So you didn't -- you didn't travel to the mediation,
10 but you did travel up to the trial in Jasper; right?

11 A. Correct.

12 Q. Okay. And the mediation, that was a one-day thing?

13 A. Yes.

14 Q. Okay. How long was the trial in Jasper?

15 A. I was only there two days. It lasted three.

16 Q. Okay. So you stayed in a hotel while you were up
17 there?

18 A. Correct.

19 Q. And what was your purpose of being up there at the
20 trial?

21 A. It -- we always send -- on cases -- the higher-value
22 cases, we always send someone to those trials.

23 My manager, Ron Vestal, had passed away by then; and I
24 had a new manager, Katina Tomee. And I went to Katina and
25 I asked her if could please go and attend this trial.

1 Because it was one of my biggest trials.

2 Q. Okay. So USAA always sends an in-house person to
3 their high-value trials; is that what your testimony is?

4 A. Generally. Oh, I should correct that. It's not
5 always. But generally if a litigation manager wants to go
6 to a trial they will let them go on the higher value ones,
7 yes.

8 Q. Okay. Where the ---

9 A. Complex.

10 Q. Where the results of the trial may -- a verdict may
11 result in USAA having to pay money?

12 A. Correct.

13 Q. But when it comes to mediations where it's USAA's
14 opportunity to try to get the case settled, there's no
15 thought given to the value of the case whatsoever in
16 determining who to send?

17 A. There is thought given to the value of the case.

18 Q. But ---

19 A. We've done a mediation with the -- when I go to a
20 mediation, I go with the intent of trying to get that case
21 settled.

22 Q. That's not quite what I'm asking you. And I
23 apologize. That was a bad question.

24 When we're trying to determine whether to send an
25 in-house person to a trial or not, we look at whether it's

1 a big case; right?

2 A. Right.

3 Q. But when we're trying to determine whether to send an
4 in-house person or a third party person to a mediation, we
5 just look at where the mediation is pending and we ignore
6 the size of the case; right?

7 A. We don't do that. That's not correct. You're ---

8 Q. But that's ---

9 MR. WHELAN: Your Honor, he continues to interrupt her
10 while she's answering.

11 MR. POULIN: I'm sorry.

12 MR. WHELAN: I would ask that she be allowed ---

13 MR. POULIN: You're right.

14 MR. WHELAN: --- to finish her answer.

15 MR. POULIN: You're right.

16 THE COURT: Thank you.

17 MR. POULIN: You're right.

18 Q. Go ahead.

19 A. I was not present at the mediation. However, I was
20 available. If Jack at any time had needed me, all he had
21 to do was pick up the phone and make a phone call to me.

22 The outside adjuster -- it's typical. You're making
23 it sound like we're sending somebody that is oblivious to
24 the whole situation. Usually these outside adjusters have
25 been prior adjusters, examiners, litigation managers,

1 sometimes even attorneys. They're knowledgeable people.

2 That's who I sent, is a -- is what Jack told me was a
3 knowledgeable person that would be able to help him make
4 the right decisions.

5 Q. Okay.

6 A. I wasn't at that mediation, but my understanding is
7 that outside adjuster had nothing to do with the downfall
8 of that mediation.

9 Q. Okay. Let me ask you this. That outside adjuster,
10 together with Jack, had authority from you and Ron to offer
11 up to \$250,000; correct?

12 A. They did.

13 Q. They did.

14 Okay. And we know from Jack's mediation report to you
15 that toward the end of the mediation before it broke down
16 Terry's attorney, Kevin Smith, told Jack I think Terry will
17 settle this case for somewhere between three and four
18 hundred thousand dollars; right?

19 A. I don't -- I would have to look at the letter that
20 Jack wrote, because I -- it was my understanding that that
21 statement was made after the mediation had failed,
22 impassed.

23 Q. Okay. Do you know when that -- what's your
24 understanding of when that statement was made?

25 A. It's -- it's my understanding that y'all were at 650,

1 our last offer was 200.

2 It's not uncommon, when you're \$450,000 apart, that
3 the case impasses. And it's also my understanding that
4 that was the mediator's decision, that because the two
5 sides couldn't communicate, that the mediator decided it
6 should just impasse.

7 It's my understanding -- I don't know that it's
8 correct -- I would have to re-look at that letter, but I
9 thought that that three to four hundred offer was something
10 that was just discussed afterwards, it wasn't in the realm
11 of the mediation.

12 Q. Okay. So ---

13 A. I could be wrong.

14 Q. Okay. Well, let's assume that it was discussed
15 afterwards. So it's your recollection, then, that when
16 everybody left mediation, USAA was at 200,000 and Terry and
17 Kevin Smith were way up to 650; right, that's your current
18 recollection?

19 A. My current recollection, yes.

20 Q. Okay. And then we know it's at least at some point
21 thereafter, Terry's attorney approached Jack and said, we
22 might be willing to move down a little bit; in fact, it
23 sounds like he said they might be willing to move down
24 almost \$300,000, right?

25 A. And let me just say this. I don't recall if Jack had

1 the direct conversation with -- with Mr. Willey or Mr.
2 Smith. I don't know if that came through the mediator
3 or -- I just want to preface that so you don't
4 misunderstand.

5 Q. I understand that completely. What I'm trying to get
6 at ---

7 A. Yes, I understood that there was the potential to
8 settle this claim between three and four hundred.

9 Q. Okay. So ---

10 A. I only had authority to 250.

11 Q. So Terry had moved down from six something, six-fifty,
12 all the way down to three hundred; right?

13 A. Yeah -- well, we ---

14 Q. Potentially?

15 A. The theory is that she moved down to 350, which is the
16 midpoint.

17 Q. Okay, well, she said somewhere between three and four?

18 A. Three and four.

19 Q. Okay.

20 A. Which typically in mediation world is 350.

21 Q. Okay. So ---

22 A. It's a bracket.

23 Q. So she moved down \$300,000?

24 A. Yes.

25 Q. How far -- how far did USAA move up from 200,000?

1 A. We did not move up.

2 Q. So you -- so you had the authority to go up to 250?
3 Yes?

4 A. If they had demanded 250, I would have -- we would
5 have offered the 250. They did not demand 250.

6 Q. You had the authority to offer 250?

7 A. I had the authority to offer 250.

8 Q. You offered 200; they said that we want 650. Right?

9 A. Correct.

10 Q. And then they, in good faith, jumped all the way down
11 to 350, 300,000 drop in their demands; right?

12 A. Yes.

13 Q. And you don't go up one penny?

14 A. We did not go up, no.

15 Q. Even though you had the money available and authorized
16 to offer?

17 A. We made a decision not to increase our offer at that
18 time. That is correct.

19 Q. Okay. All right. Now, this was also the first claim
20 that you ever handled in South Carolina, to your
21 recollection; is that right?

22 A. No. I did not say that. I believe what I said in my
23 deposition was that when I was a claims adjuster I may
24 have -- I may have handled some South Carolina claims.

25 The Tampa office does the whole southeast region,

1 which includes South Carolina. I believe I handled claims
2 in South Carolina at some point in time, but it was not any
3 length of time.

4 This was, I believe, the first South Carolina claim I
5 took as a litigation manager.

6 Q. Okay.

7 A. And I believe I only had three or four, ---

8 Q. Okay.

9 A. --- at best, if I had that many. I don't know.

10 Q. As a litigation manager?

11 A. As a litigation manager.

12 Q. This was the first one in South Carolina ---

13 A. I believe ---

14 Q. --- as a litigation manager?

15 A. --- it was my first one in South -- I believe it was
16 my first one. I'm not sure.

17 Q. Okay. And even over your full 24-year career there,
18 you had only handled - and it was your words - relatively
19 few cases in South Carolina; right?

20 A. Right. Because I've always been a Florida adjuster.

21 Q. And you admitted in your deposition that you're not
22 familiar with South Carolina law?

23 A. That is correct.

24 Q. Okay. So going back -- or moving forward. The amount
25 of money that you make every year personally, in pay, is

1 related to the amount of money you pay out in claims every
2 year; isn't it?

3 A. That is not correct.

4 Q. Okay. You receive a base salary?

5 A. I receive a base salary.

6 Q. Then you receive a Christmas bonus?

7 A. Correct.

8 Q. Which is based on it being Christmas, presumably;
9 right?

10 A. It is our end-of-the-year bonus.

11 Q. Okay. And that's the same amount every year?

12 A. Two weeks.

13 Q. Okay. And then you receive only one other form of pay
14 from USAA, right; and that's a different bonus?

15 A. Yes.

16 Q. Okay. And so that other bonus is based on the
17 profitability of the company; correct?

18 A. No. I'm not -- that is not correct.

19 Q. That is what you testified to ---

20 A. I ---

21 Q. --- in your deposition.

22 A. I -- because -- and, yes, I did; and I was mistaken.

23 Q. Okay.

24 A. I asked later to have that clarified to me. And I
25 understand that -- and I know this, and I agree that I gave

1 you incorrect information during that deposition.

2 Every year they do -- there's -- we have an employee
3 meeting about two weeks before bonus time. That employee
4 goes -- that employee meeting goes over everything that
5 USAA has done for the year. There's four categories. And
6 don't ask me to explain the four categories, because I
7 don't remember. But it's -- it has things to do with
8 member retention, member satisfaction, productivity, that
9 kind of stuff. And we are scored on each of those areas.
10 And depending on what we're scored in those areas, we get a
11 percentage of our annual income. And that's just our base
12 salary.

13 So if my base salary is - and it's not - \$100,000, we
14 got a 14.8 percent bonus this year, so I -- that person
15 that making 100,000 would get 14.8 percent of 100,000.

16 Q. Okay. So you're graded on a bunch of different
17 factors?

18 A. We are graded -- right. And it all has to do with the
19 membership. We -- everything we do at USAA is based on our
20 membership. It's all about the entire membership, not one
21 individual.

22 Q. Okay. What -- so what are all the factors that you're
23 graded on?

24 A. I don't -- I just told you I don't remember. There's
25 four categories. They go over them. And they bring in a

1 special speaker. The special speaker goes over them and
2 tells us what our annual bonus is.

3 Q. Okay.

4 A. Do you want -- I mean I listen to it.

5 Q. Okay.

6 A. You know, but it's generally a long meeting. So I'm
7 usually working and listening to it.

8 Q. Okay. So when we took your deposition, you were --
9 for the last 20-something years you've been getting paid a
10 bonus from USAA, yes?

11 A. Yes.

12 Q. Okay. Outside of the Christmas bonus?

13 A. Well, yeah -- yes.

14 Q. Okay. And you, I guess, never took the time to try to
15 understand how your bonus was calculated so that you could
16 try to make more money the next year?

17 A. No.

18 Q. So for ---

19 A. Because -- because it's a flat -- I've been there 24
20 years. That the bonus structure has changed over the
21 years. It's getting ready to change again. It used to be
22 based on performance years ago, and then they decided that
23 they would do it more on everybody -- an across the board.
24 And that's when they went to the percentage.

25 I did say in my deposition that I thought it was based

1 on our profits, but I was incorrect.

2 And, no, I obviously don't care enough to go and look.
3 You know, I get -- I love my job. I get up every morning
4 and I love to go to work. I'm one of those weird people
5 that just love what I do. I don't pay attention to annual
6 reports or income or any of that. I just don't.

7 I was incorrect, and I'll be the first one to admit
8 that I said it was based on our income and it wasn't.

9 Q. And we took your deposition -- it wasn't too Terrybly
10 long ago, was it; it was maybe the last ---

11 A. A couple of months ago, maybe.

12 Q. Yeah. Okay.

13 A. I don't know. I don't remember that, either.

14 Q. So at least as of -- up to the time that we took your
15 deposition you were under the impression that your bonus
16 was based on the profitability of the company; right?

17 A. I did think that, yes.

18 Q. Okay. And that's the assumption that you -- okay.
19 All right. Let's -- I really want to start moving through
20 some of this.

21 Does the current bonus structure give you any points
22 or grade you in any way on the amount of claims that you
23 pay?

24 A. No. No, we have -- we have quarterly reviews that the
25 manager goes over all our stats, talks about what -- you

1 know, what we -- what we do for our job, how well we do it,
2 and that kind of thing. It doesn't have anything to do
3 with how much I pay.

4 Matter of fact, I don't even know that my -- well, I
5 guess my manager does know what my disposition is. I think
6 there's a report on that. I don't know.

7 Q. There -- you're pretty certain there's a report that
8 your manager can run to ---

9 A. There's --

10 Q. --- tell how much money you're paying; right?

11 A. I know that the report has a lot of different
12 information. I can't say that it has that. I'm just -- I
13 shouldn't even have said it, but -- but they don't go
14 comparing, oh, Kathy had, you know, 100 claims and she paid
15 out this much money. That's not how I'm graded.

16 Q. All right. So you talked earlier about all this other
17 evidence you had that you thought was stronger than
18 science. We talked about the police report, which we beat
19 to death; so we're not going to go back into that. You
20 talked about then some statements, witness statements. You
21 had a witness statement from Mr. Kuck; right?

22 A. I believe there was one -- I believe there was -- the
23 best of my recollection, yes.

24 Q. Okay.

25 A. I can't say definitively.

1 Q. The guy in the -- the guy in the third car that
2 Terry ---

3 A. I know who he is, but that -- if there is a recorded
4 statement in the file, it would have been taken by the
5 claims adjuster and I would have reviewed it.

6 MR. WHELAN: Your Honor, can we approach again?

7 [Whereupon, Plaintiff's Exhibit Number 9, transcript,
8 is marked for identification by the court reporter]

9 THE COURT REPORTER: Plaintiff's Number 9, transcript,
10 marked for identification.

11 MR. POULIN: Thank you.

12 [Whereupon, an off-the-record bench conference is held
13 6/26/19, 5:20 p.m.]

14 Q. I just want to show you what has been marked as
15 Plaintiff's Exhibit Number 9.

16 [Whereupon, the witness reviews documents]

17 Q. Have you -- Ms. Moats, have you ever seen that
18 document before?

19 A. I don't remember.

20 Q. Okay. If you haven't seen that specific document
21 before, were you ever aware of this statement that Mr. Kuck
22 gave?

23 A. I am aware of that statement, yes.

24 Q. Okay. I would like to give you a minute, and not to
25 read out loud to the jury but just to skim through it and

1 so that you can confirm or deny for me that you were aware
2 of the information that's contained in that statement.

3 [Whereupon, the witness reviews documents]

4 A. Yes, I can't say I ever saw this statement. But, yes,
5 I am aware of that -- of what he said in that statement.

6 Q. Okay. And in that statement isn't it true that he
7 said, all I seen was headlights coming at me?

8 A. That's what he said in that statement.

9 Q. Okay. And that's information you had all along when
10 you were ---

11 A. It was.

12 Q. --- making your evaluation? Okay.

13 A. But -- but I also had information that Mr. Kuck's
14 original statement was that he did not see any headlights.
15 My understanding is that Mr. Kuck made this statement when
16 he was on medication. And then I understand that he went
17 back and changed his statement to say that he did not see
18 headlights again.

19 Q. Right. After he found out Terry had a million-dollar
20 policy and decided to sue her, his statement changed;
21 right?

22 MR. WHELAN: Objection, Your Honor.

23 A. The initial -- his statement ---

24 MR. WHELAN: Mischaracterization.

25 A. --- changed back to his initial -- his initial

1 statement. This was his recorded statement when he says he
2 was on medication. That is what I knew about his
3 statement.

4 Q. This statement was taken November 12, 2014? Yes? Is
5 that what it says on it?

6 A. That is correct.

7 Q. Okay. And this represented November of 2014. So this
8 was his initial statement?

9 A. No, this -- that's not my understanding. My
10 understanding that -- that before he went to the hospital
11 he made an initial statement that her headlights were not
12 on, he did not see headlights; he goes to the hospital,
13 he's on medication, and he gives this statement. That's my
14 understanding.

15 Q. What is your understanding of who he gave that initial
16 statement to?

17 A. Well, it says Soleta Roberts. I mean, I didn't
18 remember that at the time -- or Soleta Cooper, at Geico.

19 Q. You believe he called Geico and gave a recorded
20 statement at the scene of the accident before he went to
21 the hospital?

22 A. You're confusing me. No, it's my -- it's my -- I'm
23 telling you what my understanding of his statement is. At
24 the scene of the accident he said that she did not have
25 headlights on.

1 Q. Who is -- it's your understanding that he said that to
2 who?

3 A. To the police officer, I -- to the best of my
4 recollection.

5 Q. And where does your understanding of that come from?

6 A. I -- I would have to say Jack Daniel. I don't
7 remember right offhand.

8 But I -- but I recall specific discussions that there
9 were three statements made. And there were -- there were
10 three statements made by Mr. Kuck. He's the only one that
11 changed his testimony. The others did not change their
12 testimony. They all agreed that she had no headlights on.

13 Q. Well, that's not true at all; is it? The person that
14 says that she passed him, the magistrate judge that we've
15 been hearing all ---

16 A. That she had -- he thought she had parking lights on.

17 Q. Lights. So he didn't say she didn't have any lights
18 on; he said he thought she had ---

19 A. Headlights.

20 Q. --- parking lights -- he ---

21 A. He said she did not have headlights on.

22 Q. He said that she -- he thought she had parking lights
23 on?

24 A. Parking lights.

25 Q. Okay. And then there was another witness that you

1 relied on that said they didn't know whether her lights on
2 or not -- were on or not because they just didn't see it,
3 their view was obscured; right?

4 A. I don't know what witness you're talking about.

5 Q. Okay. And then you've got Mr. Johnson, who is the one
6 that ran the stop sign; and he says, I didn't see her
7 lights. Obviously, right?

8 A. [No response]

9 Q. I mean, he --- Mr. Johnson ---

10 A. He said he didn't see her ---

11 Q. --- I'll concede ---

12 A. He said he didn't see her because she didn't have
13 headlights on.

14 Q. Okay. And you also had evidence that Mr. Johnson was
15 on his phone at the time of the wreck; right?

16 A. I -- nobody ever proved that to me. I heard the
17 evidence in the trial. I did hear his testimony. Yes, he
18 did have a lot of conversation that day or texts or what-
19 have-you. But nobody ever definitively proved to me that
20 that kid was on the phone.

21 Q. Okay. Well, if he was on the phone -- I mean, you saw
22 all the text messages in the -- in the -- the ---

23 A. I saw all that, yes.

24 MR. WHELAN: Your Honor, I -- I -- I object. Can we
25 approach real quick?

1 THE COURT: Uh-huh.

2 [Whereupon, an off-the-record bench conference is held
3 6/26/19, 5:27 p.m.]

4 Q. All right. So going back to my question. And even
5 way back before the mediation, in discovery in that case
6 you were produced with a whole list of text messages and
7 phone calls that Mr. Johnson had made around the time of
8 the wreck?

9 A. I do not recall that information.

10 Q. Okay. So if your file shows that there was discovery
11 exchanged prior to the mediation, showing all these texts
12 and phone calls, you just don't recall reviewing that?

13 A. I don't recall. I would be telling you a lie if I
14 said I recalled it. I don't recall.

15 Q. Okay. And you would agree with me that if a driver is
16 on -- texting or talking on their cell phone at the time
17 that they approach a stop sign, that might be a reason why
18 they wouldn't see the stop sign and would go through it;
19 right?

20 A. If they were doing that at the time of the stop sign.
21 But nobody ever proved to me that the kid did that.

22 Q. I'm just -- I'm going to agree with you on one thing,
23 okay. I'm going to agree with you that if I am at a stop
24 sign and I look to my left and I look to my right and
25 there's a car with no headlights on, that might make it --

1 that might make it more difficult for me to see the car and
2 that might explain why I might pull out in front of them,
3 okay, that is a -- that is one possibility that makes
4 logical sense.

5 A. Yes.

6 Q. Okay. Now I'm asking you to agree with me that
7 another possibility that makes logical sense is that the
8 reason a person might disregard a stop sign and pull out in
9 front of another car is because they were texting on their
10 phone?

11 A. That could be a reason.

12 Q. Okay.

13 MR. WHELAN: Your Honor, I again I am going to renew
14 my relevance objection on this based on what was known at
15 the time. There's no evidence this was known at the time,
16 and I don't believe that ---

17 THE COURT: I think he's asked her that question. She
18 says she does not know.

19 So move on to your next question, please.

20 MR. POULIN: Okay.

21 Q. So -- all right. So you -- did you ever hire another
22 expert to look at Woody Poplin's report and give you an
23 idea about whether he did his science right or not?

24 A. We did hire someone to look at Woody Poplin's report,
25 yes.

1 Q. A man named Mr. Black?

2 A. That is correct.

3 Q. And he told you that Woody did his test right?

4 A. He told us that Woody did his test right, based on
5 what he looked at, to determine that her lights were on
6 high beams.

7 Q. Okay. And you disregarded that too, in your
8 evaluation?

9 A. I -- I took it into account. Obviously, I took
10 everything into account or we wouldn't have raised the
11 reserve to \$250,000.

12 Q. Okay. So that -- the \$250,000 was based on everything
13 that you took into account?

14 A. Everything that I looked at. Every piece of evidence
15 that I looked at. When we go to trial, you don't know
16 what's going to happen in trial; so you look at what the
17 best day could be for you and what the worse day could be
18 for you.

19 Q. And after taking everything into account and trying to
20 determine what would happen at the trial of the case,
21 determining that \$250,000 was the reasonable amount, USAA
22 never offered it?

23 A. No, we did not offer it.

24 MR. POULIN: That's all I have for you. Thank you,
25 Ms. Moats. I'm sorry that took a while. But I'm going to

1 turn you over to Mr. Whelan.

2 THE COURT: Let me have y'all approach just a minute.

3 [Whereupon, an off-the-record bench conference is held
4 6/26/19, 5:31 p.m.]

5 THE COURT: Okay. Ladies and gentlemen, it's usually
6 not our preference to stop a case in the middle of a
7 witness. You've only heard part of the testimony through
8 direct examination. Of course, Mr. Whelan has not had a
9 chance to ask any questions of this witness. But it's
10 5:32, and I'm starving. And if I'm hungry, then I imagine
11 you guys might be getting hungry, too. And I know you have
12 other family obligations. We're going to go ahead and
13 break now.

14 Again, please don't begin discussing the case. I
15 think I told you at the beginning you'll hear part of the
16 testimony, we'll take a break.

17 There's a reason we ask you not to begin deliberating
18 or not to form any particular opinion about a case until
19 you've heard all the testimony and all of the evidence. So
20 I'm going to ask you to be true to that oath now and do not
21 discuss this case with anyone overnight.

22 If you will please be here at 9:30. I'm going to ask
23 the attorneys to be here at nine o'clock. So if there's
24 any issues hopefully we can take those up before you have
25 to sit back in the jury room.

1 We're going to try to make the best use of your time
2 that we possibly can. Have a good evening. Thank you.

3 [Whereupon, the jury exits the courtroom 6/26/19, 5:33
4 p.m.]

5 THE COURT: Okay. Ladies and gentlemen, if I can ask
6 y'all to be here at 9:00 a.m. so we can -- and everybody's
7 local, are they not?

8 MR. WHELAN: We are.

9 THE COURT: So that if there's anything we need to
10 discuss before we bring the jury in.

11 I'd really like to finish this case tomorrow. I'm
12 starting to despair of that fact occurring. I mean, if we
13 need to go into Friday, certainly we'll go into Friday.

14 You all have Julie's email. You have my email as
15 well. If you send anything to Julie, if you will please
16 copy me on it as well.

17 All right. And we'll see you at nine o'clock.

18 MR. WHELAN: Thank you, Your Honor.

19 MR. WILLEY: Your Honor, before we do break, he
20 brought up some witnesses for tomorrow.

21 THE COURT: Yes.

22 MR. WILLEY: And, of course, that can be cured if he'd
23 like to talk to them tonight. I mean, I don't think that
24 he's entitled to his deposition. He's admitted discovery
25 was cut short, et cetera.

1 It's no surprise to anybody that the underlying
2 attorneys and the underlying expert whose report is the
3 subject --- or witnesses in the trial.

4 And in any event, we could call them in rebuttal
5 without ever having to listen to them. So the issue of
6 that is kind of moot. I

7 But what I'm saying as a courtesy is if he'd like to
8 talk, I know we can at least make Mr. Smith available, you
9 know, this evening. I'd have to talk to Mr. Poplin about
10 his obligations. I don't know if he has family obligations
11 or not. So just ---

12 THE COURT: Mr. Whelan?

13 MR. WHELAN: Well, I think it's -- I think we have a
14 lot of work to do tonight. I would rather not add a
15 deposition -- or two depositions to that load.

16 THE COURT: Well, I mean but you listed Mr. Smith as a
17 witness?

18 MR. WHELAN: I did not, Your Honor. I did not.

19 MR. WILLEY: I don't know -- my point is I don't know
20 the answer to that without -- I mean, there's 300 discovery
21 documents. I know he listed Jack.

22 THE COURT: Well, I mean ---

23 MR. WILLEY: He then asked me ---

24 THE COURT: --- the witness list is fairly important
25 in the greater scheme of things. And I thought you

1 indicated earlier that he had listed him as a witness and
2 that you had not.

3 MR. WILLEY: Well, he at least asked me to take Mr.
4 Smith's deposition and if I would help coordinate it. And
5 I said, I'm not Mr. Smith's attorney, you'll need to
6 coordinate it through him. And that was ---

7 THE COURT: Now what you told me earlier was that you
8 said that he was his witness, he was not your witness, and
9 so you were not going to coordinate that.

10 MR. WILLEY: No. He said -- well, I mean, there's two
11 things. There was an email where he ---

12 THE COURT: Well, what you told me earlier today was
13 that you declined to set that up because he was not your
14 witness, he was Mr. Whelan's witness. That was what I
15 understood you said earlier today.

16 MR. WILLEY: Well, perhaps I misspoke. I don't know
17 whose witness he was. What I do know is that he asked me
18 to take his deposition. So at that time, he knew he was a
19 witness in the case.

20 I said, I'm not his attorney, you will need to set the
21 deposition up through him, we will attend. And I have the
22 emails to that effect.

23 So as early as that, he knew he was a witness in the
24 case. I don't know sitting here, without going through it
25 all, whether or not there's ever been a formal discovery.

1 But in any event, we would have the opportunity to call Mr.
2 Smith in rebuttal without ever having disclosed to him.

3 So there's no issue on disclosure -- and Mr. Poulin,
4 frankly. I mean, both of them I suspect will be subject to
5 call in rebuttal. So, you know, the issue -- the issue is
6 really moot.

7 What I'm doing is more or less offering a courtesy
8 that I know I can make Mr. Smith available tonight if he'd
9 like to talk to him.

10 I mean, obviously, we know what he's going to talk
11 about. He's going to talk about what happened in the
12 underlying case, what information he provided, what offers
13 were made, et cetera. It's not a surprise to anyone.

14 But I just wanted to make that offer before we get
15 here tomorrow and it's too late to do it.

16 MR. WHELAN: Your Honor, you're right he did tell you
17 that I listed him as a witness earlier.

18 MR. WILLEY: Well, then I misspoke. Fine ---

19 MR. WHELAN: And you did. Because I never listed him
20 as a witness.

21 I did ask Mr. Willey about scheduling Mr. Smith's
22 deposition and Mr. Hood's deposition. And Mr. Willey said,
23 I'll get back to you on Mr. Hood's depositions dates.
24 Which he never did.

25 But, you know, that's a -- you know, if we -- move

1 forward with the trial.

2 And then with Kevin Smith's, he says: I don't
3 represent Kevin. I haven't list him him as a witness. You
4 can reach out to him directly to schedule it.

5 So he had him -- listed him as a witness. He has him
6 in the discovery. He told me in an email he has him listed
7 as a witness. If he had -- he identified him on his
8 pretrial brief, said at 9:30 on Monday night, when we're up
9 for trial on Tuesday morning.

10 Had he disclosed Mr. Smith as a witness, we would have
11 said we needed his deposition before this trial began. And
12 now Mr. Willey just told you what he's going to testify to,
13 which includes et cetera. So ---

14 MR. WILLEY: Your Honor, let me -- let me clear up a
15 few things. On February 18th what I said to him is: We do
16 not represent Mr. Smith, have not listed him as a witness.
17 Please reach out to him directly. Let us know when y'all
18 have overlapping dates that work. Thanks.

19 He never reached out to him to set it up. What he's
20 trying to do now is hide the ball. We listed him on a
21 pretrial brief that was sent prior to this trial. It was
22 never ---

23 THE COURT: On Monday night?

24 MR. WILLEY: Well, at the very least. But at the very
25 least.

1 I don't know -- I'm not representing one way or the
2 other, because I don't know without looking at the
3 discovery one way or the other. But what I'm saying is it
4 doesn't matter because in any event we could call him
5 without disclosure.

6 It's not required, first of all. Second of all, he
7 was listed on the pretrial brief. And I think in the
8 essence of fairness, if he had a problem with those two
9 witnesses at that time, with Mr. Smith and Mr. Poplin,
10 knowing that this case was about Mr. Poplin's report and
11 knowing that this case was about Mr. Smith's interactions
12 with USAA, he should have raised those at the pretrial
13 phase so that two things could have happened. We could
14 have remedied it sooner than the night before we intend to
15 call the witnesses. He just raises today, when they were
16 listed. You read them out to the jury as witnesses in the
17 case that would be called. You know, it's extremely ---

18 THE COURT: I don't think they were showing as
19 witnesses. It just said you need to ask the jury if they
20 have any relationship with the following people. I don't
21 think it specifically referred to them as witnesses was --
22 in the voir dire.

23 MR. WILLEY: Well ---

24 THE COURT: But at any rate -- I mean you indicated he
25 was not on your witness list.

1 MR. WILLEY: He is in our -- part of our email. I
2 don't ---

3 MR. WHELAN: He was on their ---

4 MR. WILLEY: --- understand what you mean ---

5 MR. WHELAN: He was on their witness list that was
6 emailed to us at 9:30 p.m. on Monday night at the ---

7 THE COURT: As part of the pretrial brief?

8 MR. WHELAN: Correct. Which is not before ---

9 MR. WILLEY: But and that ---

10 THE COURT: The voir dire just says do you have any
11 association with the following people. It doesn't
12 necessarily say who were witnesses and who were just
13 involved in the underlying case.

14 MR. WILLEY: But he's never raised it.

15 THE COURT: Well, I mean so he didn't raise it
16 yesterday morning? I mean ---

17 MR. WILLEY: Well, during ---

18 THE COURT: I mean, that would have been the earliest
19 for him to raise it.

20 MR. WILLEY: During the motions in limine the
21 appropriate time, just like I raised with his exhibits, he
22 listed certain exhibits, Jack Daniel's letters, et cetera,
23 I raised objections to those. Because once you ---

24 THE COURT: If you are able to make him available to
25 Mr. Whelan, I am going to say before seven o'clock this

1 evening, then we'll discuss it in the morning.

2 MR. WHELAN: Okay.

3 THE COURT: Mr. Poplin, I -- I mean, I can't expect
4 him to now interview two different witnesses this evening.
5 If you can make Mr. Smith available before seven o'clock
6 this evening for him to discuss with him, then I'll
7 consider that in the morning.

8 MR. WHELAN: Okay.

9 MR. WILLEY: He's available. Would you like to do it
10 in person or via phone?

11 MR. WHELAN: I have no idea - it is 5:41 - how I am
12 going to get a court report to transcribe a statement and
13 give me a transcript back. And especially when -- he
14 hasn't -- I mean he didn't disclose him as a witness. He
15 hasn't said what he's going to testify about.

16 MR. WILLEY: I have. I just said what's he's going to
17 testify about.

18 MR. WHELAN: You said et cetera. And I know better
19 than to not push you. I'd like to -- if Your Honor is
20 going to consider it, then ---

21 MR. WILLEY: Your Honor, just so we're clear. In the
22 pretrial brief it does explicitly say plaintiff's proposed
23 witnesses, and both of those individuals are listed there.

24 THE COURT: I understand. But you were talking about
25 the voir dire.

1 MR. WILLEY: Right.

2 THE COURT: That's my ruling.

3 MR. WILLEY: Okay. He's available.

4 THE COURT: Thank you.

5 MR. WHELAN: Can I ---

6 MR. WILLEY: Let us know when you want to talk to
7 him ---

8 MR. WHELAN: Can I ask that Mr. Willey tell me the
9 specific topics that he's going to testify about?

10 THE COURT: Well, I mean, I think we can take a pretty
11 good guess.

12 But, Mr. Willey, yes, sir?

13 MR. WILLEY: Right. I think I just listed them. I
14 mean, as to Mr. Smith or Mr. Poplin? Both?

15 THE COURT: As to Mr. Smith.

16 MR. WILLEY: Okay. As to Mr. Smith, he's going to
17 testify about what happened in the underlying case: So his
18 actions. The actions of USAA in the underlying cases as
19 counsel for Ms. Hood. What happened, obviously, at the
20 mediation. When he provided certain information to USAA
21 about the underlying claim.

22 MR. POULIN: And that's basically just cover -- color
23 in the timeline. And also negotiations. I mean,
24 obviously, ---

25 MR. WILLEY: Right.

1 MR. POULIN: --- he'll testify as ---

2 MR. WILLEY: As Ms. Hood testified, he -- she gave him
3 certain authority. He was responsible for the back-and-
4 forth negotiations. So obviously all those underlying acts
5 that he took, he'll testify to with respect to negotiations
6 and communication with USAA.

7 MR. WHELAN: Well, they're saying that he's going to
8 testify as to what happened in the underlying case. So,
9 essentially, he's going to testify about everything that
10 this whole trial is about.

11 THE COURT: No, nothing ---

12 MR. WILLEY: No.

13 THE COURT: Nothing after mediation.

14 MR. WHELAN: Right.

15 MR. WILLEY: Right.

16 MR. WHELAN: But everything that this -- that this
17 case is about, every single issue, every single subject, I
18 mean I'd ask -- we have -- he didn't provide this
19 information to USAA. He provided information to Jack
20 Daniel. Jack Daniel provided information to USAA. And he
21 said that the evaluation, USAA's evaluation, is based on
22 what it knew. What it knew came from Jack Daniel, not from
23 Kevin Smith.

24 MR. WILLEY: Again, Jack Daniel is USAA. He is their
25 agent. So anything he didn't pass along obviously would be

1 an issue.

2 They're -- it's not a surprise. They know what the
3 discovery was in the underlying case. That's what Mr.
4 Smith provided. They have a pretty detailed report about
5 what happened at mediation in the underlying case.

6 THE COURT: And just to be clear, Mr. Poplin I'm not
7 allowing to testify. You said you don't know that he can
8 even be made available today. We've got his report. I'm
9 not allowing -- he's not been listed as a witness by either
10 party, so I am not allowing him as a live witness.

11 MR. WHELAN: Thank you.

12 THE COURT: All right. Thank you.

13 MR. WILLEY: And so that's -- just to be clear, that's
14 the extent of my obligation is to provide him those topics?
15 I don't want ---

16 MR. POULIN: And to make him available.

17 THE COURT: And to make Mr. Smith available.

18 MR. WILLEY: He is.

19 THE COURT: Yes, sir.

20 MR. WILLEY: Yes. I just want to get -- how do you
21 want him made available?

22 MR. WHELAN: I don't know. I've got to find a court
23 reporter ---

24 MR. WILLEY: You don't need a court reporter to
25 interview him. He's an officer of the court. He's not

1 going to come in tomorrow and lie.

2 [Whereupon, the jury trial adjourns 6/26/19, 5:45
3 p.m.]

4 [Whereupon, resume trial 6/27/19, 9:07 a.m.]

5 THE COURT: All right. What have we got this morning?
6 Anything to discuss?

7 MR. WHELAN: A couple of things. One housekeeping
8 thing. Your Honor, I wanted if you might inform the jury
9 that Ms. Mellen is not here, to attend a personal
10 obligations.

11 THE COURT: Sure.

12 MR. WHELAN: And the other thing is -- oh, I did want
13 to put on the record we had a conference at the bar
14 yesterday during Ms. Moats' testimony concerning the
15 plaintiffs opening the door to her -- to Mrs. Hood's trial
16 testimony yet again by the claim that there was just one
17 true set of facts and then misstating the facts. So I
18 wanted to just make that comment for the record.

19 And, you know, I also wanted -- I did want to inform
20 Your Honor that we did depose Mr. Smith last night. We
21 were able to get a court reporter, took the deposition at
22 7:00. I think I went about an hour.

23 Obviously, I couldn't go into all the things that I
24 would like to go into just because of time issues. But I
25 asked him about the negotiations which I understand to be

1 the primary reason that they listed him.

2 I did want to ask that Your Honor exclude a few things
3 that he talked about, a few topics that I just discussed
4 over the phone with him. And would this be an appropriate
5 time to raise that?

6 THE COURT: I think so.

7 MR. WHELAN: Okay. And first, let me say, Your Honor,
8 that I still object to this witness testifying at all, due
9 to -- due to the fact that he was not listed as witness.

10 Mr. Willey has had the chance to review his discovery
11 responses. And I'm sure he'll agree with me that Kevin
12 Smith was not listed as a witness and we were not notified
13 that he would be a witness until 9:30 the night before
14 trial.

15 If Your Honor allows him to testify, one thing that
16 Mr. Smith talked about was he talked to the liability
17 adjuster, Missy Hammiller, before he even filed the suit and
18 Ms. Howard said something like he needed to file suit. And
19 that is irrelevant. And one reason it is, is because there
20 is no duty on the underinsured motorist carrier before the
21 suit is filed. And the other -- the other thing is that of
22 course they have a obligation to file the suit, and so it's
23 not relevant if she said they needed to file for the suit.
24 So I'd ask that that testimony be excluded, Your Honor,
25 first.

1 THE COURT: Well, I mean, the --- the duty of good
2 faith and fair dealing kicks in whether you file a lawsuit
3 or you don't file a lawsuit. I mean, the UIM carrier could
4 settle with you without you actually filing suit. But you
5 can't not file suit against the other driver and then also
6 make a claim for bad faith. So I --

7 Mr. Willey, do you want to respond to that?

8 MR. WILLEY: No. I agree with Your Honor. And, in
9 fact, UIM cases resolve all the time prior to suit being
10 filed. And sometimes we have to -- we resolve cases with
11 UIM carriers and have to file suit just for purposes of
12 getting the liability that had to pay first.

13 So I agree with you. I think the duty is beyond that.
14 It's just a question of when you can actually file that
15 base suit.

16 MR. WHELAN: Well, actually ---

17 THE COURT: Now, I mean there's also case law that
18 says the insurance company -- it's not -- it's not per se
19 bad faith because you require a lawsuit to be filed and you
20 require it to go to a jury. But the duty of bad -- the
21 duty to act in good faith is there whether you file a
22 lawsuit or not.

23 MR. WHELAN: I don't think that's what Meyers and
24 Snyder say. They say that the duty arises -- I think
25 they -- I think one of the cases may say no later than when

1 the lawsuit is filed. But they talk about the duty
2 existing when the lawsuit is filed. And I know that's the
3 federal case law we cited earlier this week. But I do
4 think that's ---

5 THE COURT: I can't possibly imagine that an insurance
6 company has no duty to act in good faith until such time as
7 a lawsuit gets filed.

8 I mean I think that the duties -- by virtue of the
9 fact that they're the insurance company and you're the
10 insured, whether you ever file a lawsuit or not, it's
11 just -- you can't bring a bad faith case and say, well,
12 they never settled the case with us, never offered us any
13 money, unless you have then gone and filed and instituted
14 the lawsuit against the underinsured motorist.

15 But, I mean I think the duty applies the entire time
16 by virtue of the fact that you're the insurance company,
17 you've got that duty to act in good faith.

18 I mean I don't think it's a huge issue in the case.
19 But I do think that it's relevant.

20 MR. WHELAN: But it doesn't go to the conduct in
21 the -- you know, the failure to offer the limits in the
22 mediations. I mean, this is so far before that. This is
23 back in 2014. So they're complaining about a failure to
24 offer limits in a mediation. There's no UIM claim even
25 open because they haven't filed suit -- actually, I'm

1 not -- I'm not sure if that's -- if that's true or not.

2 But -- because I don't know when he talked to Missy Howard.

3 But regardless, their -- their position that we had a
4 duty to offer \$250,000 at mediation, what she said back
5 over two years before in 2014, that you need to file a
6 lawsuit, which is the -- that's true. It's just -- it's
7 just not relevant, and it's prejudicial.

8 And one other thing I'd say is this gets back to the
9 argument we made at summary judgment, which is there's not
10 just a good faith duty in the air; there has to be a good
11 faith duty to do something.

12 And there is -- there is no good faith -- I think
13 Meyers and Snyder talk about the duty of good faith to
14 evaluation a claim, or whatever, starts after the lawsuit
15 is filed. So that's our only comment.

16 THE COURT: I think it's a relevant question.

17 MR. WHELAN: Your Honor, they also, I believe, seek to
18 get in the Kuck complaint and the Kuck answer through Mr.
19 Smith. And that is also irrelevant because here the Kuck
20 complaint was filed against Ms. Hood, USAA hired an
21 attorney to represent Ms. Hood, the attorney answered for
22 Ms. Hood, who said her lights were off, and it's signed by
23 attorney for Ms. Hood.

24 And the law in South Carolina is very clear that the
25 attorney, Chris Nickels, was acting for Ms. Hood. He is

1 her attorney. He is not USAA's attorney. So it's
2 irrelevant and it's -- I mean, they're trying to -- they
3 are trying to make it go to disparate positions. And what
4 they're arguing to the jury is it is improper to do
5 something required by the law, which is retain an attorney,
6 pay for an attorney to represent the insured, and then the
7 attorney fulfills his ethical obligations for taking Ms.
8 Hood's position, you know, answering the way she says the
9 facts are. So that can't be evidence of bad faith.

10 THE COURT: Mr. Willey?

11 MR. WILLEY: We've already argued this ad nauseam. I
12 mean, the position was taken by Mr. Nickels ---

13 THE COURT: Mr. Nickels says the lights are on.

14 MR. WILLEY: Correct.

15 MR. WHELAN: Therese Hood says the lights are on.

16 MR. WILLEY: No, no ---

17 THE COURT: I understand. But in the complaints ---

18 MR. WILLEY: In the answer.

19 THE COURT: I'm sorry. In the Kuck's complaint they
20 say her lights were off.

21 MR. WILLEY: Right.

22 THE COURT: He filed an answer. He denies that ---

23 MR. WILLEY: Explicitly. Right.

24 THE COURT: --- in his answer.

25 MR. WILLEY: Right. The issue being that the manager

1 of the BI claim, which he was handling, is the same as the
2 manager of the UIM claim. Everything in the BI file, the
3 manager had access to. Everything in the UIM file the
4 manager had access to.

5 And, in fact, what we'll see -- we had some testimony
6 on this yesterday. But the Poplin report made its way from
7 the BI file to the UIM file. And so although they're not
8 supposed to comingle files, they did comingle files.

9 And this goes to exactly what he says, that there is a
10 disparate position. I mean it's USAA's position in one
11 case that the lights are off, and in the other case that
12 the lights were on. Over here (indicating) to protect
13 their BI limits. And over here (indicating) to protect
14 their UIM limits.

15 It's never about Ms. Hood. The demand has never been
16 for more than the policy limits.

17 And, in fact, USAA -- Your Honor didn't let us get
18 into that, but -- yesterday in evidence. But USAA sent the
19 Hood's a letter that said: It's within the policy limits,
20 the claim. Don't worry about it. You don't have personal
21 exposure.

22 So this is all about USAA's money. It's not about Ms.
23 Hood.

24 And, you know, of course, we argued additionally
25 before about Mr. Nickels' obligations. He can't just sign

1 the pleading because it's his client's position. He has to
2 believe it.

3 And, in fact, USAA authorized him and wrote a check to
4 Mr. Poplin to hire him, which supported that position. And
5 that's where the opinion came from. And Mr. Nickels has
6 obligations under the rules to not take the position that
7 he knows to be false. And, of course, he didn't do that in
8 this case; because, in fact, her lights were on. And USAA
9 knew that.

10 MR. WHELAN: This is -- I mean this just shows how far
11 afield we're getting that he's talking about Chris Nickels'
12 professional obligations as an attorney.

13 That has -- USAA has no control over that. They have
14 an obligation to hire an attorney. An attorney has these
15 professional obligations to represent their client, Mrs.
16 Hood, not the insurance company. And he's doing exactly
17 what Mr. Willey just said, is representing his client.

18 And Mr. Nickels is not saying the lights were on.
19 He's not saying the lights were off. There's a complaint
20 that says the lights were on, and he denies that.

21 And I know that's a subtle distinction. But there's a
22 difference between -- I mean, if he admitted that, that
23 would block him in from there on.

24 So I guess my ---

25 MR. WILLEY: Well, he's still denying that. I mean,

1 the case was up for trial this week. That's still the
2 position.

3 THE COURT: I find it's relevant and admissible.

4 MR. WHELAN: All right. And then, Your Honor, he
5 also -- I don't know whether Mr. Willey is going to ask him
6 about Jack Daniel's conduct in a deposition.

7 We objected to that as irrelevant, and we do think
8 it's irrelevant. It doesn't -- there's no duty of good
9 faith. There's no allegation that he did anything
10 improper. So I don't -- again, I don't think he should get
11 into Jack Daniel's conduct.

12 THE COURT: Mr. Willey?

13 MR. WILLEY: Mr. Daniel is an agent of USAA. The
14 deposition was before the mediation. We've already
15 determined that all acts of USAA and its agents prior to
16 the date that the mediation occurred are relevant to the
17 issues in this case. And this is just more of that. I
18 mean ---

19 [Whereupon, plaintiff's counsels confer]

20 MR. WILLEY: Right, and it goes to damages. I mean,
21 she's already testified and he didn't object as to some of
22 the things that occurred during the deposition. And Mr.
23 Smith is simply going to be acknowledging basically what
24 she already testified to so.

25 THE COURT: I guess what I would say to that is if

1 there is a specific question that you object to, Mr.
2 Whelan, make your objection and I'll rule on it.

3 MR. WHELAN: Okay. Thank you, Your Honor.

4 THE COURT: All right. Let's bring the jury in, if
5 they're here.

6 [Whereupon, a recess awaiting jury 6/27/19, 9:20 a.m.
7 to 9:29 a.m.]

8 THE COURT: Okay. Are we ready for the jury? I think
9 we have all the jurors present now.

10 Thank you, sir.

11 [Whereupon, the jury enters the courtroom 6/27/19,
12 9:29 a.m.]

13 THE BAILIFF: The jurors are all present, Your Honor.

14 THE COURT: Okay. Ladies and gentlemen, thank you
15 again for being so prompt this morning. We do appreciate
16 it and hope you had a good evening.

17 I did want to mention to you that you'll notice Ms.
18 Katie Mellen, who was the attorney seated next to Mr.
19 Whelan previously in the week, I have excused her for the
20 rest of the week. She had some important personal
21 obligation, so I just wanted to explain the fact that she
22 is not here this morning.

23 All right. Anything further before we re-call Ms.
24 Moats to the stand?

25 Okay. Ms. Moats, if you want to come on up.

1 [Whereupon, the witness comes forward]

2 [Whereupon, the witness takes the witness stand]

3 THE COURT: And, Ms. Moats, you're still under oath.

4 THE WITNESS: Yes, ma'am.

5 MR. WHELAN: Good morning, Ms. Moats.

6 THE WITNESS: Good morning.

7 KATHY MOATS, Having Been Previously Sworn, was Examined and
8 Testified as Follows:

9 **CROSS-EXAMINATION BY MR. WHELAN OF KATHY MOATS:**

10 Q. We heard from you yesterday afternoon. I just want to
11 back up a little bit and just quickly ask you a little bit
12 about yourself.

13 Where are you from?

14 A. I was born in Tampa, raised in Lutz, Florida. And I
15 currently live on my family homestead.

16 Q. Okay. And who do you live there with?

17 A. I live there with my husband of 41 years.

18 Q. All right. And do you have any other family down
19 there?

20 A. I do. I have a biological son, Christopher who's 37.
21 He's an EMT-firefighter for Pasco County. And he's married
22 to Lisa; and they have two sons, my grandsons and my
23 granddaughter.

24 Q. Okay. And do you -- do you get to see your grandkids?

25 A. I -- my grandkids are my life. Those three grandkids

1 I do everything for. I participate in helping them get to
2 places and doing things and --

3 Q. Okay. Now, you have been with USAA for how long?

4 A. Twenty-four-and-a-half years.

5 Q. And did you have any insurance experience before you
6 were at USAA?

7 A. I did. I worked for three separate independent
8 insurance agencies. I've been in the insurance industry
9 since January of 1982.

10 Q. Okay. And I guess let's get into this case.

11 So I want to start by asking you have you spoken with
12 anybody about your testimony since you left the stand
13 yesterday?

14 A. No.

15 Q. All right. Now, Mr. Poulin was asking you about the
16 point of impact of the vehicles and showing you
17 photographs. I believe there were many questions asked
18 about that.

19 A. Yes, sir.

20 Q. And I believe that you told him you could not remember
21 every detail of the accident after several questions on
22 that subject?

23 A. Correct.

24 Q. Now, you have certainly had involvement. You've had a
25 chance to look at this case because Mr. Willey deposed you

1 for four hours back in March; correct?

2 A. Yes, sir.

3 Q. All right. And you have looked at your deposition --
4 excuse me, you've participated in your deposition with Mr.
5 Willey, you have read the letters from Jack Daniel to you
6 with his evaluation of the claims; correct?

7 A. Yes, sir.

8 Q. And Mr. Daniel would send -- what Mr. Daniel would
9 do -- actually, let stop there.

10 What was Mr. Daniel's job?

11 A. Mr. Daniel's job was to defend USAA for the claim that
12 Mrs. Hood made against USAA to recover her uninsured
13 motorist -- underinsured motorist coverage.

14 Q. Okay. And what would he -- how would he report to
15 you?

16 A. When he initially gets a case he starts requesting
17 discovery, which is all the information that he will need
18 to make a proper evaluation of the claim. He has to report
19 that information back to me. And then together -- we work
20 together to determine what additional information we may
21 need and how we need to proceed with a case.

22 Q. Okay. Now, when you are evaluating a case, what are
23 the general things that you look at?

24 A. In general, I look at everything that's given to me.

25 Q. Okay.

1 A. Every piece of information.

2 Q. All right. Is liability an important component?

3 A. I look at liability, yes. I look -- there are --
4 there are three major things I look at when I look at an
5 accident. I look at liability to determine who's at fault,
6 who's not at fault, or if there's comparative negligence.
7 I look at causation, which is whether or not the injuries
8 that are being claimed were actually caused by the
9 accident. And then I look at the damages, what the actual
10 damages are; and that can -- that's two basic areas, what
11 her injuries are and what her economic damages are.

12 Q. Okay. Let's start with the liability. Liability
13 means what? What is liability?

14 A. Negligence. Who was responsible for the accident.

15 Q. Who's at fault?

16 A. Who's at fault. Right.

17 Q. A lot of claims you handle have clear liability;
18 right?

19 A. Yes, sir.

20 Q. That would be like a rear-end accident, for example?

21 A. Yes, sir.

22 Q. And then there are some claims that there's disputed
23 liability; right?

24 A. That is correct.

25 Q. Okay. I want to ask you about some things Mr. Poulin

1 asked you about. I want to hand you ---

2 [Whereupon, Defendant's Exhibit Number 3, Kuck letter,
3 is marked for identification by the court reporter]

4 THE COURT REPORTER: This will be Defendant's
5 Number 3.

6 MR. WHELAN: Thank you.

7 Q. This is -- this is the police report, Defendant's
8 Exhibit 3. This is one Mr. Poulin was asking you about
9 yesterday, but I don't think he moved it into evidence.

10 MR. WHELAN: I would move this into evidence as
11 Exhibit -- Defendant's Exhibit 3, Your Honor.

12 MR. POULIN: No objection.

13 THE COURT: It is admitted.

14 [Whereupon, Defendant's Exhibit Number 3 is admitted
15 into evidence by the Court]

16 Q. Now, is this a copy of the accident report that Mr.
17 Poulin was asking you about?

18 A. It looks like it, yes, sir.

19 MR. WHELAN: I'll tell you what. Let's zoom in if we
20 could.

21 Q. The first thing I want to do is he was asking you
22 about witnesses to the accident. And if you could go -- so
23 right here (indicating) it identifies in the top left
24 there's Antoine Johnson; right?

25 A. Yes, sir.

1 Q. And then next to him there's Therese Hood; right?

2 A. Yes, sir.

3 Q. And then down below that there is William Kuck?

4 A. Yes, sir.

5 Q. And then next to there, there's Mary Kuck?

6 A. Yes, sir.

7 MR. WHELAN: And if you could scroll up just a little
8 bit.

9 [Whereupon, display adjusted]

10 MR. WHELAN: There you go.

11 Q. And then towards the bottom there's Kerry Tanrath; ---

12 A. Yes.

13 Q. --- is that right?

14 A. Yes, sir.

15 Q. Okay. And so there were five witnesses?

16 A. Yes, sir.

17 MR. WHELAN: And if you would -- another thing I would
18 like to do, if you could, Alex, is there are --

19 Q. There are sections, Ms. Moats, that talk about ---

20 MR. WHELAN: Zoom right back in where you were.

21 [Whereupon, display adjusted]

22 Q. --- contributed to collision. And so you see under
23 Antoine Johnson the police officer, under contributed to
24 collision, down next to Ridgeland, South Carolina --

25 MR. WILLEY: Down a little more.

1 [Whereupon, display adjusted]

2 A. It says no.

3 Q. Okay. And then what about under Mary Kuck?

4 MR. WHELAN: Over. Over.

5 [Whereupon, display adjusted]

6 MR. WHELAN: There you go.

7 A. Mary Kuck ---

8 Q. Did the police officer ---

9 A. It says no.

10 Q. Okay. And then how about under Therese Hood?

11 A. It says yes.

12 MR. WHELAN: Okay. Now, if we could scroll down a
13 little bit more.

14 [Whereupon, display adjusted]

15 Q. Now, Mr. Poulin told you or asked you that police
16 officers don't testify at trial. That's what he said. Do
17 you remember that?

18 A. He did say that.

19 Q. Okay. Did this police officer testify at trial?

20 A. Yes, she did. And, yes, I was present for that
21 testimony.

22 Q. Okay. And he said that police officers aren't fact
23 witnesses?

24 MR. POULIN: Your Honor, I would object to that. I
25 never said that. I said the accident report is not

1 admissible at trial.

2 THE COURT: That's sustained.

3 Q. Okay. Was this police officer a fact witness?

4 A. Yes, she was.

5 Q. Okay. And what did she testify to concerning Ms.
6 Hood's fault?

7 MR. POULIN: Your Honor, I would also -- may we
8 approach for a moment?

9 THE COURT: Sure.

10 [Whereupon, an off-the-record bench conference is held
11 6/27/19, 9:42 a.m.]

12 Q. All right. Let me ask you a different question. Did
13 Officer Whirl give a deposition?

14 A. To my knowledge, yes, she did. To my best
15 recollection, she did.

16 Q. All right. Do you recall what Officer -- and,
17 obviously, you weren't at that deposition; right?

18 A. [No response]

19 Q. How would you find out about it?

20 A. Mr. Daniel gave me a report about all the statements
21 from the various witnesses.

22 Q. Okay. And do you recall what it was that the officer
23 testified to?

24 A. I do. The report that Jack Daniel sent to me
25 indicated that the police officer went to the hospital and

1 interviewed Ms. Hood at the hospital and that she said that
2 Ms. Hood never said she had her headlights on, what she
3 said to the officer was that her headlights are always in
4 the automatic position and that they always come on when
5 it's dark enough.

6 Q. Okay. Do you -- let me ask you this. Can we -- do
7 you recall whether the officer said anything about checking
8 her in-car camera?

9 A. Yes.

10 Q. What was that?

11 A. When the officer got to the scene, she recalls that
12 Ms. Hood's vehicle was still running. And I guess at that
13 time the witnesses there all said that -- or I shouldn't
14 say all. But some of the witnesses said that her
15 headlights were off. And so to verify the fact that she --
16 the officer remembers that the vehicle was running but the
17 headlights were off. She went back to her dash cam and she
18 looked at the dash cam at that time and confirmed that her
19 vehicle was running and the vehicle headlights were off at
20 the time.

21 MR. WHELAN: All right. Well, let's zoom in a little
22 bit on this -- on this statement.

23 Q. I want to go down to the last -- very last line: Unit
24 two's running lights were not on upon my arrival. Is that
25 right?

1 A. Yes.

2 Q. Okay. And so the officer said that the running lights
3 were not on, and then she went to the video to confirm it;
4 correct?

5 A. Yes, sir.

6 Q. Now, is this the type of thing that would be
7 reasonable to rely on in your investigation?

8 A. Absolutely.

9 Q. What about ---

10 A. There's no reason for a police officer not to tell
11 what she saw.

12 Q. All right. What about the statements given to the
13 police officer by Antoine Johnson; do you recall what
14 Antoine Johnson told the police officer?

15 A. Antoine Johnson did not -- I believe did not
16 specifically say that her headlights were off. What he
17 testified to or told her was that he pulled up to the stop
18 sign, he looked, he did not see her vehicle coming, he did
19 not see any headlights. And then I believe he went on to
20 tell her that even if her headlights had been off, he did
21 not see a vehicle coming.

22 Q. Okay. And you talked about William Kuck yesterday.

23 A. Yes.

24 Q. He is the guy that initially said they were on ---

25 A. On ---

1 Q. --- and then said ---

2 A. --- I mean, off, on, and then back off again.

3 Q. Okay. And Mary Kuck was consistent the whole time?

4 A. Mary Kuck has been consistent the whole time.

5 Q. And what about Kerry Tanrath -- actually, I'm going to
6 hand you another document. This is Hood USAA 96 through
7 99.

8 [Whereupon, Defendant's Exhibit Number 4, statement,
9 is marked for identification by the court reporter]

10 THE COURT REPORTER: Defendant's 4 marked for
11 identification.

12 MR. WHELAN: Thank you.

13 Q. Do you recognize Exhibit 4?

14 A. It's a recorded statement taken by the USAA adjuster
15 of Mr. Tanrath.

16 Q. Okay. And would this have been in the file when it is
17 set up?

18 A. Yes. When the file, the separate UIM file, is set up
19 by the BIA adjuster, the recorded statement is normally
20 something that is transferred.

21 Q. Okay. So let's look at --

22 MR. WHELAN: Your Honor, I'd move this into evidence
23 as Exhibit 4.

24 MR. POULIN: No ---

25 THE COURT: Any objection?

1 MR. POULIN: No objection, Your Honor.

2 THE COURT: It is admitted.

3 [Whereupon, Defendant's Exhibit Number 4 is admitted
4 into evidence by the Court]

5 Q. All right. And I'd like to go to the middle of the
6 page where after she asked about the phone number. And
7 then the question is:

8 (Q) Okay, now, do you remember about what time the
9 accident happened on November the 7th?

10 A. Yes, he answered:

11 (A) Uh, it would be -- it was after 5:30 because it
12 was -- because it was dark out.

13 Q. Okay. And if we could turn the page. Let's go down
14 to the third question from the bottom that starts with,
15 okay, um.

16 A. Okay, what?

17 Q. All right, so the question is:

18 (Q) Did you see anything that happened prior to
19 seeing the car, the oncoming car?

20 And what did Mr. Tanrath say?

21 A. I'm sorry.

22 Q. Oh, I'm sorry. Okay.

23 A. I don't see a question.

24 THE COURT REPORTER: The screen is on.

25 MR. WHELAN: You can look up there (indicating).

1 THE BAILIFF: Oh, I'm sorry. I was looking at that
2 (indicating).

3 MR. WHELAN: That's okay.

4 A. Okay.

5 (Q) Did you see anything that happened prior to
6 seeing the car, the oncoming car?

7 (A) The only thing -- the only thing that I observed,
8 the oncoming car did not have any headlights on.

9 Q. Okay. And then he goes on.

10 A. He says:

11 (A) But it -- and I have to put a, um, from my
12 vantage point, all that I could see was the passenger side
13 of the oncoming vehicle and the passenger-side light
14 driver's -- driving light was not on.

15 Q. Okay. And is this a -- would this statement be a
16 reasonable basis to conclude that this was a case of
17 disputed liability?

18 A. Absolutely.

19 MR. WHELAN: I'm going to mark another document, Bates
20 Number 77 through 86.

21 [Whereupon, Defendant's Exhibit Number 5, Statement
22 for Johnson, is marked for identification by the court
23 reporter]

24 THE COURT REPORTER: Defendant's Number 5 marked for
25 identification.

1 MR. WHELAN: Thank you.

2 Q. What is this document, Kathy?

3 A. This is the recorded statement that the adjuster,
4 Missy Howard, took from Antoine Johnson.

5 MR. WHELAN: Okay. And, Your Honor, I'd move this
6 into evidence, please, as Exhibit 5.

7 MR. POULIN: No objection, Your Honor.

8 THE COURT: It is admitted.

9 [Whereupon, Defendant's Exhibit Number 5 is admitted
10 into evidence by the Court]

11 Q. Okay. And the date of this would be November 13th; is
12 that right?

13 A. That is correct.

14 Q. Okay. So within a week of the accident. And if we
15 could turn to the fourth page of this document. And the
16 question is -- I won't make you read all of this.

17 (Q) Okay. Can you tell me what happened?

18 He said he was coming out, he looked both ways, and
19 from his view it was clear.

20 And we pulled out: She was right there, and she hit
21 me on the side and then kept going and then went on the
22 other side of 278 and hit some -- and hit someone else.

23 And then she said -- and then he said what?

24 A. But she was driving with no lights.

25 Q. All right. And would this be a reasonable basis to

1 believe that liability was contested?

2 A. Yes, sir.

3 Q. I'm going to hand you what we marked as Exhibit 88
4 through 94.

5 [Whereupon, Defendant's Exhibit Number 6, Statement of
6 Hood, is marked for identification by the court reporter]

7 THE COURT REPORTER: Defendant's Exhibit Number 6
8 marked for identification.

9 MR. WHELAN: Thank you.

10 Q. All right. Kathy, what is Defendant's 6?

11 A. This is the statement that the adjuster, Diane Martin,
12 took from Therese Hood.

13 Q. Okay. And who was on the phone with Therese Hood? It
14 says -- it says so right up at the top. It says Hugh --

15 MR. WHELAN: Actually, can you pull that up, Alex?

16 A. Oh. Kevin Smith ---

17 Q. I'm sorry. It's the first page.

18 A. Kevin Smith, the attorney ---

19 VIDEO OPERATOR: Exhibit -- I'm sorry?

20 A. --- was on with her.

21 MR. POULIN: It's -- I don't object to it.

22 MR. WHELAN: Your Honor, we move Defendant's 6 into
23 evidence.

24 MR. POULIN: No objection.

25 THE COURT: Without objection, it is admitted.

1 [Whereupon, Defendant's Exhibit Number 6 is admitted
2 into evidence by the Court]

3 Q. I'm sorry, Kathy. Let me -- let me back up.

4 So you see at the top there are three parties to this
5 call?

6 A. Correct. Diane Martin, who is the adjuster on the
7 liability case; Therese Hood; and her attorney, Kevin
8 Smith.

9 Q. Okay. So when you see the B asking the questions,
10 that's Kevin Smith? Is that a B or a backwards 3, or what?

11 A. It says 3, but ---

12 Q. Okay. Now, let's turn to Page 2 and the question and
13 answer at the bottom of this page. What did Ms. Hood tell
14 USAA her speed was at the time of the collision?

15 A. Thirty, at best.

16 Q. Did you subsequently learn what her speed was?

17 A. Yes. In Woody Poplin's report he viewed the black box
18 in the car and her estimated speed was 62 in a posted speed
19 limit of I believe 45.

20 Q. Okay. Did you subsequently learn that there were --
21 there was an additional eyewitness to the accident?

22 A. Yes, sir, I did.

23 Q. And who was that?

24 A. Dustin Lee who is part-time magistrate in South
25 Carolina and part-time attorney.

1 Q. Okay. And what did -- what did -- what was -- what
2 did Dustin Lee see?

3 A. Excuse me?

4 Q. I'm sorry. What did Dustin Lee see?

5 A. Dustin Lee said that -- do you want me to tell you
6 everything that he said that I remember?

7 Q. Well, what was important to your evaluation that he
8 said?

9 A. There were several items that were important to my
10 evaluation with Dustin Lee. Dustin Lee was -- this road is
11 two lanes in the direction that Mrs. Hood was traveling in.
12 Dustin Lee was in the left lane.

13 Because Dustin Lee is a magistrate he's aware of the
14 fact that he can travel four miles over the speed limit
15 without getting a ticket. So he routinely travels four
16 miles over the speed limit on this road and uses his cruise
17 control. So he was going 49 on cruise control at the time
18 that he was traveling on this road.

19 At some point in time, Mrs. Hood came up behind him
20 and started tailgating him. And after a while, he decided
21 that she wasn't going to go around him so he decided that
22 he was going to move to the right lane. So he moved to the
23 right lane. And when he moved to the right lane, she sped
24 up and went past him.

25 Mr. Lee then said that, you know, he's traveling in

1 the right lane, she's in the left lane but she's far ahead
2 of him, and that's when he sees Antoine Johnson pull out
3 and he said he knows right away that something's going to
4 happen. And it did.

5 Q. Okay. Now, did Mr. Lee call 911?

6 A. He did. But I don't believe he was the first person
7 that called. He did call.

8 Q. Okay. And was what Mr. Lee testified to and said in
9 his 911 call, a reasonable basis for believing that this
10 was a case of disputed liability?

11 A. Yes, it was. On two accounts. Both that she did not
12 have headlights on, she potentially had running lights on,
13 and that her speed was in excess of the posted speed limit.

14 Q. Okay. Now, there were -- there was evidence going
15 both ways in this case. Would you agree with that?

16 A. Yes.

17 Q. All right. What is -- I mean, did USAA ever take a
18 position that there was no evidence whatsoever that her
19 headlights were on?

20 A. I can't say that we took a definitive. No, we did
21 not. I mean, there was evidence in Mr. Poplin's report
22 that her headlights were potentially on.

23 Q. Well, what did Mr. Poplin say was on?

24 A. Mr. Poplin said that the high beams were on.

25 Q. Okay.

1 A. He did not say that the -- he specifically said the
2 low beams were not.

3 Q. Right. And you can't go back in time and see what
4 happened in the accident; can you?

5 A. No. I can only go by the evidence that's presented to
6 me.

7 Q. The only people who knew what happened were the people
8 who were there; correct?

9 A. Yes.

10 Q. Okay. And what you're doing is evaluating what a jury
11 may do when they're presented with evidence in court;
12 correct?

13 A. Yes. The jury is presented with most of the evidence
14 that I see.

15 Q. Okay. And so you know that Ms. Hood is going to
16 testify and presumably say that her lights were on at
17 trial; right?

18 A. That would have been my assumption, yes.

19 Q. And you presumably know that she's going to have an
20 expert or some other -- she's going to try and support her
21 statement in some way at trial; right?

22 A. Yes, sir.

23 Q. Okay. And then you also know that there are other
24 witnesses who are going to testify who are going to say
25 something different; right?

1 A. Yes, sir.

2 Q. Okay. And is that why you believed there would be
3 some sort of a compromise verdict?

4 A. Yes.

5 Q. Okay. Now, Mr. Poulin asked you about this Poplin
6 report and what he called science. He said you disagreed
7 with science.

8 A. I don't believe I said I disagreed. I believe I said
9 science is not perfect.

10 Q. All right. And how long after -- do you recall how
11 long after the accident that Mr. Poplin did his test?

12 A. If I remember correctly, the report was dated August
13 12th of 2016; so I assume he did the test sometime within
14 the days or weeks before that report.

15 Q. Okay. And the accident was in 2014?

16 A. Yes, sir. November, 2014. Yes, sir.

17 Q. Now, how did Mr. Poplin's opinion fit with what Ms.
18 Hood said?

19 A. Mr. Poplin said that there was hot shock on the high
20 beam only and that hot shock indicates that the light was
21 on, the high beam was on. The low beam he said was not on.

22 Q. Okay. And looking at the facts of the accident and
23 what Ms. Hood said and what the other witnesses said, did
24 Mr. Poplin's opinion match up with that testimony of that
25 other evidence?

1 A. Well, in the fact that he indicates that her
2 headlights in the high beam position would have been on.

3 Q. Okay. Had anyone ever testified that her high beams
4 were on; had anyone before this Poplin report came out two
5 years later, ever said that her -- ever said anything about
6 high beams?

7 A. No. And, in fact, she never really said that her
8 headlights were on. She -- her contention all along was
9 that her headlights are on automatic all the time. And she
10 even indicated in this trial that she never touches that
11 switch, she doesn't even know how it works.

12 Q. Okay. And this was a highway with traffic coming in
13 both directions?

14 A. Yes, sir.

15 Q. Now, Mr. Poulin asked you about different factual --
16 different factual positions and what the true facts of the
17 accident are. What did the jury determine the true facts
18 were with respect to Ms. Hood's liability?

19 A. He -- they determined that she was at least 49 percent
20 responsible for the accident.

21 Q. Well, I mean, they were precise; ---

22 A. Yes.

23 Q. ---- they determined she was out how -- what
24 percentage did ---

25 A. Forty-nine percent. Yes, they determined she was 49

1 percent.

2 Q. Okay. And you said that your evaluation was what,
3 50-50?

4 A. 50-50.

5 Q. Okay. And if she had -- if the jury had found her two
6 more percent at fault, she would have received what?

7 A. She would not have been able to recover a penny.

8 Q. Okay. And is that something that you evaluated when
9 determining how much USAA owed based on this case of
10 disputed liability -- or, actually, let me rephrase that.

11 Is -- that's something you took into account in
12 determining what a jury may do with this case?

13 A. Yes. If a jury -- if a jury had found her 51 percent
14 at fault, she would have received nothing. So that's what
15 we call on a good day for us.

16 Q. Okay. And you knew it might be a good day, might be a
17 bad day?

18 A. Might be a good day. Might be a bad day. And we
19 looked at both sides.

20 Q. All right. And so what happens to the case value if
21 it might be a good day and it might be a bad day?

22 A. We -- well, for her we would give her -- on her end,
23 we would give her money. If it's a good day for her and a
24 bad day for us, she's going to get money.

25 And the jury could give her money. And we knew that.

1 And we knew that the jury could give her good money.

2 Q. And is that why you evaluated this case at \$250,000,
3 up to 250,000 ---

4 A. That is why I evaluated the case at 250.

5 Q. All right. What -- you mentioned liability and
6 damages. What considerations were in play with respect to
7 the damages?

8 A. We looked at her injuries. We -- and we looked at her
9 medical bills.

10 Q. Okay. Did she have prior injuries?

11 A. Yes, she did. She is -- she retired from the military
12 I believe in ---

13 MR. POULIN: Your Honor -- Your Honor, may we
14 approach?

15 THE COURT: Yes.

16 [Whereupon, an off-the-record bench conference is held
17 6/27/19, 10:02 a.m.]

18 Q. Ms. -- Ms. Moats, we've heard Ms. Hood testify that
19 she was on disability.

20 A. Yes, sir.

21 Q. All right. Was she on disa- -- did that disability
22 exist before the accident?

23 A. Yes, sir, 100 percent military disability.

24 Q. Okay. And she was receiving that before the accident?

25 A. Yes, sir, she was.

1 Q. All right. And was she also receiving state
2 disability?

3 A. She did get a disability from the State of South
4 Carolina, yes.

5 Q. Okay. So -- and she was not working at the time of
6 the accident; correct?

7 A. She was not working.

8 Q. So they're no lost wages to consider?

9 A. That's correct.

10 Q. All right. Now, how did the venue -- is venue
11 something you take into consideration?

12 A. Definitely something that we take into consideration.

13 Q. Okay. And what did -- what was your consideration
14 with venue in this case? Well, actually, let me -- let me
15 stop for a second. What is venue?

16 A. Venue is the area that the case is actually tried in,
17 which is usually the county in which the accident occurred.

18 Q. Okay. And what county did they file Ms. Hood's case
19 in?

20 A. Jasper.

21 Q. All right. And what were the considerations in Jasper
22 County?

23 A. Well, there were -- there were good and bad. We look
24 at the venue, and we looked at our defen- -- or Mr.
25 Johnson, the defendant, the tortfeaser. And we knew that

1 he lived in that area and that he would be well-perceived
2 because he lived in that county. And then we looked at the
3 fact that -- and that's a county of lower income, I think
4 lower educated people. And then we looked at the fact that
5 Mrs. Hood I believe lived in Charleston or somewhere in the
6 area around there and that on the date of the accident she
7 was actually traveling to her timeshare or condo in Hilton
8 Head. So because we know -- knew that the venue would see
9 her as an influenced person, that they might not perceive
10 her as well as they would accept Antoine Johnson.

11 Q. Okay. So that's something you -- again, there's pros
12 and cons in the venue, just like the other stuff; so you
13 weighed that?

14 A. Yes, sir.

15 Q. All right. Now, Mr. Poulin asked you about your
16 bonus. Do you think about your bonus when you're handling
17 claims?

18 A. No. I only think about my bonus in February of every
19 year.

20 Q. All right.

21 A. I mean I don't. I love what I do. I love my job.
22 I've done it for twenty-four-and-a-half years with USAA.
23 Our job is to protect and serve our membership.

24 As Mr. Hood told you, we're a little bit different
25 than most insurance companies. We're not publically owned.

1 We are owned by our USAA members. And they're the ones
2 that we're there to protect and to serve. And I think I do
3 a good job of doing that.

4 Q. Okay. And, now, when you're handling a claim like
5 this UIM claim, Mrs. Hood is the insured; right?

6 A. Yes, she is.

7 Q. And you also are -- you also have to look out for all
8 of the other insured's ---

9 A. I do.

10 Q. --- and USAA helps you?

11 A. Yes, sir, I do.

12 Q. I mean if you just pay claims without regard to what
13 the value is, what happens?

14 A. Then it increases the premiums of the entire
15 membership.

16 Q. And who are the owners of USAA?

17 A. The -- any -- well, it's changed over the years.
18 When I started, you had to be a commissioned officer
19 twenty-four-and-a-half years ago. And over time, we've
20 added -- because the military is decreasing, we've added --
21 you know, we went to the noncommissioned officers. Then we
22 went to the enlisted.

23 And my understanding now - and I don't work in policy
24 services - but if anyone that has ever served in the
25 military that got an honorable discharge is eligible to be

1 a USAA member. And those members own our company.

2 Q. And do you know how many members there are?

3 A. No. But our -- every member number indicates when you
4 became a member. So if you were member 50,000, if your
5 member number is 50,000, that means that you were the 50-
6 thousand member -- Member Number 50,000.

7 Q. And he asked you about profits. I mean, the
8 profits -- let me back up.

9 Do the members get a dividend at the end of the year?

10 A. Every year they actually get two forms of payment.
11 They get a dividend in the form of a check. And if you're
12 a 40-year-member-plus, you get a 40-year member dividend
13 check also.

14 However, we also have what we call a subscriber
15 savings account. And that is an account where money is put
16 into that account and it grows every year. And you can't
17 actually use that money until you are no longer a USAA
18 member. And then you take that money out. But it's like
19 a -- I want to use the word profit sharing. but I guess
20 that's what it's like.

21 Q. Yes ---

22 A. It goes into an account for them.

23 Q. So obviously, as an insurance company, you are -- the
24 insured's are insuring for the future; correct?

25 A. Correct.

1 Q. And we can't predict the future; right?

2 A. No, we cannot.

3 Q. Okay. So we have to keep reserves in the company
4 sufficient to handle claims that may arise if there's a
5 Hurricane Katrina next year or something like that; right?

6 A. Right. Right. The State of South Carolina would not
7 let us do business if we did not project what our claims
8 are for next year and keep sufficient money available for
9 that.

10 Q. Okay. Now, you mentioned the member number. And Mr.
11 Poulin said in opening that to USAA Ms. Hood was just
12 Person Number 011043223.

13 A. If he had not said that number, I would have had no
14 idea whether her number started with a one, a three, a
15 five, whatever. I don't -- I use the number to access her
16 claims file. That's the only reason I ever use that
17 number.

18 Q. All right. But how do you -- how do you refer to the
19 Hoods in correspondence?

20 A. USAA is unique because we insure the military. So
21 when I pull up a file it tells me if that person is a
22 sergeant, a major, a commander, whoever, or if I'm just to
23 address them as Mr., Miss, or Mrs.

24 Q. Okay.

25 A. And that's how I would address. Right now I don't

1 remember what hers says, but I -- at this point in time, I
2 would say Mrs. Hood.

3 Q. All right. Is it true that USAA ever called Mrs. Hood
4 a liar?

5 A. No. And it's something that -- I would lose my job if
6 I flat-out called my insured a liar.

7 Q. And, now, obviously, in a lawsuit credibility is an
8 issue; right?

9 A. It's a big issue.

10 Q. And what is credibility?

11 A. Whether or not someone can be believed about what
12 they're telling you, is there evidence to the contrary that
13 she may not or he may not be telling you the whole story.

14 Q. And is that something you assess in your ---

15 A. I have to, yes.

16 Q. All right. And if an -- and if a witness writes
17 another witness and tells them if they testify a certain
18 way it will be profitable for them, how does that affect
19 credibility?

20 A. It tells me that they're trying to affect that other
21 person's testimony to go in their favor.

22 Q. Okay. Now ---

23 A. And it affects their credibility.

24 Q. Now, Mr. Poulin asked you about South Carolina law
25 yesterday. If you had a question about South Carolina law

1 who would you go to?

2 A. I would go directly to my manager. But I also -- we
3 have a big program at USAA about mentoring. So I have an
4 unlimited amount of mentors that I could have gone to had
5 my manager not been available.

6 Q. All right. And does the attorney also help?

7 A. The attorney. Yes. I'm sorry. Yes, I would also ask
8 Jack Daniel.

9 Q. He asked you about this arbitration, okay. Explain to
10 us -- this is a property damage arbitration; right?

11 A. Property damage only. It does not affect the bodily
12 injury case.

13 Q. Okay. So what happens is you guys were Mrs. Hood's
14 insurer, so you paid to fix her vehicle; right?

15 A. We did.

16 Q. Geico was Mr. Johnson's insurer, so they paid to fix
17 his vehicle; right?

18 A. Yes.

19 Q. And because it was a case of disputed liability, it
20 goes to an agreed-upon arbitration; right?

21 A. Yes.

22 Q. And they send the information to another adjuster that
23 works at another insurance company; right?

24 A. Usually it's another adjuster, yes.

25 Q. And this is typically right after the accident

1 happens; it's not years down the road, is it?

2 A. Typically, it's somewhere in the first year, yes.

3 Q. Okay.

4 A. It can be longer, but typically the first year.

5 Q. Okay. Now, let me -- this is USAA 24 and 26.

6 [Whereupon, Defendant's Exhibit Number 7, evaluation,
7 is marked for identification by the court reporter]

8 THE COURT REPORTER: And it's Number 7, marked for
9 identification.

10 MR. WHELAN: Your Honor, can we approach on this
11 briefly?

12 THE COURT: Sure.

13 [Whereupon, an off-the-record bench conference is held
14 6/27/19, 10:16 a.m.]

15 Q. Now, Mr. Daniel wrote you several case analyses and
16 evaluation letters?

17 A. Yes, sir, he did.

18 Q. All right. I'm going to hand you what has been marked
19 as exhibit ---

20 MR. WHELAN: I'm sorry.

21 [Whereupon, Defendant's Exhibit Number 8, case
22 analysis 10/21/15, marked for identification]

23 [Whereupon, Defendant's Exhibit Number 9, 3/29/16
24 letter, marked for identification]

25 [Whereupon, Defendant's Exhibit Number 10, 5/12/16

1 letter, marked for identification]

2 [Whereupon, Defendant's Exhibit Number 11, 8/22/16

3 letter, marked for identification]

4 [Whereupon, Defendant's Exhibit Number 12, 2/20/17

5 letter, marked for identification]

6 MR. POULIN: Robbie, can you tell me which dates or
7 Bates stamps numbers?

8 MR. WHELAN: Oh. I'm sorry. I am just going to put
9 them all in.

10 [Whereupon, counsels confer]

11 THE COURT: Okay, eight through twelve marked for
12 identification.

13 MR. WHELAN: Thank you.

14 MR. WHELAN: Your Honor, these are what were
15 discussed -- these are the letters that were discussed in
16 the motion in limine yesterday.

17 I gave -- I gave -- I gave you guys these
18 yesterday ---

19 MR. POULIN: I know. I understand. I just want to
20 know how we're marking them so I can ---

21 MR. WHELAN: Oh, oh. Okay.

22 MR. POULIN: Or are you going to refer to them by
23 Bates number? I've got them in front of me, but I ---

24 MR. WHELAN: I'm going to -- I'm going to refer to
25 them by date. So ---

1 MR. POULIN: Okay.

2 Q. Ms. Moats, I have showed you -- let's just take them
3 one at a time.

4 A. August -- I mean, March 29th?

5 Q. Let me have them, please.

6 So the first letter, which we've marked as Defendant's
7 8, was the report dated October 21st, 2015. Is that an
8 evaluation you received from Mr. Daniel?

9 A. Yes. It's our initial first analysis. Which at that
10 time was required within 90 days, I believe; 90 to 120
11 days.

12 Q. Okay.

13 MR. WHELAN: Your Honor, we would move that in as
14 Defendant's 8.

15 MR. POULIN: Your Honor, we would just renew our same
16 objection about the redactions.

17 THE COURT: Thank you. It is admitted.

18 [Whereupon, Defendant's Exhibit Number 8 is admitted
19 into evidence by the Court]

20 Q. All right. Now --

21 [Whereupon, pause for Mr. Whelan]

22 Q. All right. So Mr. Daniel in these letters is
23 providing information concerning what facts he has found
24 out; correct?

25 A. Yes.

1 Q. There is a --

2 MR. WHELAN: If we could pull that up, Alex. It is
3 135 through 140. So we'll start with 135.

4 Q. This is the Hood -- or actually, I'm sorry.

5 [Whereupon, pause for Mr. Whelan]

6 A. Can -- can I just clarify something?

7 Q. Sure.

8 A. The initial case analysis is not just what Mr. Daniel
9 has discovered. It's a culmination of what we knew before
10 it went to suit, and it's a verification from him that this
11 information is also what he found.

12 Q. Okay.

13 A. And then it's in addition to what he would have found
14 in his initial -- or his ongoing discovery.

15 Q. Okay. And at this time Mr. Daniel is handling the UIM
16 case; right?

17 A. Yes.

18 Q. Okay. So before we get into this I want to back up a
19 little bit and talk about the difference between the
20 liability case and the UIM case. So let's start with
21 liability insurance.

22 A. Okay. Liability insurance covers our insured member.
23 When they're involved in an automobile accident and they're
24 at fault in that accident or have some comparative
25 negligence in that accident, it, number one, provides

1 them a defense. And then, number two, it provides them
2 liabil- -- or a monetary coverage up to their policy limit.

3 So an example would be if they have \$25,000 in policy
4 limits on the bodily injuries, we would pay the other party
5 up to that policy limit.

6 And then the same with property damage. If should
7 they have 25,000 in property damage, the property damage
8 was only 10,000, we would pay that 10,000 because it's
9 within that limit.

10 Q. Okay. Now, you are -- you are paying for a lawyer for
11 them; right?

12 A. We give them a lawyer, yes. A defense.

13 Q. All right. Who does the lawyer represent?

14 A. The lawyer does not represent USAA. We pay them; but
15 the lawyer represents the defendant, and their obligation
16 is to provide a defense for that defendant.

17 Q. Okay. Now, with respect to underinsured motorist
18 coverage, which is UIM, that's a different type of
19 coverage; right?

20 A. It is a different type of coverage.

21 Q. Okay. Now, what does that do?

22 A. Okay. I guess the best example would be to give this
23 example: Mr. Johnson was the tortfeasor in this accident,
24 so the claim is against Mr. Johnson because Mrs. Hood felt
25 that he was at fault. Mr. Johnson's insurance company was

1 Geico. Geico provided Mr. Johnson the coverages under his
2 liability, which are defense and monetary. Mr. Johnson
3 only had \$25,000 in coverage. So because of the extent of
4 Mrs. Hood's injuries, Geico opted to pay up to that policy
5 limit, which was \$25,000.

6 Mrs. Hood obviously had injuries in excess of that
7 because we evaluated -- eventually evaluated the claim at
8 \$250,000. So USAA then has to step into the shoes of Mr.
9 Johnson, because she pays for that coverage.

10 If her coverage had only been \$100,000, we would have
11 provided her coverage up to 100,000. In this case she had
12 coverage, 500,000 per vehicle. And in the State of
13 Califor- -- excuse me, the State of South Carolina she gets
14 what's called stacking coverage. She had two vehicles on
15 the policy and each vehicle had \$500,000 in coverage. So
16 in South Carolina she gets to stack both vehicles. So
17 ultimately her coverage was one million dollars.

18 Q. Okay. So Ms. Hood is represented in the case against
19 Johnson by a personal attorney, an attorney she hired,
20 Kevin Smith?

21 A. Kevin Smith.

22 Q. Okay. And Kevin Smith files a lawsuit against Antoine
23 Johnson; right?

24 A. Yes.

25 Q. And Antoine Johnson's liability carrier hires him a

1 lawyer; correct?

2 A. Yes.

3 Q. And that lawyer answers the case on behalf of Antoine
4 Johnson, his client. And he -- what does -- what does
5 Antoine Johnson, through his lawyer, say about whether the
6 lights were on or off?

7 A. He says that he did not see any lights on her vehicle,
8 he did not see her vehicle.

9 Q. Okay. And Antoine Johnson's liability carrier
10 actually filed an answer in this case before we were ever
11 involved; right?

12 A. To my -- yes. To my recollection, yes.

13 Q. Okay. And then down the road, the insurer, Geico,
14 offers the \$25,000 that they have to Ms. Hood?

15 A. Yes, sir.

16 Q. And at that point, Ms. Hood releases Antoine Johnson
17 from personal liability; so Antoine Johnson doesn't have
18 to pay anything?

19 A. Yes, sir.

20 Q. Okay. And but her suit against Antoine Johnson is
21 still pending?

22 A. That is correct.

23 Q. All right. So she's still going to go to Jasper
24 County and Kevin Smith is still going to ask a jury to
25 award damages to Mrs. Hood?

1 A. For Mrs. Hood.

2 Q. All right. So Jack Daniel comes in as the UIM
3 insurer, and what does he do? What is his role?

4 A. His role is to defend USAA, to represent USAA against
5 the UIM claim.

6 Q. Okay. But he's doing it in the name ---

7 A. In the name of Antoine Johnson. Antoine actually sat
8 at the table in the trial with him.

9 Q. Okay. And why is it -- what would happen if USAA
10 didn't defend the case against Antoine Johnson and just let
11 the plaintiff -- the plaintiff's attorney go to trial in
12 Jasper County with no one at the other table?

13 A. Well, that could have been -- that wouldn't have been
14 in our favor because it looks -- they would be wondering
15 who Ms. Hood is actually suing.

16 Q. So, basically, this makes it a fair fight to have two
17 lawyers there?

18 A. It makes it a fair fight, which is why we asked him to
19 be present.

20 Q. Okay. Now, you were asked a lot of questions about
21 the Chris Nickels' file and the Jack Daniel file?

22 A. Yes, sir.

23 Q. You don't write the laws in South Carolina; USAA does
24 not write the laws in South Carolina?

25 A. No, we did not.

1 Q. UIM is created by state statute; right?

2 A. Yes, it is.

3 Q. Now, you are assigned to a single file; correct?

4 You -- when you get a new claim in, it is one file;
5 correct, one claim?

6 A. One claim, one file; yes.

7 Q. All right. And sometimes you get UIM claims and
8 sometimes you get liability claims?

9 A. Yes, sir.

10 Q. Do you have a -- do you know what the percentage is?

11 A. I would say that most of my claims are UM and UIM
12 claims.

13 Q. Okay. When you get a liability case, do you handle
14 that any different than when you have a UM or a UIM case?

15 A. Not in long-term for the investigation; other than
16 when I have a BI case, a bodily injury case, I am allowed
17 to speak directly to my insured.

18 In the -- in the case of an uninsured motorist case,
19 once they get an attorney I can no longer make contact with
20 my insured.

21 Q. And in the -- in the instance in which there is a
22 liability case that Chris Nickels is defending, and a UIM
23 case that Jack Daniel is defending, you -- you're only
24 evaluating the UIM case; correct?

25 A. Right.

1 Q. And there's another adjuster evaluating the BI case?

2 A. Yes, sir.

3 Q. All right. Do you know what that other adjuster's
4 analysis was?

5 A. No. And I still don't to this day. I've been sitting
6 here listening and I keep -- I'm being told that I made a
7 decision that was in direct opposite of what the BI file
8 says. I don't know that, and I don't think that anyone has
9 told y'all that.

10 The only thing that I have heard here is that Mr.
11 Willey said that Chris Nickels, in Ms. Hood's file, filed
12 answers stating that her headlights were on. I know that
13 Mr. Poplin make a -- did that report that said that her
14 high beams were on. But I don't know, because I never go
15 into that BI file -- and it is not my habit, or anyone's
16 habit at USAA, to comingle or discuss the accounts. I
17 don't know what that file says in terms of negligence.

18 And here's my assumption on that. We paid Antoine
19 Johnson and we paid Mary Kuck, and we have made offers to -
20 - and I've learned this through my -- our counsel here,
21 that we've made offers to Mr. Kuck and apparently that is
22 going to trial because of a value dispute.

23 So they would not have paid anything in Mrs. Hood's
24 file if they did not find factual evidence that she had
25 some comparative liability or negligence.

1 Q. So basically what you're saying is that Antoine
2 Johnson sued Ms. Hood and we hired -- or USAA hired Chris
3 Nickels to represent Ms. Hood and USAA did the second one
4 of these things by paying money to settle those cases;
5 right? Two of them, one still going?

6 A. One still going.

7 Q. All right. And if they paid money -- the only reason
8 to paid money is by determining that Ms. Hood could be
9 found at fault by a jury; right?

10 A. Yes.

11 Q. Okay. Now, when you get a -- any claim in, is the
12 ultimate goal to resolve that claim?

13 A. It's to resolve it and to come to a fair and
14 reasonable conclusion of the evidence that I was given.
15 And I don't remember if I testified to it yesterday, but
16 one of the things that I wanted y'all to understand is that
17 we do two completely separate investigations.

18 So I do an investigation under the UM file. The other
19 adjuster does an investigation under the BI file. I don't
20 ask her what she does, or he. I don't -- they don't ask
21 me.

22 And one thing I wanted to clarify, that I want y'all
23 to understand, is Geico, on behalf of Mr. Johnson, is also
24 doing an investigation. I can't control what Geico does or
25 doesn't do. Geico may, on their own, obtain an expert.

1 They could -- they could do that. I have a right to
2 maintain an expert if I want to.

3 What -- there was a lot of questions about the Poplin
4 report. The Poplin report told us that her headlights were
5 on high beam, there was no evidence that her headlights
6 were on low beam.

7 Well, fortunately in my investigation, separate from
8 the Hood BI claim are -- so in my investigation, Jack
9 Daniel has an assistant. Her name is Mattie Settie.
10 Mattie Settie happened to own the same vehicle that Mrs.
11 Kuck owned.

12 And so Mattie was working in direct relationship with
13 Jack. She was his associate. And she told Jack how her
14 headlights worked in her car.

15 So what they determined to do is they decided to go to
16 the dealership and to take a video of exactly how that
17 switch works. Now, keep in mind, Mrs. Hood doesn't know
18 how that switch works.

19 But when that switch is on the automatic position and
20 she turns that car on, her car lights, headlights, come on
21 low beam, not high beam.

22 And so she contends the whole time that her lights
23 were in the automatic position. They would not have come
24 on high beam, they would have come on low beam.

25 She says that she never touched the switch. So we can

1 only assume that that car should have been -- had the
2 headlights been on, it should have been on low beams. And
3 the Poplin report did not say that.

4 The other thing that I found interesting when Mattie
5 went to the dealership is that when the high beams are on,
6 the low beams are also on. They work in connection with
7 each other. The hot shock that Mr. Poplin talked about,
8 was only on the high beam, not on the low beam. If her
9 vehicle was in the automatic, number one, it should have
10 been on low beam; and, number two, if it had been on high
11 beam, there should also have been hotshot on the low beam.

12 And the last thing that we found out was that in --
13 the only time her car could be on high beam without being
14 on low beam is when you do the flash on the handle. If you
15 do a flash for that second that you do the flash, it's on
16 high beam only.

17 That's the investigation that I did. Because Mattie
18 Settie gave that information to Jack Daniel, I don't know
19 that the adjuster in Mrs. Hood's BI claim had that
20 knowledge or did that investigation but.

21 Q. Thank you, Kathy.

22 Now, how many times have you testified at trial
23 before?

24 A. This is the first and only time I have ever testified
25 in a trial of any kind.

1 Q. How many times have you ever been deposed?

2 A. I have been deposed one time, by Mr. Willey a few
3 months ago.

4 Q. Okay. How many times have you been the subject of a
5 bad faith lawsuit?

6 A. Never. In twenty-four-and-a-half years, never.

7 Q. Now, when you are evaluating a case do you rely on --
8 let me ask you a different question.

9 When you're evaluating a case, what weight do you give
10 to the evaluation of the defense counsel?

11 A. I give it significant weight, because they're
12 knowledgeable. They're doing -- they're the one that's
13 actually doing the investigation.

14 However, I do have the right as the litigation
15 manager -- and what that means is that I manage the suit
16 with Mr. Jackson so -- I mean, with Mr. Daniel. So Mr.
17 Daniel really can't do anything in that file unless I
18 approve it. And I have the right to override what he would
19 say if I disagreed for some reason.

20 Q. And did -- so Mr. Daniel can give you a settlement
21 evaluation and you can decide to go above it or below it
22 based on your own evaluation?

23 A. Yes.

24 Q. All right. But you had an attorney who was
25 experienced in this area ---

1 A. Yes.

2 Q. --- on this case?

3 Now, these letters that we've looked at, I think you
4 have Exhibit 8 in front of you.

5 A. I grabbed that. Initial case analysis.

6 MR. WHELAN: Is that -- is eight in evidence?

7 THE COURT REPORTER: It is.

8 MR. WHELAN: Okay.

9 Q. Now, I'm going to hand you Exhibit 9. This is a
10 letter from Mr. Daniel dated March 29th, 2016.

11 THE COURT: Did you hear that date? March 29th, 2016?

12 MR. POULIN: I did. Thank you, Your Honor.

13 A. Okay.

14 Q. And is this an evaluation that Mr. Daniel gave to you?

15 A. Yes, it is.

16 Q. Okay. And looking at the first one, Exhibit 8 --
17 that's right. The last page, which is -- the second-to-
18 the-last page, which is 140. I just wanted to ask you
19 about the initial evaluation when the case came in. So at
20 this time Geico -- this is -- the date, again, is October
21 21st, 2015. Geico is still defending the case but it's not
22 paid its \$25,000 yet; and Mr. Daniel does not have
23 discovery yet from the plaintiff?

24 A. That is correct.

25 Q. And his evaluation at that time, what he told you the

1 settlement range was, was what?

2 A. Four to twelve thousand dollars.

3 Q. Okay.

4 A. Mr. Daniel had been asking Mr. Smith for a demand.

5 And a demand is when they make a monetary demand from us

6 and they provide us with all the medical records and

7 documentation that we would need to make an evaluation of

8 the claim. And at no time at this point, the four to

9 twelve thousand dollars, had Mr. Smith given him a demand.

10 Q. Okay. So that's October -- I'm sorry, that's actually

11 October of 2015.

12 And then the next report is Octo- -- is what date? It

13 is Exhibit 9.

14 A. March 29, 2016.

15 Q. Okay. And at this time Mr. Daniel has been able to do

16 more investigation?

17 A. Yes, sir.

18 Q. And he talks to you about the discovery from the

19 plaintiff, the deposition of Antoine Johnson, the letter

20 from Mr. and Mrs. Kuck, Mr. Kuck's recorded statement,

21 eyewitness Dustin Lee -- and we'll go through this with Mr.

22 Daniel. I'm trying to save time.

23 A. Okay.

24 Q. And then so he's looking at things that are both pros

25 and cons for the plaintiff; right, like, for example, Mr.

1 Kuck's statement had changed; right?

2 A. Correct.

3 Q. And then his evaluation is what -- I'm sorry, this is
4 on Page 155.

5 A. ... five. He says: That providing a 25,000-dollar
6 credit for Geico's policy and assuming a reliability
7 argument remains slightly stronger for the plaintiffs; a
8 reasonable settlement, that range is 170 to 275.

9 Q. Okay. So that's a pretty big range; \$100,000, right
10 there?

11 A. Right. But then he prefaces that by saying under the
12 circumstances we recommend reevaluating the case's value
13 after more discovery is conducted.

14 Which means we didn't have everything we need to make
15 a fair evaluation of the claim.

16 Q. Okay. And that takes us to the next exhibit. I'm
17 going to hand you a letter dated May 12th, 2016, which is
18 marked as Exhibit 10. And is this the next evaluation from
19 Mr. Daniel?

20 A. [No response]

21 Q. Is this -- is this the next evaluation that Mr.
22 Daniel ---

23 A. Oh, yes, sir. I'm sorry. Yes, May 12th, 2016. Yes,
24 sir.

25 Q. Okay.

1 MR. WHELAN: And, Your Honor, we would move this into
2 evidence, please.

3 Q. Kathy, what's the exhibit number on that?

4 A. This is Number 10.

5 MR. WHELAN: Ten. It is Exhibit 10.

6 MR. POULIN: We would renew our same objection before,
7 Your Honor.

8 And I'm just a little bit confused. Were -- did you
9 move all three of those other letters in the last time you
10 moved, or did you mark them all together? I'm just trying
11 to keep ---

12 THE COURT: They've been marked as eight through
13 twelve. Eight is currently in evidence. I don't believe
14 nine is in evidence. He's just offering ten into evidence
15 now.

16 MR. POULIN: Okay. I didn't think so, either; but
17 nine was up on the screen.

18 THE COURT: I don't believe ---

19 MR. WHELAN: I thought I moved -- I thought I moved
20 nine in, Your Honor. If I didn't, I would move nine into
21 evidence, please.

22 THE COURT: And so you're moving nine and ten into
23 evidence?

24 MR. WHELAN: Correct.

25 THE COURT: And you're renewing the same objections?

1 MR. POULIN: Correct, Your Honor.

2 THE COURT: Yes. That's noted for the record. Thank
3 you.

4 [Whereupon, Defendant's Exhibit Number 9 admitted into
5 evidence by the Court]

6 (Whereupon, Defendant's Exhibit Number 10 admitted
7 into evidence by the Court]

8 Q. All right. Now, looking in -- at May 12th, now more
9 discovery has been done; correct?

10 A. Yes, sir.

11 Q. And Corporal Jennifer Whirl, the police officer, has
12 been deposed; right?

13 A. Yes, sir.

14 Q. And we have -- we have talked about this. But he goes
15 through one, two, three, four pages talking about Officer
16 Whirl's deposition and pros and cons. And then he goes --
17 then he talks about Plaintiff Hood's deposition?

18 A. Yes, sir.

19 Q. All right. And then he talks about the letter to --
20 that Ms. Hood wrote to the Kuck's asking them to give a
21 statement to her lawyer?

22 A. Yes.

23 Q. All right. And he says that the plaintiff has --

24 MR. WHELAN: If we could go to 161, please, Alex.

25 Q. Okay. So there's the letter to Mr. and Mrs. Kuck.

1 And he discusses that. We've been over it. It goes on for
2 a few pages.

3 A. Yes, sir.

4 Q. Right before that, if you would, please; it says Ms.
5 Hood has identified a new witness in her deposition, a
6 Bonham?

7 A. Oh, yes.

8 Q. All right. And was Ms. Hood ever able to get --
9 provide any evidence from this alleged witness, Ms. Bonham?

10 A. No. We never took a deposition. She did not testify
11 at the trial, to my knowledge.

12 Q. Okay. And then it talks about her injuries. It talks
13 about her disability claims. It talks about a liability --
14 a liability analysis.

15 And if you could go to 165 at the bottom of the page.
16 Now Mr. Daniel's evaluation is what?

17 A. It says, at present a reasonable settlement value for
18 this case would be 95 to \$245,000.

19 Q. All right. And, again, there's pros and cons in these
20 things?

21 A. Yes, there is.

22 Q. And if we could go to Page 166, which is the last page
23 of this exhibit on May 12th. And at this point are you
24 guys trying to get a demand from Mr. Smith?

25 A. We had been trying to get a demand from Mr. Smith. We

1 had -- we were even at one point told by Mr. Smith that he
2 was going to be sending us one, and he never did.

3 Q. Okay. And Mr. Daniel -- let me ask you this. Let me
4 ask you this. If Mr. Smith had made a demand for in this
5 settlement range would you have wanted to settle the case?

6 A. Between 95 and 245, absolutely.

7 Q. All right. Let's go to the next letter, please, which
8 is dated August 22nd, 2016. This is the second-to-the-last
9 one. This is Bates labeled 180 through 184.

10 A. Okay.

11 Q. Do you recognize Exhibit 11?

12 A. Yes, I do.

13 MR. WHELAN: We would move that into evidence, Your
14 Honor.

15 THE COURT: Hang on just a second. Okay. Yes, I'm
16 sorry. I had my numbers wrong. That's Exhibit Number 11
17 is August 22nd, 2016.

18 Mr. Poulin?

19 MR. POULIN: Same objection, Your Honor.

20 THE COURT: So noted. Thank you. It is admitted.

21 [Whereupon, Defendant's Exhibit Number 11 is admitted
22 into evidence by the Court]

23 MR. WHELAN: Thank you.

24 Q. This is a five-page letter. Again, there's pros and
25 cons in the letter and an evaluation ---

1 A. Yes, sir.

2 Q. --- an evaluation at the end. And he -- if you look
3 at the first page, he says that he had a conversation with
4 Kevin Smith. And in the middle of the page it says Mr.
5 Smith also advises that he -- that's it. Mr. Smith also
6 said that he has retrieved data from Plaintiff Hood's
7 vehicle that proves plaintiff's lights were activated at
8 the time of the accident?

9 A. Correct.

10 Q. And he also said that he had cell phone records that
11 say he was talking on the phone at the time of the
12 accident?

13 A. And I believe that was the first time I knew of any
14 cell phone records, yes.

15 Q. Okay. And then Mr. Smith says again he would be
16 sending us a demand letter, at the end; doesn't he?

17 A. Yes, he does.

18 Q. Okay. And did he?

19 A. No. We never received a demand.

20 Q. All right.

21 A. To this date, I don't believe we've ever received a
22 demand.

23 Q. Okay. Now, if we could go down to the next paragraph,
24 please.

25 A. Okay.

1 Q. All right. In this discussion with Mr. Daniel, Mr.
2 Smith told Mr. Daniel that he had hired Woody Poplin?

3 A. He had hired Woody Poplin, yes.

4 Q. Okay. And Mr. Smith told Mr. Daniel, in the last line
5 on this page, that Poplin confirmed that her headlights
6 were turned on?

7 A. Yes, he did.

8 Q. Okay. And then if you go -- if you could go to the
9 next page, please.

10 A. Can -- can I just say something about Mr. Poplin's
11 report?

12 Q. Sure.

13 A. Mr. Poulin yesterday, and I believe it was even
14 mentioned today, has indicated that the BI adjuster or
15 litigation manager shared this report with me.

16 I don't remember how this report was shared with me;
17 and I don't think he knows, either. And if you read Mr.
18 Daniel's report, it says: Even though plaintiff counsel
19 has yet to formally name this expert, we are going to send
20 Mr. Poplin a subpoena rather than await production of this
21 file.

22 Q. Right.

23 MR. WHELAN: That's the next page, top of the -- top
24 of the page. Right. There you go.

25 (Whereupon, display adjusted)

1 A. So, I mean to indicate that I shared -- that the BI
2 adjuster shared a file with me, when he has no definitive
3 proof, and we mentioned getting a subpoena, that leads me
4 to believe that we could have potentially gotten it
5 directly from Mr. Poplin.

6 I'm not saying that's what we did. I'm saying that's
7 what potentially could have happened.

8 Q. Okay. And, I mean, if -- you're not going to share an
9 evaluation with a liability adjuster if you're the UIM
10 adjuster; are you?

11 A. No. I have no idea what the evaluation in the other
12 file is, and they have no idea what my evaluation is.

13 Q. Okay. Is it -- let me ask you a different question.

14 Now, if we could go to the Page 182 at the bottom.

15 [Whereupon, document displayed]

16 MR. WHELAN: All right.

17 Q. Now, Mr. Daniel believed that -- he says, this is a
18 case in which we have a decent chance of a verdict in favor
19 of the defendant on liability. Correct?

20 A. Yes, sir.

21 Q. Plaintiff's medical bills total \$208,000; correct?

22 A. Yes, sir.

23 MR. WHELAN: All right. And then if we could turn to
24 the next page.

25 Q. He says, based on -- okay, he talks about possible

1 jury -- jury ranges. He says if the case goes poorly there
2 could be a 500,000-dollar to 850,000-dollar verdict?

3 A. Yes, sir.

4 Q. If the -- if the plaintiff's damages case goes well
5 and the jury decides the defendant should have seen her,
6 there could be a verdict of between 275,000 and 450,000?

7 A. Yes, sir.

8 Q. And there was a potential chance of a verdict in
9 excess of a million dollars; but that was fairly low,
10 correct?

11 A. Yes, sir.

12 MR. WHELAN: All right. And if we could go down to
13 the next paragraph.

14 [Whereupon, display adjusted]

15 Q. All right. So his evaluation, again, is -- he says
16 that there is a wide settlement range of 95 to 245. And he
17 says that the -- if the offer were to exceed plaintiff's
18 medical bills or entertain negotiations over \$210,000, that
19 would be generous; correct?

20 A. Yes.

21 Q. All right. But he said that facts currently do not
22 warrant an offer that far exceeds \$245,000?

23 A. That is correct.

24 Q. If we could go ---

25 A. Can I just clarify something that I think might be

1 important for the jury to know?

2 Q. Please.

3 A. When Jack Daniel talked about a foreseeable verdict of
4 275 to 450, that's before any setoffs. Under our policy,
5 there is a non-duplication clause in our policy which says
6 that anything that she's already collected she can't
7 collect again.

8 So if she collects \$25,000 from Mr. Johnson's policy
9 and then she also had under her policy that she paid for
10 she had \$50,000 in PIP coverage, she can't collect that,
11 either, as well as any other medical bills that may have
12 been paid by Medicare or any other source, whether it be
13 TriCare, Medicare, the VA, whatever.

14 So jury verdict range is different. It's going --
15 it's always going to be higher than a potential verdict --
16 or range that we put on a case in terms of negotiations
17 pretrial.

18 So that's why -- I just wanted to make sure that you
19 understood why the verdict range was higher than what Mr.
20 Daniel put in his actual settlement range. Because we're
21 taking into account that we're going to get all those
22 offsets.

23 Q. So you have got the verdict range if liability is
24 against Mr. Johnson ---

25 A. Mr. Johnson.

1 Q. --- and then if liability was against Ms. Hood, that
2 would be zero?

3 A. Right.

4 Q. And so you find a settlement value in the middle?

5 A. Correct.

6 Q. Somewhere in that range?

7 A. Somewhere in the range, yes.

8 Q. Okay. I believe the last letter is dated February
9 22nd. And that has been -- is this a letter that Mr.
10 Daniel sent to you on February 20th, 2017?

11 A. Yes.

12 MR. WHELAN: Okay. We would move this into evidence
13 as Exhibit 12, Your Honor.

14 MR. POULIN: Same objection, Your Honor.

15 THE COURT: Thank you. It is admitted over
16 plaintiff's objection.

17 [Whereupon, Defendant's Exhibit Number 12 is admitted
18 into evidence by the Court]

19 Q. And in this document, Mr. Daniel talks about the
20 depositions of William Kuck and Mary Kuck?

21 A. Yes, sir.

22 Q. Mr. Smith deposed both of them; and Mr. Kuck's
23 deposition, Mr. Kuck said that his lights were -- her
24 lights were off; right?

25 A. He initially said her lights were off, yes.

1 Q. At the deposition he also said her lights were off?

2 A. He does at one point, yes.

3 Q. And then Mr. Daniel, on the -- on Page 2 ends at Bates
4 Number 253, the second full paragraph, the bottom line.

5 Although Mr. Kuck had an inconsistent statement -- actually
6 that's -- I'm sorry, it's the next paragraph after that.

7 I'll tell you what, let's move on just to save time.

8 A. Can I just say something about Mr. Kuck's statement?

9 Q. Please.

10 A. He -- they're implying all along that he testified
11 that her headlights were on. He never testified at the
12 trial. If he was in support of her, I would have thought
13 they would have testified. If they thought his testimony
14 was strong enough, he would have testified at the trial.
15 And he didn't.

16 Q. Was the -- was any scientific evidence presented at
17 trial?

18 A. No ---

19 MR. POULIN: Your Honor, Your Honor ---

20 THE COURT: That's sustained.

21 MR. POULIN: We've already been through this.

22 THE COURT: Thank you.

23 Q. All right. And if you could look at Page 258, bottom
24 of the page.

25 {Whereupon, display adjusted}.

1 MR. WHELAN: There we go.

2 Q. This is -- this is Mr. Daniel talking about mediation?

3 A. Yes, it is.

4 Q. All right. He says that our last settlement offer was
5 \$200,000 ---

6 A. Yes, sir.

7 Q. --- and the plaintiff's lowest specific demand was
8 \$650,000?

9 A. Yes, sir.

10 Q. And the plaintiff suggested the case get settled
11 between 300 and \$400,000?

12 A. Yes, sir.

13 Q. And then if you turn to the next page, bottom
14 paragraph, Mr. Daniel says that at this time his
15 recommended range is 95,000 to \$245,000?

16 A. Yes, sir.

17 Q. Okay. So based on all the evidence that he's
18 gathering, he is at 95 to 245 ---

19 A. And he's remained that way.

20 Q. And he remained that way.

21 Now, the authority that USAA had on this case was how
22 much?

23 A. Was 250,000.

24 Q. Okay. And that was above what Mr. Daniel was
25 recommending at that time?

1 A. Yes, it was.

2 Q. Okay.

3 MR. WHELAN: If I could have just a moment, Your
4 Honor.

5 [Whereupon, pause for Mr. Whelan]

6 Q. Now, I'm just going to ask you about the -- about one
7 other topic. What is a mediation?

8 A. I am very familiar with mediations. As you heard
9 yesterday, my main job with USAA for the past six to seven
10 years has been to attend mediation. I attend somewhere in
11 the realm of 20 to 25 mediations every month. I'm very
12 familiar with how -- with how they work. It's a strategy
13 on both sides.

14 When you go to a mediation and you know that you only
15 have 250,000 in authority, you've made a 200,000-dollar
16 demand or offer, and their last formal demand was \$650,000,
17 that's a 450,000-dollar difference. It's futile to go on
18 at that point in time.

19 I think there was some reference yesterday, and I'm
20 not sure -- well, let me go on and explain to you. When
21 you go to a mediation, both parties present on either side.

22 Mrs. Hood came with her attorneys, and my attorney
23 came with a representative for me. I was not present.
24 There's a neutral mediator in the middle. That mediator
25 has no opinion on either side. What his job is to do is --

1 and I believe it's the same in South Carolina. But
2 everybody goes into one room. The plaintiff's side gives
3 their opening. So it's kind of like a mock trial, a small
4 trial.

5 So the plaintiff goes in. They give their opening.
6 And their opening is basically telling the mediator why
7 they think that they should be paid the sum of money that
8 they're going to ask for.

9 Then our side gets to go, the defense side. Jack
10 Daniels would have given his reasons why we should not pay
11 them that money.

12 And each side has a chance after that to rebut, if
13 they want to, if they want to clarify something or
14 whatever. But both sides do this to give the mediator
15 information.

16 Now, on our side, on the defense side, one of the
17 things that almost every one of my attorneys do when they
18 go into mediation -- and Mr. Daniel will have to talk to
19 this. I don't know if he did it. But that's the only
20 opportunity that we have to talk directly to Therese Hood.

21 And normally, we will even address that. We'll say,
22 Ms. Hood, this is the only opportunity that we're going to
23 have to tell you what you're going to see when we go to
24 trial. And we're here -- another thing, and there again,
25 Jack Daniels will have to say -- I usually say or my

1 attorney will say, we're here in good faith, we want to get
2 this settled.

3 When I go to a mediation my whole intent to go to that
4 mediation is to get that case settled for both sides. And
5 the mediators will tell -- will say -- during his opening
6 statement he will normally say something to the effect of a
7 good mediation is when one side goes out and they took less
8 money than they wanted and the other side leaves up- -- or
9 disappointed because they paid more than they wanted.

10 Something I wanted to say, too, to the value, that
11 200,000-dollar value, is Mr. Willey and Mr. Smith have both
12 been in this business a long time, as have I. At no point
13 in time, to my knowledge, did Jack Daniel ever go into that
14 mediation and say, 200,000 is our final offer. He offered
15 the 200,000 and left it open. That should have indicated
16 to Mr. Willey and Mr. Smith that there was more money out
17 there to be had.

18 On the other side, their last formal demand at
19 mediation was \$650,000. It's my understanding through Jack
20 Daniel that this conversation about the three to four
21 hundred thousand was outside of mediation.

22 So what that tells me is that he wants somewhere
23 between three and four hundred thousand. We look at
24 midpoints. When they give us a bracket like that, we look
25 at midpoints. So that told me he wanted 350,000.

1 He knew that I didn't have anything that started with
2 a three, or I would have offered it at that point in time.
3 So he knew that I had something between my last offer of
4 two hundred and his demand of potentially three to four
5 hundred.

6 At no point in time did he ever make a demand to us
7 for anything under three hundred thousand dollars, when he
8 knew that there was something between two and three hundred
9 thousand dollars.

10 MR. POULIN: Your Honor, I object. There's no
11 foundation that's been laid to what or -- what Mr. Smith
12 knew or didn't know. In fact, he is going to testify to
13 the opposite.

14 THE COURT: Thank you.

15 And I understand you're giving her some latitude over
16 it. But if you'll ask the questions and let her answer
17 specific questions, please.

18 THE WITNESS: Okay.

19 Q. What was the last formal offer that Mr. Smith made?

20 A. \$650,000.

21 Q. Okay. And then he suggested that the case could
22 settle between 300 and 400?

23 A. And 400.

24 Q. Did he ever make an offer below that?

25 A. Never.

1 Q. Were you surprised to hear that Ms. Hood would have
2 accepted \$250,000?

3 A. Absolutely. And I'm surprised to hear that, because
4 in their discovery they found out that my reserve was set
5 at 250,000.

6 Q. And, now, obviously USAA would have -- you said your
7 goal is to resolve cases; right?

8 A. Absolutely, the goal is -- and I resolve probably --
9 at mediation I resolve 80 to 85 percent of my cases. And
10 that -- don't take that as specific. I'm just giving you a
11 general, 80 to 85.

12 However, when we go to mediation sometimes we find out
13 information because of the opening statement that their
14 side gives and the information that the mediator is giving
15 back and forth sometimes we discover additional information
16 that helps us to resolve that case.

17 So somewhere after the mediation, we settle -- all but
18 maybe one to two percent of our cases ever see a trial.

19 Q. All right.

20 A. So between that 80 and 85, up to say 98 percent on
21 average, settled between the mediation and before it goes
22 to trial. One to two percent of our cases go to trial.

23 Q. All right. And if -- if -- when offers are being
24 exchanged, if USAA is at 200 and the plaintiff is at 650 or
25 350 or some other number well above that, is there any

1 requirement for USAA to offer all of its authority to
2 mediation?

3 A. There's absolutely no requirement unless we -- you
4 know, if we -- if there's some indication that we could get
5 it settled at 250, like a demand -- and I can't speak on
6 behalf of Mr. Smith. But I can tell you that two options
7 could have happened here that would have gotten this case
8 settled.

9 Either Mr. Smith could have come and said we'll take
10 \$250,000, at which time Jack Daniels would have said done.
11 Or he could have come and said we'll take 350 if you'll --
12 we'll put 350,000, which was the midpoint in his bracket.
13 Three to four hundred thousand is his midpoint.

14 So he could have come and said we'll take 350,000 or
15 we'll take 300,000. And at that point -- well, 350
16 probably wouldn't have done it. But let's say he had gone
17 to his low end, 300. So now we're at a bracket of 200 to
18 300 and Jack Daniel knows that the midpoint of that is 250.

19 At that point in time Jack Daniels would have probably
20 called me and said, hey, what do you want me to do. And I
21 would have said go to him and tell him we'll meet him in
22 the middle. We could have settled the case then, too. But
23 that was never done.

24 Q. Now, were there settlement negotiations at trial?
25 Actually, let me back up.

1 Were there any settlement negotiations after the
2 mediation; did Mr. Smith ever make a demand after the
3 mediation?

4 A. No. And, in fact, if you read this letter of February
5 20th, 2017, which was after the trial -- just a minute.
6 Let me find it.

7 Q. Well, ma'am, let's -- let's just -- I don't think we
8 need to look at that.

9 A. I've got it.

10 Q. Time interests.

11 So you know -- were there any demands from Mr. Smith
12 before the mediation?

13 A. Before the mediation, ---

14 Q. Yes, ma'am.

15 A. --- no.

16 Q. Were there any demands from Mr. Smith after the
17 mediation?

18 A. No.

19 Q. What happened at trial; were there any negotiations at
20 trial ---

21 MR. POULIN: Your Honor, again ---

22 THE COURT: That's sustained. Thank you.

23 MR. WHELAN: I'm sorry. Negotiations at trial?

24 THE COURT: At trial, no, sir.

25 MR. WHELAN: Okay.

1 THE COURT: Sustained.

2 Q. Now, the result of the -- what was the result of the
3 trial? What was the result of the inability to settle the
4 case for USAA? How did that affect the membership?

5 A. It affected our membership negatively. We had to pay
6 all of the defense costs, the costs, the attorneys' fees.
7 And we ultimately had to pay her her million-dollar policy
8 limit, when they were only asking for six-fifty or
9 something in the three to four range.

10 Q. Okay. And how did that inability to settle affect
11 Mrs. Hood?

12 A. She actually profited from her going to trial.

13 MR. WHELAN: Thank you, Ms. Moats.

14 THE COURT: Can we take a short break before we go
15 into redirect?

16 Ladies and gentlemen, we've had you in here for a
17 little over an hour and a half. Let's take a ten-minute
18 break. Thank you. Please don't begin discussing the case.

19 [Whereupon, a recess is taken 6/26/9, 11:11 a.m. to

20 [Whereupon, resume after break 6/27/19, 11:24 a.m.]

21 THE BAILIFF: Your Honor, the jury is complete.

22 THE COURT: Thank you. Mr. Poulin?

23 MR. POULIN: Thank you, Your Honor. Ms. Moats, good
24 morning again.

25 THE WITNESS: Good morning.

1 MR. POULIN: Did you have a good restful night last
2 night?

3 THE WITNESS: No.

4 MR. POULIN: No. Okay. Well, your memory seems to be
5 a lot better today, so that's good. We've got -- we've got
6 a fresher Ms. Moats, it seems like.

7 **REDIRECT EXAMINATION BY MR. POULIN OF KATHY MOATS:**

8 Q. I guess if we were just to summarize what you've spent
9 the last probably two hours testifying about, we've got a
10 wreck where there's a little bit of conflicting evidence on
11 each side; right?

12 A. Yes.

13 Q. And we talked about all that evidence that you
14 reviewed?

15 A. Yes.

16 Q. And then your evaluation based on that review; right?

17 A. Yes.

18 Q. Okay. And, really, all of that we can agree that
19 really the case isn't about what actually happened and who
20 was at fault in the wreck; right? This case ---

21 A. This case.

22 Q. --- isn't about who was at fault?

23 A. Correct.

24 Q. It's already been decided, right, by another jury?

25 A. Yes.

1 Q. Who's determined that Terry is entitled to at least --
2 to 1.275 million dollars; right?

3 A. Yes.

4 Q. Okay. So this case is about your evaluation of all
5 that evidence and what you did based on your evaluation.

6 Now, I think it would be a good idea just to make sure
7 we're very clear on the timelines, since we've been through
8 a lot of documents and a lot of testimony, and make sure
9 that we're all on the same page with the timeline.

10 MR. POULIN: Can I have the defense's exhibits,
11 please?

12 [Whereupon, Mr. Poulin reviews exhibits]

13 Q. All right. So Defendant's Exhibit Number 8, that's
14 kind of where the case starts; right, give or take -- you
15 get it in June -- late June or early July of 2015, and you
16 send it off to Jack Daniel, and that's kind of where your
17 interactions with Jack start; correct?

18 A. Correct.

19 Q. Okay. And then he sends you that report on what date?

20 A. October 21st, 2015.

21 Q. Okay. And that's his basically his initial report to
22 you; right?

23 A. Yes.

24 Q. And at that time y'all don't have any of the medical
25 bills or really know much about the injuries? This is very

1 early on; right?

2 A. This is very early on, yes.

3 Q. But you do have a fair amount of information there
4 about the liability part of it, about what happened in the
5 wreck; right?

6 A. Yes.

7 Q. So you know about the police report at that point,
8 based on that letter?

9 A. Yes.

10 Q. You know about Kerry Tanrath and what he's going to
11 say in his statement, based on that letter; right?

12 A. Yes.

13 Q. You know about Antoine Johnson and what he's going to
14 say, based on that letter; right?

15 A. Yes.

16 Q. Okay. And y'all know at that point what Terry Hood is
17 going to say because her statement is known to you at that
18 time, as well; right?

19 A. I'm not sure that I have her statement at that time.
20 I'm trying to see if he references it.

21 [Whereupon, the witness reviews documents]

22 A. I'm sure -- I would feel confident that we knew at
23 that time what her statement was going to be, yes.

24 [Whereupon, Plaintiff's Exhibit Number 10, estimate,
25 marked for identification]

1 Q. Okay. All right. And I'm going to hand you what's
2 been marked as Plaintiff's Exhibit Number 10. This was
3 actually part ---

4 [Whereupon, Mr. Whelan standing]

5 THE COURT: Just a minute. I think there's -- yes,
6 sir?

7 MR. WHELAN: I object to the relevance of this
8 exhibit, Your Honor.

9 MR. POULIN: It's a part of that -- it's a part of
10 that report.

11 THE COURT: You can approach.

12 [Whereupon, an off-the-record bench conference is held
13 6/27/19, 11:28 a.m.]

14 Q. All right. I'm sorry about that, ---

15 A. That's all right.

16 Q. --- ma'am. Going back to Defendant's Exhibit
17 Number 8, at the end of this letter from Mr. Daniel,
18 Exhibit 8 that's already in evidence, ---

19 A. Yes.

20 Q. --- there's a little section on estimated legal
21 budget. Do you see that?

22 A. Yes, I do.

23 Q. Okay. And when we talk about an estimated legal
24 budget, he's talking about the estimate of what it will
25 cost y'all in attorney's fees and that type of thing to

1 defend this lawsuit; right?

2 A. Yes.

3 Q. Okay. And every ---

4 MR. WHELAN: Your Honor, I object to relevance.

5 THE COURT: Objection -- it's noted. The objection is
6 overruled. Thank you.

7 Q. Okay. And every litigation has some defense cost to
8 you to hire and pay for the attorneys; right?

9 A. Yes, it does.

10 Q. And do you remember what the estimated defense cost
11 was in this case?

12 A. I don't, other than looking at this file ---

13 Q. Okay.

14 A. --- that you're giving me.

15 Q. What is a typical defense cost in a car-wreck case
16 like this?

17 A. Depending on whether it goes to trial. I would say
18 most of the cases I handle are somewhere in the five to
19 fifteen-thousand-dollar range.

20 Q. And defense costs?

21 A. And defense costs.

22 Q. What if they go all the way to trial?

23 A. Depends on the trial. It could go upwards of \$100,000
24 or more. I ---

25 Q. Okay. So initially y'all get the claim; you don't

1 know much about the damages side of it, but you know all
2 about the liability side; and Jack says reasonable value of
3 the case is somewhere around \$10,000 to offer in
4 settlement; right?

5 A. Yes.

6 Q. Okay. And then the case progresses and y'all get more
7 information on medicals and that type of thing; and the
8 value of the case, in Jack's opinion, changes, kind of
9 fluctuates, up to 275 and back to 245, based on what we saw
10 in the flowchart; right?

11 A. Correct.

12 Q. Okay. And at the end of the day it's your evaluation
13 of the case that matters; right?

14 A. Ultimately, yes.

15 Q. Because you don't have to accept Jack's evaluation?

16 A. I don't have to.

17 Q. And he's your -- he reports to you? You're his boss?

18 A. Yes.

19 Q. And, in fact, in this case you actually evaluated the
20 case slightly higher than Jack when you went to 250 and he
21 was at 245; right?

22 A. I asked for authority at 250, yes.

23 Q. Okay. All right. So moving forward in the timeline
24 now, let's put up our -- let's move now basically to the
25 timeframe around mediation. Because I think that's really

1 what's most relevant about this case.

2 MR. POULIN: Can we get the screen up?

3 VIDEO OPERATOR: I don't have it.

4 Q. All right. We established yesterday, and the Woody
5 Poplin report is in evidence, that the Woody Poplin report
6 on -- as Plaintiff's Exhibit 8, is dated August 12th, 2016;
7 right?

8 A. Yes.

9 Q. Okay. And we also established yesterday, and it's
10 Plaintiff's Exhibit Number 7, that the -- y'all -- Ron, we
11 think, set the reserve on this claim up to \$250,000 on
12 August 24th, 2016; correct?

13 A. That is correct.

14 Q. Okay. And did I understand your testimony correctly
15 yesterday that the increase in the reserve had nothing to
16 do with Woody Poplin's report?

17 A. You were making it sound like we got this report and
18 that's when we made our decision to increase the \$250,000.
19 That is not the case.

20 If you will look at Mr. Jackson's reports, he had
21 indicated earlier on that the case was worth 95 to 245. I
22 should have, at that time, and I will admit, probably
23 changed that reserve to 245 and I did not do so.

24 The fact that Ron changed that reserve was because he
25 found my error. It is not in direct -- you're assuming

1 it's in direct correlation with this report, and it's not.

2 Q. And it's your testimony that it's not; right?

3 A. It has something to do with it, because it's part of
4 my investigation of the file. So, yes, when I went -- when
5 we went to trial on this we would have taken into
6 consideration that a jury might have seen this report and
7 they might have believed this report. So we have to
8 include that in our evaluation of the case.

9 Q. Okay.

10 A. But was the 250 solely on this? No.

11 Q. Okay. And if I also understood your testimony
12 correctly yesterday, the reason that Ron discovered your
13 mistake, or whatever, and that the reserve was bumped up to
14 250 on August 24th, is because y'all had a meeting to
15 prepare for the upcoming mediation; is that right?

16 A. Yes.

17 Q. You said there's a mediation coming up some time in
18 August and y'all were meeting to prepare for that
19 mediation?

20 A. It was -- it was August, and then it was October, I
21 think; and then it ended up in December. And at some point
22 I would have met with Ron on that.

23 Q. Well, y'all would have met before the first mediation,
24 right, so that you would be prepared to go, even though it
25 ultimately didn't ---

1 A. We should have, yes.

2 Q. Okay. So before the first mediation was ever
3 scheduled, y'all -- you and Ron met on it, and that's when
4 y'all bumped the reserve up to \$250,000?

5 A. Two-fifty.

6 Q. Okay. That's what you testified to yesterday and
7 that's still your testimony today?

8 A. As far as -- best of my recollection, yes.

9 Q. Okay. But now we know, based on the exhibits that
10 your attorney has put into evidence; and specifically
11 Exhibit Number 11, what's the date on Exhibit Number 11?

12 A. August 22nd.

13 Q. Okay. And in this August 22nd letter to you -- which,
14 by the way, he sends to you by email; right?

15 A. I normally, yes, email an attachment; yes.

16 Q. Okay. And in this August 22nd letter he says: Dear
17 Kathy, I write to provide you an update on the status on
18 this case. The parties were scheduled for mediation in
19 this case on August 19th.

20 Is that what he said in the letter?

21 A. Yes.

22 Q. Okay. So that -- the initial mediation date was
23 actually August 19th, ---

24 A. You are ---

25 Q. --- right?

1 A. You are correct.

2 Q. Now, farther in this letter he mentions Woody Poplin's
3 report; right? Farther down in the letter.

4 A. Yes.

5 Q. And he also -- this is where he brings to your
6 attention that there is a contention that Mr. Johnson was
7 on his cell phone, they had the cell phone and they were
8 getting cell phone records.

9 A. In that one letter, yes, he does say that.

10 Q. In this same letter? This?

11 A. This one?

12 Q. Yes, ma'am.

13 A. Okay.

14 Q. This is August 22nd.

15 A. Yes. Yes. You're right.

16 Q. Okay. And, in fact, in this same letter it reminds
17 you that Kevin Smith had cancelled the mediation on August
18 7th, 2016; that's when Kevin wrote and said the August 19th
19 mediation can't go forward?

20 A. August the -- uh-huh.

21 Q. Okay. But then the reserve on the claim wasn't
22 changed until August 24th; is that right?

23 A. You are correct. Yes.

24 Q. Okay. So is it fair to assume that, in fact, the
25 reserve change on August 24th was not a result of a pre-

1 mediation meeting between you and Ron but it was for some
2 other reason?

3 A. There was still a mediation date pending on this. And
4 at some point in time I would have went to Ron and I would
5 have said we need to send this file for request for
6 authority. And ---

7 Q. Okay.

8 A. And I ---

9 Q. And you would -- and you would have scheduled that
10 meeting for three days after what you thought ---

11 A. We already knew ---

12 Q. --- the mediation was going to be?

13 A. --- the mediation was cancelled, but we knew that the
14 mediation was also going to be rescheduled. And if I
15 remember correctly - and I may not be absolutely on point -
16 I think it was going to be rescheduled in October and then
17 it got bumped up to December.

18 [Whereupon, pause for Mr. Poulin to confer with court
19 reporter regarding exhibit]

20 MR. POULIN: Robbie, do you still have your what you
21 marked for identification as Exhibit 7?

22 MR. WHELAN: What was that?

23 MR. POULIN: It was what we had the bench conference
24 about.

25 MR. WHELAN: That is what you objected to.

1 MR. POULIN: That is not accurate. That is what you
2 said you didn't want to put in.

3 [Whereupon, counsels confer]

4 MR. POULIN: This is what was marked as 5. We can
5 also remark it ---

6 THE COURT REPORTER: Seven?

7 MR. POULIN: Or seven, I'm sorry.

8 THE COURT REPORTER: Do we have the one with the label
9 that I put Number 7 on?

10 MR. WHELAN: I will find it in my stack.

11 [Off the record momentarily]

12 MR. WHELAN: Here is it. Well, this has -- this has
13 my -- I guess ---

14 MR. POULIN: Oh ---

15 MR. WHELAN: I think that is the judge's writing.

16 MR. POULIN: What about that one? Do you want to just
17 remark that as Defendant's 7?

18 THE COURT REPORTER: We're on the next Defendant's
19 -- Plaintiff's number?

20 MR. POULIN: This is what was already pre-marked as
21 Defendant's 7.

22 THE COURT REPORTER: Okay. Are we agreeing that this
23 was ---

24 THE COURT: Are we substituting?

25 THE COURT REPORTER: Substituting this for Defendant's

1 7?

2 MR. POULIN: Yeah, that's fine.

3 THE COURT REPORTER: Okay.

4 MR. POULIN: I'm sorry, Your Honor.

5 THE COURT REPORTER: That's okay.

6 [Whereupon, Defendant's Exhibit Number 7B, evaluation,
7 was substituted for Defendant's Exhibit Number 7. The
8 original exhibit marked Defendant's Exhibit Number 7 is
9 relabeled as Defendant's Exhibit Number 7A]

10 MR. POULIN: I am sorry, Your Honor.

11 Thank you.

12 Q. Okay. Now and so at some point y'all did have a
13 meeting, you and Ron and whoever else sat down and had a
14 meeting, ---

15 A. And I am sure that wasn't the only one.

16 Q. --- an authority meeting to figure out mediation;
17 right?

18 A. Yes.

19 Q. Okay. I am going to show you what was previously
20 marked as Defendant's Exhibit Number 7. And I am going to
21 refer you down to the middle of the page. And I how this
22 will help --- help us refresh your memory a little bit
23 about what happened at that meeting, since we weren't able
24 to recall much of that yesterday. Are those notes that
25 were taken regarding that meeting?

1 [Whereupon, the witness reviews documents]

2 A. You're -- I'll -- I apologize. I'm still -- even with
3 glasses, I'm having a hard time reading this.

4 Q. Okay. I thought that might be an issue. Let me see
5 if you can read it better on my iPad.

6 [Whereupon, the witness reviews documents]

7 THE COURT: I had trouble reading it, as well. It was
8 pretty ---

9 MR. POULIN: And the writing ---

10 THE COURT: Don't feel badly.

11 MR. POULIN: --- is very small.

12 THE WITNESS: Even with glasses I'm having trouble.

13 Q. So we're on the second page here. And I'm going to
14 zoom into this section on the middle for you, okay. See if
15 that makes it any easier. Does that make it a little bit
16 easier -- oh, sorry.

17 [Whereupon, display adjusted]

18 A. Well, obviously, when I touch that side is what's
19 doing it. Let me try to hold it this way. No, it doesn't
20 matter; I can't read it either way.

21 Q. Okay. And it says sort of here on the top, middle
22 part of the page it says: Claims authority conference
23 conducted today and authority granted for 250,000 regarding
24 UIM claim ---

25 A. Right.

1 Q. --- for Therese Hood. Do you see that?

2 A. Right.

3 Q. And then below are some notes about -- presumably
4 about the claims authority ---

5 A. Right.

6 Q. --- meeting that you conducted; right?

7 A. Right.

8 Q. Okay. And who -- are those your notes or Ron's notes?

9 A. No, this is a -- this is called an IET, injury
10 evaluation tab. It's in the claims file. And back when
11 this request for authority was done, I was required to fill
12 this out.

13 Q. Okay. So this is something that you filled out?

14 A. Yes.

15 Q. Okay. And I believe you testified earlier today,
16 while Mr. Whelan was asking you questions, that your
17 evaluation of the comparative negligence in this case was
18 50-50. Was that your testimony today?

19 A. Yes.

20 Q. Okay. Now, if you will read here on this note that
21 you filled out, where it says liability issues -- are you
22 with me?

23 A. Yeah. This thing keeps flipping back and forth.

24 Q. Okay. What does it say about liability issues? That
25 next sentence.

1 A. It says, our evaluation is the evidence will support
2 probable liability rests with Johnson.

3 Q. And Johnson -- Johnson is the guy that ran the stop
4 sign; right?

5 A. Uh-huh.

6 Q. Okay. So your evaluation is that the evidence will
7 support that probable liability rests with Mr. Johnson?

8 A. That's what it says.

9 Q. Okay. And that's what was discussed at that
10 settlement authority conference meeting, at least according
11 to these notes?

12 A. That would have been something that was discussed.

13 Q. Okay. Thank you.

14 And, in fact, as well, all along there were notations
15 in the -- in the USAA claims file that had the liability
16 determined to be 20 percent Mr. Johnson -- 20 percent Ms.
17 Hood, 80 percent Mr. Johnson; right?

18 A. That's what the liability adjuster put, yes.

19 Q. Okay. And you had the ability to change that?

20 A. I had the ability to change it. Yes, I did.

21 Q. And you didn't?

22 A. And I didn't.

23 Q. So that stayed in your file all throughout?

24 A. I'm assuming, yeah.

25 Q. Okay.

1 A. And there's a reason for that. Because when a file
2 goes to arbitration and the arbiter determines under the
3 property damage that it's 80-20, I cannot change that
4 liability in that -- in that claims file because that
5 affects whether or not our insured is charged an additional
6 premium because she -- if she -- if she's at fault in the
7 case to a certain percentage, it will increase her premium.
8 If it's not at fault.

9 Under the terms of arbitration, when we go to
10 arbitration we are bound by that 80-20 on that property
11 damage.

12 Q. Right.

13 A. If I change that, it could affect whether or not she
14 was charged for the accident. And I can't change it
15 because of the rule to bar.

16 Q. You can't change it?

17 A. Right.

18 Q. And you also didn't change it because you agreed that
19 it was most likely Mr. Johnson was liable for the wreck?

20 A. That's what the file says.

21 Q. Okay.

22 A. When I fill out that file and I'm asking for large
23 sums of money, there are things that I may or may not say
24 in that file that will help me get that money.

25 Q. So you may fudge the truth a little bit in your

1 report?

2 A. No, I don't fudge it. But I may -- I may not have
3 said -- I may have wanted to get \$250,000 so I put
4 liability is probable with Mr. Johnson. I could have gone
5 on there and said it's also probable with Mrs. Hood.

6 Q. But ---

7 A. But I'm limited to the information that I can put in
8 these files, so I have to put what I think is relevant for
9 that -- for that RFA.

10 Yes, I did put that the liability was probable with
11 Mr. Johnson because there was a good probability that he
12 would be found at fault.

13 Q. The liability most probably rests with Mr. Johnson;
14 right? Not half of it ---

15 A. I'll concede that ---

16 MR. WHELAN: Your Honor, object ---

17 A. --- I put that in ---

18 MR. WHELAN: Objection ---

19 A. -- the file.

20 MR. WHELAN: --- to mischaracterization, Your Honor.

21 THE COURT: That's sustained.

22 Q. Okay. So \$250,000 is the authority. There's no
23 dispute about that; right?

24 A. There's no dispute about that, no.

25 Q. And that was communicated to Jack Daniel?

1 A. Yes, it was.

2 Q. Jack knew that 250,000 was his authority?

3 A. That is correct.

4 Q. Okay. Y'all send Jack up to the mediation with the

5 third-party adjuster; correct?

6 A. Correct.

7 Q. Okay. And you will agree with me that Jack is acting

8 as an agent of USAA at that point?

9 A. He's acting as my attorney, USAA's attorney.

10 Q. Who -- right, ---

11 A. Yes.

12 Q. --- that y'all have paid for and that y'all trust;

13 right?

14 A. Yes.

15 Q. That's one of the reasons you didn't go, because you

16 trust ---

17 A. I trust Jack.

18 Q. --- Jack to handle it. Okay. And he goes up there.

19 Now, let me ask you this. You said you know how mediations

20 work and you go to a lot of them. And you said that

21 there's a lot of back-and-forth at a mediation; right?

22 A. Correct.

23 Q. Okay. And so one of the things that often happens is

24 a -- one party will make a demand or an offer and then the

25 other party will counter; right?

1 A. Yes.

2 Q. And then the parties will take turns going back and
3 forth?

4 A. Yes.

5 Q. Until it either settles or doesn't settle; right?

6 A. Yes.

7 Q. That's the way it usually works?

8 A. That's the way it usually works.

9 Q. Okay. So usually, then, if mediation is working the
10 way it's supposed to work, when one party moves off of
11 their number either up or down, then it's the other party's
12 turn to do something; right?

13 A. Yes.

14 Q. Okay. So if in this case Mr. Smith is at six hundred
15 fifty thousand and Mr. Jack Daniel comes back and says
16 we'll pay two hundred thousand, Mr. Smith comes back and
17 says we can probably get it done between three and four
18 hundred thousand, would you agree with me that it is now
19 Mr. Daniel's turn to make the next move?

20 A. I would -- I would agree with you under normal
21 circumstances. But not being there, I can't tell you.
22 That's something you're going to have to ask Jack Daniel.

23 Q. Okay.

24 A. Because I don't know why he made the decision not to
25 make that offer.

1 Q. Okay. And I believe you testified earlier or at least
2 you seemed to insinuate earlier, that then what Kevin Smith
3 should have done is he should have then made another lower
4 demand even though Jack never made a response to his last
5 one?

6 A. I never said he should have done that at mediation.

7 Q. Okay.

8 A. What I said was there was ample opportunity basically
9 after mediation for him to come to us at any time and say,
10 hey, I realize you probably don't have anything with a
11 three on it but how about if I offer -- or if I demand
12 three hundred. Then Jack would have made a counter demand
13 to him or -- and potentially got it settled.

14 Q. But there was ample opportunity after mediation for
15 y'all to go to them and offer a higher number as well,
16 wasn't there?

17 A. You were still at a number that we couldn't pay.
18 There was opportunity, yes; but you were still at a number
19 that we couldn't pay.

20 Q. But it was your turn to make a move, wasn't it?

21 A. And I believe that Jack Daniel asked for a demand,
22 another demand, a specific demand, that was never given to
23 us.

24 Q. It was your turn to make a move on changing the
25 number?

1 A. And under normal circumstances, yes, we would have ---

2 Q. Yes.

3 A. --- made that move.

4 Q. Okay. So it was your turn to make the next move once
5 mediation ended?

6 THE COURT: That's been asked and answered. Move on,
7 Mr. Poulin.

8 Q. Now, another thing that you said is that usually the
9 result of a good mediation is where one party pays more
10 than -- a little bit more than they want to get it done and
11 another party pays a little bit less -- or takes a little
12 bit less than they want to get it done; ---

13 A. Right.

14 Q. --- is that what you testified to earlier?

15 A. That's right.

16 Q. Okay. So in this case if Ms. Hood is saying that I
17 want somewhere between 300 and 400,000, which you
18 interpreted to mean 350, the midpoint; right?

19 A. Right.

20 Q. And y'all, we know from your notes, want to pay no
21 more than \$250,000; right?

22 A. Right.

23 Q. So actually a good reasonable mediation there, case
24 probably settles for somewhere closer to 275 or 300; right?

25 A. That's not correct. My authority was 250. And that's

1 where we valued -- that's where we got -- there was a value
2 range that we put on this case where it could settle
3 anywhere from 95 to \$250,000.

4 Q. So you wanted Therese, Terry, to walk out of mediation
5 accepting less than she wanted; but USAA didn't want to
6 walk out of media- ---

7 A. I never -- I never said I wanted her to do that.

8 Q. USAA wanted to walk out of mediation paying no more
9 than what they wanted?

10 A. She told us that her -- and you told us that her
11 demand, her authority, was \$250,000. Had we reached the
12 250,000, we would have both walked out of there without
13 that scenario. We would have both walked out of there
14 paying what we wanted, ---

15 Q. That's exactly right; ---

16 A. --- if that's the case.

17 Q. --- had you offered the \$250,000 it would have settled
18 that day.

19 Now, I've got one last question for you, ma'am. We --
20 you said you know how mediations work. And, you know,
21 there's a lot of posturing in mediation; right?

22 A. There's a lot of posturing.

23 Q. A lot of times attorneys may exaggerate here or there;
24 right?

25 A. They strategize.

1 Q. And, you know, it's -- you're not usually going to
2 come right out and tell the other side what your number is,
3 at least at the beginning; right?

4 A. Right.

5 Q. So, for example, Kevin Smith says we could probably
6 get it done between three and four hundred thousand
7 dollars; right? That's one of the things he ---

8 MR. WHELAN: Your Honor ---

9 A. Okay, there again, I wasn't at the mediation ---

10 THE COURT: Stop just a minute. What's the basis of
11 your objection?

12 MR. WHELAN: That they're -- it's facts not in
13 evidence.

14 THE COURT: Again, she has said she doesn't know when
15 that three or four hundred came in.

16 MR. POULIN: Okay.

17 THE COURT: So move along to your next question.

18 MR. POULIN: Understood.

19 Q. Okay. Well, let me ask you this, ma'am. You would
20 agree with me, though, that it is not okay for somebody to
21 go into a mediation and lie, just tell an outright lie;
22 right?

23 A. Right.

24 Q. You cannot go into a mediation and tell a lie?

25 A. I would not go into a mediation and lie.

1 Q. Okay. And if, in fact, Jack Daniel went into that
2 mediation and told Kevin Smith and told the mediator that
3 he did not have any authority from USAA over \$200,000,
4 would you agree with me that that would be a lie?

5 MR. WHELAN: Objection. Again, facts not in evidence.

6 THE COURT: That's sustained.

7 MR. POULIN: I have no further questions, Your Honor.

8 MR. WHELAN: Just a couple, Ms. Moats.

9 **RECROSS-EXAMINATION BY MR. WHELAN OF KATHY MOATS:**

10 Q. Now, you weren't at the mediation; Mr. Poulin wasn't
11 at mediation?

12 A. Correct.

13 Q. You don't know what was said. And at mediation there
14 is posturing that's done; right?

15 A. Correct.

16 Q. You see that on the plaintiff's side all the time?

17 A. All the time.

18 Q. You see it with codefendants; right?

19 A. Yes.

20 Q. This is the process of bartering to come to an
21 agreement; right?

22 A. Yes.

23 Q. Is there bluffing by both sides?

24 A. Bluffing?

25 Q. Yes. Yes, ma'am.

1 A. Of course.

2 Q. If the -- if it was the policy or the rule that a
3 defendant, or anybody, had to come in a mediation and just
4 pay their top dollar or their bottom dollar, you wouldn't
5 have the mediation; ---

6 A. Wouldn't be ---

7 Q. --- would you?

8 A. Correct.

9 Q. You'd just ---

10 A. There would be no reason for it.

11 Q. You'd just put all your money out there?

12 A. Right.

13 Q. And they -- it just wouldn't make any sense.

14 MR. WHELAN: Now, can we pull up Exhibit 11, please.
15 That is 180. And pull in the first paragraph.

16 [Whereupon, document on display]

17 Q. All right. And it says that Mr. Daniel tells you on
18 August 5th plaintiff's counsel, Kevin Smith, contacted us
19 to cancel mediation and we agreed to postpone it; right?

20 A. Yes, sir.

21 Q. Okay. So a mediation was going to be scheduled;
22 right?

23 A. Yes. And according to that IET, it was scheduled on
24 October 28th.

25 MR. WHELAN: And if we could -- I'm going to move to

1 enter Defendant's 7 in evidence. I think -- do you have
2 Defendant's 7?

3 MR. POULIN: Just subject to our -- what we had
4 discussed before, I have no objection.

5 THE COURT: Subject to our previous discussions
6 regarding redactions.

7 MR. WHELAN: Okay.

8 (Whereupon, Defendant's Number 7B, with redactions, is
9 admitted into evidence.

10 MR. WHELAN: And, Alex, this is Hood USAA 24 and 25.

11 [Whereupon, document displayed on screen briefly]

12 Q. This is the very small document that you just looked
13 at.

14 THE COURT: And that's -- if you'll take that page
15 down, please.

16 [Whereupon, document removed from display]

17 MR. WHELAN: It's page 25.

18 THE COURT: All right. Before that comes up on the
19 screen, can I get y'all to approach?

20 [Whereupon, an off-the-record bench conference is held
21 6/27/19, 11:57 a.m.]

22 MR. WHELAN: And, so just for the record, Your Honor,
23 we -- your ruling is that the second and third pages of
24 this exhibit can come into evidence, but the first cannot?

25 THE COURT: I don't think there was any objection to

1 the second and third pages.

2 MR. POULIN: No objection.

3 THE COURT: That's correct.

4 MR. WHELAN: All right. So could you pull up 25,
5 please.

6 [Whereupon, document displayed]

7 Q. And this is the page that Mr. Poulin just showed you.
8 This is an injury evaluation; is that right?

9 A. Yes. Injury evaluation tab is what it's called. IET.

10 MR. WHELAN: Okay. And I'd like to zoom in on the
11 middle.

12 [Whereupon, display adjusted]

13 MR. WHELAN: You are getting warmer.

14 [Whereupon, display adjusted]

15 MR. WHELAN: Right there. Okay.

16 Q. Now, the second sentence down ---

17 [Whereupon, display adjusted]

18 Q. That's it. That's what Mr. Poulin just asked you
19 about several times. And it says probable liability rests
20 with Johnson.

21 A. Probably, yes.

22 Q. Rests with him. Okay. And under South Carolina law
23 if a plaintiff -- if the parties are found equally at
24 fault, who does liability rest with?

25 A. Each of them ---

1 Q. Okay.

2 A. --- equally.

3 Q. If the plaintiff is found 51 percent at fault, who
4 does liability rest with?

5 A. With the plaintiff. She's barred from recovery.

6 Q. Okay. And when you say probable liability rests with
7 Johnson, you're not suggesting that Ms. Hood is going --
8 that it is likely that a jury is going to find her absolved
9 from fault; are you?

10 A. No. And I think if you'll go up on the IET you'll see
11 where it says comparative negligence.

12 Q. Right.

13 A. They put 50 percent.

14 MR. WHELAN: Well, right before we get there, if you
15 could zoom in on the numbers section of this.

16 [Whereupon, display adjusted]

17 Q. All right. So Ms. Hood's medical bills were \$207,000?

18 A. That's what was known at the time, yes.

19 Q. Okay. And you evaluated the general damages, which
20 would be medicals plus pain and suffering and emotional, et
21 cetera, between ---

22 A. Yes, sir.

23 Q. --- 242 and 342?

24 A. Yes, sir.

25 Q. And then the amount of negligence that you predicted

1 was 50 percent?

2 A. Yes, sir.

3 MR. WHELAN: Could you highlight that, Alex?

4 [Whereupon, display adjusted]

5 Q. All right. And that was one percent off of what

6 Ms. -- what the jury ultimately found?

7 A. [No response]

8 Q. And so you -- then it says \$25,000 offset. That's

9 what she received from the ---

10 A. From Mr. Johnson's insurance policy with Geico.

11 Q. Okay. And that's what leads you to a value range of

12 200 to \$250,000?

13 A. Yes.

14 MR. WHELAN: Okay. Thank you very much, Ms. Moats.

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

16 [Whereupon, Ms. Moats exits the witness stand]

17 THE COURT: Can I get y'all to approach real quick on
18 just timing?

19 [Whereupon, an off-the-record bench conference is held
20 6/27/19, 12:01 p.m.]

21 THE COURT: Ladies and gentlemen, what we were trying
22 to do, we are having lunch brought in for you. We had
23 scheduled it for about 12:30.

24 The next witness is going to be -- you're going to
25 hear the deposition excerpts. We're going to read those

1 deposition excerpts. It should go fairly quickly. We just
2 need to get that ready for you.

3 Rather than having you sit here waiting on us to do
4 that, I'm going to go ahead and give you just like a five-
5 minute break. Just so you know what our plan is, we're
6 going to go through a witness by reading the deposition
7 excerpts, and then your lunch should be here and we're
8 going to go ahead and break for lunch then.

9 Okay. Thank you again. Please don't begin any
10 deliberation.

11 [Whereupon, the jury exits the courtroom 6/27/19,
12 12:03 p.m. followed by a break to set up for reading
13 portions of deposition]

14 [Whereupon, court reporter requested page and line
15 numbers that will be read into the record]

16 MR. POULIN: It is just going to be Page 4 - Page 4,
17 Line 7 through 11. Page 11, Lines 4 through 6. Page 13,
18 Line 11 all the way through Page 18, Line 12. Page 22, 6
19 through 9. Page 33, Line 4 through Page 34, Line 2. Page
20 54, Line 3 through Page 55, Line 11. And Page 56, Line 24
21 through Page 59, Line 10. Page 60, Line 2 through Page 60,
22 Line 14. Page 81, Lines 20 through 22. Page 82, Line 4
23 through Page 84, Line 4. Page 85, Line 4 through 86, Line
24 7. Page 88, 21 through 23. Page 95, Line 1 through Page
25 96, Line 8. Page 103, Line 15 through Page 105, Line 7.

1 Page 109, 3 through 7 -- that's weird. Why is that there?
2 Well, I don't know that that needs to be there. And I also
3 don't know why we -- she kept that part out. Do you want
4 to strike that? I'm not sure what that's doing there.

5 Yeah, Robbie, it looks like that is my designation;
6 and I don't know what it does, so I'm happy just to ---

7 MR. WHELAN: Okay.

8 MR. POULIN: --- take that out. It has no context
9 with anything before or after it, as far as I can tell.

10 MR. WHELAN: Yeah, that's fine. Yeah, you can strike
11 that.

12 MR. POULIN: Okay. So ---

13 THE COURT REPORTER: So nothing on 109?

14 MR. POULIN: Nothing on 109.

15 THE COURT REPORTER: Okay.

16 MR. POULIN: And we will do that on both copies before
17 we forget.

18 [Pause for Mr. Poulin]

19 MR. POULIN: All right. So nothing on 109.

20 THE COURT: Okay.

21 MR. POULIN: 115, Line 2 through Line 14. 117, Line 3
22 through 7. 117, Line 22 through 25. 118, Line 1 through
23 2. 120, Line 7 through 16. 121 ---

24 MR. WHELAN: I had that as strike it.

25 MR. POULIN: The rest of 121?

1 MR. WHELAN: Yeah, I had this as out. I mean
2 that's -- that is not -- I mean that should not -- I think
3 that is a mistake. I think that is out.

4 MR. POULIN: Oh, okay. So nothing on 121.

5 THE COURT REPORTER: Okay.

6 [Whereupon, plaintiff counsels confer]

7 MR. POULIN: Okay. So nothing on 121. 122, 10
8 through 19 ---

9 PLAINTIFF ASSISTANT: I already have that marked out.

10 MR. POULIN: Oh, okay.

11 So that was a mistake.

12 130, 7 through 16, and 21 through 25. 131, 1 through
13 4. 135, 11 through 24. 137, 15 through 23. 155, 9
14 through 12. And that's it.

15 THE COURT REPORTER: Okay. I'm going to do a
16 parenthetical that says that's what you're going to be
17 reading. But if something is not read, that up to
18 y'all ---

19 MR. POULIN: To make a note of it.

20 THE COURT REPORTER: To make a note of it. And then
21 I'll go on the record and make a note of it.

22 MR. POULIN: Got you. And then that's -- that's Missy
23 Howard; right? Just to make sure.

24 THE COURT REPORTER: Yes.

25 MR. POULIN: Okay.

1 THE COURT REPORTER: And I'll make this a Court's
2 Exhibit.

3 MR. POULIN: Thank you.

4 [Whereupon, Court's Exhibit Number 10, Missy Howard
5 Deposition, is marked for identification by the court
6 reporter]

7 [Off the record momentarily for counselors to confer]

8 THE COURT: Okay. Are we ready?

9 MR. WILLEY: We are ready, Your Honor.

10 THE COURT: Okay. Let's bring the jury in.

11 MR. WHELAN: Your Honor, he made a comment in opening
12 about we invited this witness to come and she didn't come,
13 which isn't accurate. He served an invalid subpoena
14 improperly. So I just wanted to make sure there's no
15 comment like that and he's going to read the testimony
16 without inflection by the witness.

17 MR. POULIN: Well, yeah, I will not make any comment.
18 But I assume there Your Honor understands that she like ---

19 MR. WILLEY: It's not personal.

20 MR. WHELAN: Yeah, that's okay. I just don't want
21 them saying -- I mean, it's okay if they say ---

22 MR. POULIN: Elizabeth -- Elizabeth is going to read
23 the answers.

24 MR. WHELAN: Yeah, that's good.

25 THE BAILIFF: Are you ready?

1 THE COURT: Yes, sir. Thank you.

2 [Whereupon, the jury enters the courtroom 6/27/19,
3 12:19 p.m.]

4 THE BAILIFF: The jury is all present.

5 THE COURT: Thank you. Okay. Ladies and gentlemen,
6 testimony is now going to be presented to you by a
7 deposition. And a deposition is just a document that
8 contains the sworn testimony given by a witness, outside of
9 court, in the presence of their lawyers.

10 The testimony is entitled to the same consideration as
11 a live witness' testimony, the same consideration as if the
12 witness were present and gave the testimony about to be
13 read to you from the witness stand.

14 It's for you to determine the effect, value, weight,
15 and the truth of the testimony given in the deposition just
16 as you would any other witness.

17 Thank you.

18 MR. POULIN: Thank you, Your Honor. At this time we
19 would like to publish the deposition of Gail Missy Howard.
20 And Elizabeth, from my office, has been gracious enough to
21 agree to read the answer portion of it for us.

22 THE COURT: Come on up.

23 **DIRECT EXAMINATION BY MR. POULIN OF GAIL MISSY HOWARD (via**
24 **reading deposition):**

25 [Whereupon, deposition testimony of Gail Missy Howard

1 is read to the jury]

2 MR. POULIN: That is it, Your Honor. Thank you.

3 Thank you, Elizabeth.

4 ASSISTANT TO PLAINTIFF COUNSEL: Thank you.

5 THE COURT: Mr. Willey, Mr. Poulin, Mr. Whelan, can I
6 get y'all to approach for just a minute.

7 [Whereupon, an off-the-record bench conference is held
8 6/27/19, 12:22 p.m.]

9 THE COURT: Okay. Ladies and gentlemen, your lunch is
10 here. We are going to break until 1:30, give y'all a
11 chance to eat. You're welcome to move about the building.
12 I don't want you to feel you're hostages and trapped in the
13 jury room.

14 If you want to eat in the building, that's fine. If
15 you want to take your lunch and leave the building, that's
16 perfectly fine. But we're going to take an abbreviated
17 lunch today so we can move along, and we'll reconvene at
18 1:30.

19 Again, please don't begin discussing the case. Thank
20 you.

21 [Whereupon, the jury exits the courtroom 6/27/19,
22 12:44 p.m.]

23 THE COURT: All right. If there's nothing else, then
24 we'll be at recess until 1:30.

25 [Whereupon, the jury trial adjourns 6/27/19, 12:45

1 p.m.

2 [Whereupon, resume 6/27/19, 1:37 p.m. with jury
3 present]

4 THE COURT: Okay. Mr. Poulin, Mr. Willey, are you
5 ready to call your next witness?

6 MR. POULIN: We are, Your Honor. We are going to call
7 Kevin Smith to the stand.

8 [Whereupon, witness is duly sworn]

9 THE CLERK: And for the record, please state your full
10 name, spelling your last.

11 THE WITNESS: Kevin Smith. S-M-I-T-H.

12 [Witness chair sinks, after witness is seated]

13 MR. POULIN: Kevin, I think you are probably tall
14 enough, with the chair.

15 THE WITNESS: Yeah.

16 **DIRECT EXAMINATION BY MR. POULIN OF KEVIN SMITH:**

17 Q. If you would, would you take a minute and just
18 introduce yourself to the jury.

19 A. I am Kevin Smith. I was born and raised in
20 Charleston. Went to Bishop England High School. It was
21 downtown. And played basketball at the Citadel. Went to
22 law school up in Boston after that. And I have been
23 practicing here ever since. I work in Charleston.

24 Q. Okay. And we learned earlier - I guess you have known
25 Terry and her family for a little while, even before 2014?

1 A. Yeah, I -- I represented Terry's daughter a long time
2 ago and got a call several years later from her daughter
3 telling me about what happened to her mom. So I had
4 already known Terry and David from the interaction. So,
5 yeah, I have known them for quite a long time.

6 Q. Okay. And then when they called you in 2014 what did
7 they call you about?

8 A. Terry had been involved in a pretty bad wreck.

9 Q. Okay. And we have heard a lot about the wreck through
10 other witnesses. But just briefly to make sure we are all
11 on the same page kind of explain for us who the people were
12 and kind of what happened in the wreck.

13 A. Okay. I lived with this case for quite a while, so my
14 memory is pretty extensive of it. I will try and be brief.
15 Terry is heading down I think 21 going towards Hilton Head
16 Beaufort area, and somebody is coming off of a side street.

17 And she is coming this way (motioning). And he is
18 coming this way (motioning). And what he wants to do is he
19 wants to go that way (motioning). So he has got to cross
20 over her lane.

21 She so is riding down. He hits her broadside. Sends
22 her into oncoming traffic. And she has a head-on collision
23 in the other lane.

24 Q. Okay. And is Terry the only one in her car?

25 A. She is.

1 Q. Okay. And then what about the car -- she is pushed
2 into oncoming traffic, hits another car; our understanding
3 there was two people in that car?

4 A. That's right.

5 Q. Okay. And then the guy that hit her, his name was
6 Antoine Johnson?

7 A. That's correct.

8 Q. Okay. What was the insurance situation like for Mr.
9 Johnson?

10 A. Mr. Johnson had 25,000, the state mandatory minimum.

11 Q. Okay. Worth of liability insurance?

12 A. Yes.

13 Q. Okay. And as you started to evaluate the case did it
14 appear that the \$25,000 was going to be enough to fully
15 compensate Terry for all of her injuries?

16 A. No, not even close.

17 Q. Okay. And what about -- what about in her car, she
18 had USAA?

19 A. Yes.

20 Q. Did she have any UIM on that policy?

21 A. Yeah, she carried -- it is an optional kind of
22 insurance you can buy. It costs a little bit more. But it
23 is really, you know, one of only types of insurance that
24 covers you. And she had a total of a million dollars in
25 underinsured coverage.

1 Q. Okay. So let's start with the liability policy with
2 Geico. It is my understanding -- I guess did y'all have to
3 file a lawsuit?

4 A. Yes.

5 Q. Okay. And then did Geico pay its \$25,000?

6 A. Yes.

7 Q. Okay. and then what you do after that; I guess you
8 turn your attention to USAA?

9 A. Right. USAA was -- they were already involved in the
10 case. You know, when you file a lawsuit like this -- you
11 guys know this. This is really for y'all.

12 But when you file a lawsuit like this you have got the
13 person who caused the injuries. Well, their insurance
14 company is hiring their lawyer. And their insurance
15 company is paying the claim.

16 And now when that person's insurance company pays up,
17 just like Mr. Johnson's insurance company did, they just do
18 a switch seats. This USAA lawyer now sits where the Geico
19 lawyer was. They kind of act like they are representing
20 the defendant, but they are really not; they are the
21 injured parties own insurance company.

22 But they are sitting in that chair just like they are
23 the lawyer for the at-fault defendant.

24 Q. Now is this type of law that you primarily practice?

25 A. Yes.

1 Q. Okay. And how long have you been practicing law?

2 A. About 17 years.

3 Q. And in your 17 years is it fair to say you've probably
4 handled hundreds if not thousands of car wreck cases?

5 A. Yes.

6 Q. How -- now do you file a lawsuit in every case?

7 A. No.

8 Q. Okay, walk us through sort of what you do when a claim
9 first comes into your office?

10 MR. WHELAN: Your Honor, I object to relevance.

11 THE COURT: Make it specific to this case?

12 MR. POULIN: I will, Your Honor.

13 THE COURT: Thank you.

14 Q. Let me ask you this: Were there any -- was there any
15 opportunity or negotiations with USAA about settlement
16 before you filed this lawsuit?

17 A. Yes and no. In a case like this I'm always going to
18 have a conversation with the insurance company, is this a
19 case we can settle, is this a case we are going to have to
20 file suit on.

21 Terry had some pretty horrific injuries and it was
22 going to, you know, take a large amount of money to settle
23 her case. There is no sense in sitting around and seeing
24 what is going to happen. If we have got to go to court,
25 let's go ahead and file it and get it going.

1 And so I would have had a conversation -- I had a
2 conversation with USAA, is this something we can get
3 settled. And ---

4 MR. WHELAN: Your Honor, I object to this as incurring
5 prior to the suit being filed. UIM suit being filed. It
6 is not relevant.

7 THE COURT: I am going to allow it. Thank you.

8 A. Basically, no, we are not going to settle, file suit.
9 So I did.

10 Q. Okay. And the people in the other car, the Kuck's, it
11 is my understanding that they had a lawsuit going as well?

12 A. They did. They hired a lawyer out of Orangeburg. I
13 think where they are from. And then I think he associated
14 somebody local to Jasper County.

15 Q. And did you have any personal involvement in that
16 lawsuit between the Kuck's and Terry?

17 A. No.

18 Q. Okay. What about was that lawsuit of any interest to
19 you as it pertained to your representation of Terry?

20 A. Absolutely. Because if the same witnesses are
21 involved, depositions are going to be taken, answers are
22 going to be given. The Kuck's are a witness to this case.
23 And so it was very -- what happened in that case was very
24 relevant to my case.

25 (WHEREUPON, Plaintiff's Exhibit Number 11, Kuck lawsuit,

1 was marked for identification.)

2 Q. I'm going to hand you Plaintiff's Exhibit Number 11.

3 Do you recognize that document?

4 A. Yes.

5 Q. And what is that?

6 A. This is a lawsuit filed by Mr. Kuck, the person in the
7 vehicle Ms. -- that Terry hit head on.

8 Q. Okay. So that is the copy of the lawsuit from the
9 other case?

10 A. Yes.

11 Q. Okay. Okay. And is that something that you obtained
12 as part of the investigation and analysis into Terry's
13 case?

14 A. Yes.

15 MR. WHELAN: Your Honor, I object to this on relevance
16 as well.

17 THE COURT: I mean according to my previous ruling I
18 am going to allow it. Thank you.

19 Q. And what -- what were the allegations in that
20 complaint that the Kuck's made against Terry? I think
21 specifically maybe Paragraph 4 and Paragraph 7?

22 A. They alleged that Mr. Johnson ran the stop sign and
23 that Terry didn't have headlights on.

24 Q. Okay.

25 MR. POULIN: Your Honor, at this time we would move

1 that exhibit into evidence.

2 MR. WHELAN: I object to relevance.

3 THE COURT: It is admitted over defendant's objection.
4 (WHEREUPON, Plaintiff's Exhibit Number 11 was admitted into
5 evidence.)

6 (WHEREUPON, Plaintiff's Exhibit Number 12, answer to
7 complaint, was marked for identification.)

8 Q. Now, Kevin, I am going to hand you Plaintiff's Exhibit
9 Number 12. What is that document?

10 A. This is the answer to the complaint that was filed by
11 the Kuck's. And it was filed by the lawyer that USAA hired
12 to defend Terry against the Kuck's in that case.

13 Q. And what was his name?

14 A. Chris Nichols.

15 Q. Okay. Let's go back to -- well, let me ask you this.
16 Is that also a document that you obtained as part of your
17 investigation and representation for Terry?

18 A. Yes.

19 MR. POULIN: Your Honor, we would also move that into
20 evidence.

21 MR. WHELAN: I also object to relevance, Your Honor.

22 THE COURT: The objection is overruled. It is
23 allowed.

24 (WHEREUPON, Plaintiff's Exhibit Number 12 was admitted into
25 evidence.)

1 Q. Kevin, let's go back to the complaint that the Kuck's
2 filed. And if you would, read -- read the allegation that
3 Mr. Kuck made in Paragraph 4 of his complaint against
4 Terry.

5 A. That on or about November 7, 2014, plaintiff was
6 operating his vehicle traveling west on US Highway 278 in
7 Beaufort County, State of South Carolina, and stopped at a
8 traffic light. Defendant Johnson was traveling in an
9 easterly direction and attempted to cross US Highway 278
10 and was struck by defendant Hood who was operating her
11 vehicle with no headlamps illuminated. Defendant Hood
12 proceeded to drive through a median and strike the
13 plaintiff's vehicle causing a head-on collision.

14 Q. Okay. And then going back to Mr. Nichols' answer what
15 was Mr. Nichols' response to allegation in Paragraph 4?

16 A. Defendant Therese Hood admits so much of the
17 allegations of Paragraph 4 of the complaint as alleges that
18 the accident occurred on November 7, 2014, on US Highway
19 278 in Beaufort County, State of South Carolina. As to the
20 remaining allegations of Paragraph 4 Defendant Therese Hood
21 denies saying and demands strict proof thereof.

22 Q. Okay.

23 A. So they admitted that the wreck happened. They are
24 denying everything else.

25 Q. Okay. And then going back to the complaint in

1 Paragraph 7, the -- Mr. Kuck's attorney lists a whole host
2 of reasons why he believes Terry was negligent in the
3 wreck; is that accurate?

4 A. Yes.

5 Q. Okay. And what is Reason Number C?

6 A. In failing to properly illuminate her headlamps/lights
7 on the vehicle in which she was operating.

8 Q. Okay. And how did Mr. Nichols respond to Paragraph 7
9 in his answer?

10 A. He denied it.

11 Q. And these -- a summons and complaint in a case and an
12 answer in a case, are those documents that get filed with
13 the court?

14 A. Yes.

15 Q. And those are documents that are signed by the
16 attorney?

17 A. Yes.

18 Q. Was there anything else about the Kuck -- the Kuck
19 case that you learned that turned out to be helpful for you
20 in your representation of Terry?

21 A. I learned ---

22 MR. WHELAN: Objection to vagueness, Your Honor, and
23 relevance.

24 THE COURT: I am going to allow it. Thank you.

25 A. I learned that USAA had hired an expert, one of these

1 guys that tests the filaments, the headlamp filaments. You
2 know, when you get into a wreck even though your car may be
3 a mangled mess people can come in there and test your
4 headlights to see if they were on at the time of the wreck.
5 It is very technical and has to do with calcification and
6 all of these kind of things.

7 But these guys can come in and look and see if the
8 headlights were on at the time of the wreck. And USAA had
9 hired one of those guys by the name of Woody Poplin.

10 And much to my surprise Mr. Poplin had determined that
11 her headlights were on at the time of the wreck. And that
12 is consistent with the answer that Mr. Nichols who was
13 defending her on behalf of USAA, that is consistent with
14 his answer where he denied that her headlights were off.

15 Q. All right. Let's turn back to your case with Terry.
16 Just like there was a summons and complaint filed in the
17 Kuck's case to start the lawsuit, did you have to file a
18 complaint in your case?

19 A. Yes.

20 Q. And when you file your complaint what is the next
21 step; what do you do with that complaint after you get it
22 filed?

23 A. You file it with the court. You serve it on the
24 defendant. And the defendant has a certain amount of time
25 to file a formal answer.

1 Q. And when underinsured motorist is involved do you also
2 have to serve it in any other way?

3 A. Yeah, you have to serve the underinsured carrier. So
4 in this case when I filed my complaint I had to serve it on
5 Mr. Johnson but I also have to serve it on the Department
6 of Insurance and then they accept service for USAA and they
7 send it to USAA officially.

8 Q. And so what did USAA -- did USAA hire a lawyer?

9 A. Yes.

10 Q. That came into your case?

11 A. Yes.

12 Q. Okay. And when a lawyer -- what was his name?

13 A. Jack Daniel.

14 Q. Okay. And when a lawyer like Jack Daniel, like USAA
15 lawyer, comes into the lawsuit you have already filed are
16 there any documents they file with the court?

17 A. They also file an answer.

18 Q. Okay.

19 (WHEREUPON, Plaintiff Exhibit Number 13, answer, was marked
20 for identification.)

21 Q. I am going to show you Plaintiff's Exhibit Number 13.
22 Is that a copy of the answer that Mr. Daniel filed in your
23 case?

24 A. Yes.

25 Q. Okay. And if you would sort of go down to the last

1 paragraph there on the first page. As far as the
2 allegations you make in your complaint what are -- what is
3 Jack Daniel's response to your allegations?

4 A. He denies each and every allegation of the complaint.
5 Denies everything.

6 Q. Okay.

7 A. Denies that Terry lives where she lives. Denies a
8 wreck even happened. Denies ---

9 MR. WHELAN: Your Honor, I object to this.

10 A. --- everything.

11 MR. WHELAN: A general denial is proper under the
12 rule. He is mischaracterizing what that is.

13 THE COURT: Well, I will let you ask him questions on
14 cross-examination. Thank you.

15 MR. POULIN: Your Honor, at this time we would move
16 Mr. Daniel's answer into evidence.

17 MR. WHELAN: We object to relevance, Your Honor.

18 THE COURT: It is admitted. I am going to allow it.

19 [Whereupon, Plaintiff's Exhibit Number 13, admitted
20 into evidence]

21 Q. And now, Kevin, as you started to ramp up your case
22 did you start to gather documents or do any other type of
23 investigation to look for facts and evidence yourself?

24 A. Yes.

25 Q. Okay. And what about -- how do you go about that; is

1 there a way to request documents?

2 A. Yes. We can -- I mean, like y'all know, there's all
3 kinds of places you can get information. But the typical
4 place you get information in a lawsuit is the parties ask
5 each other for information.

6 There's interrogatories and there's requests for
7 production. Interrogatories are questions. So we would
8 send the questions to the other side. They have to answer
9 those questions within 30 days. We would send requests for
10 documents to the other side. They would have to give them
11 to us within 30 days. And they do the same. They send
12 them back and forth and that is kind of what is called the
13 discovery period.

14 We are just discovering what information each other
15 has and knows. You typically do that before you start
16 taking depositions.

17 Q. Okay. And if any point prior to that an insurance
18 company has taken a recorded statement of a witness is that
19 something they would transcribe and they give to you as
20 part of your request for documents?

21 A. Yes, we specifically ask for it.

22 Q. Okay. And talk to us about -- so in this particular
23 case we understand Terry actually gave a recorded statement
24 herself; is that right?

25 A. I think so.

1 Q. Okay. And then were you able to obtain ---

2 MR. WHELAN: Your Honor, I object to this. Can we
3 approach?

4 THE COURT: Sure.

5 (WHEREUPON, bench conference 6/27/19, 1:55 p.m.)

6 Q. All right. Kevin ---

7 MR. WHELAN: Your Honor, just to put it on the record,
8 I object to relevance.

9 THE COURT: Thank you.

10 Q. One of the guys in that third car, Mr. Kuck, did he
11 give a statement at any time to an insurance company?

12 A. He did.

13 Q. Okay. And was that statement reduced to writing?

14 A. It was.

15 Q. Okay. And you had a copy of that statement?

16 A. Yes, it is actually ---

17 Q. Is it your ---

18 A. He gave a statement to USAA.

19 Q. Okay. So it is your understanding USAA had a copy of
20 that statement as well?

21 A. That is who I got it from, yes.

22 Q. Okay. And what did Mr. Kuck at the time of that
23 statement say about with respect to Terry's headlights?

24 A. I can tell you word for word. I will probably never
25 forget it. He said all I seen was headlights coming right

1 at me. He said it a few different times and a couple of
2 different ways.

3 But I in my case I made a clip -- an audio clip of
4 that. Because I get the paper that they transcribe, but I
5 also wanted the audio recording. And I remembered I had
6 clipped that out.

7 Q. We talked about other kinds of discovery. What is the
8 request to admit?

9 A. That is another thing you do in the discovery phase of
10 the case. Sometimes it is a little bit after the exchange
11 of documents. And it is just an attempt to kind of narrow
12 some issues in a case, right. Figure out the stuff we
13 don't have to fight over. And it is called a request to
14 admit.

15 So you on one side are sending a request to the other
16 side to admit something. It might be admit to the
17 authenticity of this document so that I don't have to call
18 a records custodian to come into court and waste
19 everybody's time saying it is authentic.

20 But then also you can, you know, do it on several
21 issues. So I sent some requests to admit over to the USAA
22 lawyer in our case.

23 (WHEREUPON, Plaintiff's Exhibit Number 14, request to
24 admit, was marked for identification.)

25 Q. Kevin, did any of the requests that you sent over to

1 USAA lawyers involve the issue of Terry's headlights?

2 A. Yes.

3 Q. Okay. And what is it that I've handed you there as
4 Exhibit 14?

5 A. This is the request to admit that I sent over to the
6 USAA lawyer.

7 Q. Okay. And what was the question that you asked them
8 to admit or deny.

9 A. Admit that plaintiff Therese Hood was operating her
10 vehicle with her headlamps illuminated at the time of the
11 collision.

12 Q. And what was the response that they gave to that
13 request?

14 A. Denied.

15 Q. Okay. And their response to that request, is that
16 signed by an attorney?

17 A. Yes, Jack Daniel.

18 Q. Okay. Is it signed by Jack or ...?

19 A. I'm sorry?

20 Q. Is it signed by Jack or -- it might be -- that one
21 might be signed by Madison?

22 A. Oh, I'm sorry it is Madison.

23 Q. Okay. And if you would explain to us who Madison is.

24 A. Madison Suddy, a young, female defense lawyer. Works
25 with Jack. Handled the case with him.

1 Q. Okay. So she works with Jack?

2 A. Yeah, she was an attorney of record on the case. Also
3 Jack and her both were -- were hired by USAA.

4 Q. At the same firm and everything like that?

5 A. Yes. I think Jack was a little bit senior, and she
6 was sort of assigned to work with him on the case.

7 Q. Okay. Now when you received this response to your
8 request to admit did it surprise you?

9 A. I am not so sure that it surprised me. But it
10 certainly angered me. Because you can recall, the lawyer
11 that USAA hired to defend Therese against the case brought
12 by the Kuck's, right, that lawyer had said her headlamps
13 were on. And he had filed that in official pleadings.

14 And then the lawyer that USAA hired to go against
15 Therese now says he denies that her headlights were on. So
16 these are two totally opposite positions by two totally
17 different lawyers from different firms that are going to go
18 into two different courts and appear in front of two
19 different juries and say two different things. Both of
20 them hired by Theresa's insurance company.

21 MR. POULIN: And, Your Honor, I don't recall if I
22 moved Plaintiff's 14 into evidence, the request to admit
23 the responses. But I would offer that at this time.

24 MR. WHELAN: No objection.

25 THE COURT: It is admitted.

1 (WHEREUPON, Plaintiff's Exhibit Number 14 was admitted into
2 evidence.)

3 Q. Okay. You weren't in here earlier, but there was some
4 testimony when Terry was on the stand about a letter that
5 she sent directly to Mr. and Mrs. Kuck. Are you aware of
6 that letter?

7 A. I became aware of it, yes.

8 Q. Okay. Did you represent her at the time the letter
9 was sent?

10 A. Yes.

11 Q. Did you know that she was sending the letter at the
12 time that she sent it?

13 A. Absolutely not.

14 Q. Okay. When did you become aware of the letter that
15 she had sent?

16 A. I think somebody might have just pulled it out in a
17 deposition at some point. So it was sort of sudden.

18 Q. But you are -- once you got a chance to look at the
19 letter -- you basically even though you didn't know when
20 she sent the letter, looking back at it now you know the
21 timeframe that she wrote and sent that letter; it had a
22 date on it, right?

23 A. Oh, yes.

24 Q. Okay. If you would just kind of color in for us a
25 little bit what was going on with the case at that time

1 period discovery wise when she sent that letter.

2 A. I was gearing up to go take the Kuck's deposition.
3 And I was worried that the Kuck's were going to change
4 their story. All right. They are on record, Mr. Kuck,
5 saying all I seen was headlights coming at me.

6 I knew at that point though that the Kuck's knew that
7 Mr. Johnson had 25,000 in insurance and that Terry had a
8 million, so if it is Mr. Johnson's fault they get 25 grand.
9 And they were hurt too. Their case was worth more than 25.

10 So if it was Mr. Johnson's fault they are stuck with
11 25,000. If it is Terry's fault they can get up to a
12 million, because that is how much insurance she carried
13 both for herself and for others if she hurt them. So I was
14 worried that they were going to change their story.

15 And I -- you know, I don't have conversations like
16 this with all of my clients. But because I have known
17 Terry and her daughter I talk to them like friends and just
18 told him what was going on in the case. I told them what I
19 was thinking.

20 Terry was not a client that had called me for updates.
21 Because I'd let her know what was going on. And I told
22 Terry my fears. And, you know, unbeknownst to me Terry
23 takes it upon herself to write a letter to the Kuck's.

24 Q. Okay. And you have had a chance to read that letter
25 since?

1 A. Yes.

2 Q. Okay. And there is some -- as she is describing
3 things to the Kuck's she's talking about insurance and
4 different policies and how they apply and that type of
5 thing. Do you recall reading that in the letter?

6 A. Yes.

7 Q. Okay. Is her analysis about how the insurance and all
8 that type of stuff works is that accurate in that letter?

9 A. It is not accurate. And I can tell you I had lots of
10 conversations with Terry about the way all of this worked.

11 And I mean, listen, it is confusing. And so I don't
12 blame her. But Terry was confused about the coverages and
13 the way all of this kind of stuff worked, even after
14 explaining it to her. And that was clearly reflected in
15 the letter.

16 Q. Okay. And we -- let me ask you this, Kevin. Actually
17 USAA all along based on the claims filed looks like was
18 making a big deal about these headlights ---

19 A. Yeah.

20 Q. --- and it sounds like it was a big deal through the
21 discovery of your case. And it has been a big deal in this
22 case. And I don't know if we've actually talked about this
23 yet, but I guess -- so I guess this wreck happened late at
24 night?

25 A. That is the thing. It didn't. It wasn't late at

1 night. It was six o'clock in the afternoon. You know, we
2 are not just going to -- you know, we turn up every stone.
3 We uncover everything we can. Therese was -- she deserved
4 the best legal representation. That is why she hired us.
5 And so -- so we, you know, did all of that.

6 But the truth of the matter is the wreck happened at
7 six o'clock in the evening. The law did not require her to
8 have her headlights on.

9 There was testimony from the Kuck's even, right, that
10 there was enough light outside. You could see the median.
11 You could see the trees. You could see other cars with or
12 without headlights on. So there was enough light that Mr.
13 Johnson should have seen Terry coming down the road if he
14 was looking.

15 So in actuality in my mind it was a non-issue. So
16 why was USAA taking this chance in doing this? Why were
17 they -- why were they hiring one lawyer to go to one jury
18 and say one thing and hiring another lawyer to go to
19 another jury and say something different?

20 You know, if you -- if they thought that lights were
21 so important then it broke down. Y'all are going to have
22 to pay either the Kuck's or you are going to have to pay
23 Terry, right? If her headlights were on you have got to
24 pay Terry her underinsured coverage. If her headlights are
25 off then it is Terry's fault and you are going to have to

1 pay the Kuck's, her underinsured carrier, and you are not
2 going to have to pay Terry anything.

3 But see what they wanted to do was try and avoid
4 paying them both. All right. And I didn't understand it,
5 because I didn't think the headlights were such a big
6 issue. So why -- why did they take this big step and
7 commit these things to writing like this? Why would they
8 file a document denying that her headlights were on when
9 they hired an expert who -- they hired an expert who said
10 her headlights were on. They have a recorded statement
11 from a guy saying all I seen was two headlights coming
12 right at me. That is Terry. That is the head-on
13 collision. Why would they go that far and put this stuff
14 in writing and file official documents and sign their name
15 and put their bar number on it when it really wasn't that
16 bad -- that big of an issue, in my mind. That's -- that
17 was -- I'm sorry to go on. But that was my frustration.
18 Q. Understood.

19 A. I was trying to eliminate certain issues with these
20 requests to admit, and they were just creating them.

21 Q. So another process that is used through the discovery
22 phase of a case to gather information is depositions,
23 correct?

24 A. Yes.

25 Q. Okay. And at any point in your lawsuit was Terry

1 deposed?

2 A. Yes.

3 Q. And who is the lawyer who requested and took that
4 deposition?

5 A. Jack Daniel.

6 Q. And were you present at that deposition?

7 A. Yes.

8 MR. WHELAN: Your Honor, may I -- may I renew my
9 objection to this sort of testimony and having a continuing
10 objection as to relevance with respect to this topic?

11 THE COURT: Sure, but if there is a specific question
12 other than just the general testimony about what happened
13 at the deposition if there's a specific objection.

14 MR. WHELAN: Yes. Relevance.

15 THE COURT: I understand. But I think what we
16 discussed at the bar was that if you had an objection to a
17 specific question that we would address it at that point.

18 MR. WHELAN: Oh, okay. So I have a continuing
19 objection on this. Thank you.

20 THE COURT: Yes.

21 Q. Now prior to taking your client in to submit to a
22 deposition would you sit down with your client ahead of
23 time or did you sit down with Terry ahead of time to kind
24 of explain what was going to happen and get her prepared
25 for that?

1 A. Yes.

2 Q. And what was her mental state of mind like in your
3 preparation sessions?

4 MR. WHELAN: Objection. Calls for speculation.

5 THE COURT: That is sustained.

6 Q. What -- how -- how receptive was Terry to the
7 explanations that you were giving her to get her prepared?

8 A. Terry was a wreck. She was an absolute wreck. Terry
9 has -- and it feels weird to be blocking -- it feels like I
10 am hiding from you, Terry. I

11 (WHEREUPON, display on witness stand adjusted to allow
12 better visibility.)

13 A. She is a -- she is a -- she is a --- she is a very
14 nice and sort of overly really honest person. She's got a
15 military history and a teaching history. And she is very
16 proud of it.

17 And but, you know, Terry has been through some things
18 in her life. And she -- she suffers from Parkinson's. And
19 she is embarrassed about that. And I -- there's no reason
20 to be embarrassed about that. But she is.

21 MR. WHELAN: Your Honor, ---

22 A. And when Terry gets ---

23 MR. WHELAN: --- I have to object to this and move to
24 strike all of this testimony.

25 THE COURT: That would not be relevant.

1 A. Well, can I just ---

2 THE COURT: I am sustaining that objection. So you
3 can ask your next question. Thank you.

4 Q. With respect, Kevin, to -- to the actual deposition,

5 A. Yeah.

6 Q. --- how long did it take?

7 A. Five hours.

8 Q. Okay. And what was Mr. Daniel's demeanor during the
9 course of taking the deposition, Jack?

10 A. Argumentative, repetitive, trying to trip her up,
11 skipping around, asking her why she left things out four
12 hours into the deposition. Terry didn't do well. Terry
13 did not do well.

14 Q. And what -- did you meet with her after the deposition
15 to kind of go over how it went?

16 A. Yes.

17 Q. And what -- tell us what that meeting was like, your
18 discussion with her.

19 A. Well, I mean I didn't have the heart to tell Terry how
20 poorly she did. I didn't have the heart. But it is not
21 the end of the world.

22 And, you know, who is to say what anyone is going to
23 do four or five hours into a deposition with a grilling
24 like this. So it happens. And I'll deal with it.

25 You know, we got -- there's issues in every case. And

1 if there weren't issues in cases people wouldn't need
2 lawyers. So we are used to dealing with issues on cases.
3 And bad depositions are something that we deal with.

4 So I told her it was okay, we would deal with it just
5 fine. And so I think she was comforted by that. But Terry
6 knew, she knew ---

7 MR. WHELAN: Objection.

8 A. --- that it was ---

9 MR. WHELAN: Speculation, Your Honor.

10 THE COURT: That is sustained.

11 Q. And what -- I guess I am asking more about her
12 demeanor during that post-deposition meeting that y'all
13 had.

14 A. Crying. I wouldn't say hysterical. But she was
15 crying. She was visibly upset. And her -- her -- I forget
16 what you call it, but it was increased.

17 Q. I assume you have defended numerous depositions?

18 A. Yes.

19 Q. Okay. How would you compare Jack Daniel's conduct in
20 this depositions to other depositions that you have ---

21 MR. WHELAN: Objection, Your Honor. Relevant --
22 relevance. Prejudicial.

23 THE COURT: That is sustained. I mean her deposition
24 would have been taken regardless.

25 Q. So after all of the discoveries done and the

1 depositions are taken the next stage is to go to mediation?

2 A. Yes.

3 Q. All right. Explain to us what a mediation is.

4 A. Well, first of all it is court ordered. So you have
5 got to do it. I think it is after about 10 months after
6 filing you have to conduct mediation in your case.

7 And mediation is where the parties, right -- so in
8 this case it would be them (pointing) and them (pointing).
9 And they get together in a neutral lawyer's office, a
10 lawyer that doesn't represent either one. And nowadays it
11 is lawyers that just do mediation.

12 And so you show up at a neutral lawyer's office. And
13 what you are there for is basically like a settlement
14 conference. You are there to see if the mediator can
15 facilitate a settlement between the two sides.

16 So usually what it is, it starts out with opening
17 statements from each side and then the parties break off
18 into a separate room and the mediator just carries offer,
19 counter offer, offer, counter offer.

20 And you see -- I mean I have been in mediations that
21 started at nine o'clock in the morning and ended at
22 midnight. But you take the time and you see if you can't
23 get the case settled.

24 Q. So in Terry's mediation did it start the same way with
25 opening statements?

1 A. Yes.

2 Q. Okay. Who gave the opening statement for USAA?

3 A. Jack Daniel?

4 Q. Okay. And what was the sort of the crux of the
5 statement that he gave?

6 A. Terry ---

7 MR. WHELAN: Objection, ---

8 A. --- is a liar ---

9 MR. WHELAN: --- relevance, Your Honor

10 THE COURT: I'm going to allow it.

11 A. Terry is a liar. She is crazy. It was tough to -- it
12 was tough to sit there and hear. I prepare people -- I
13 prepare my clients to hear the bad side. And, you know,
14 actually I want them to hear it. You know, because I don't
15 want them to hear it for the first time in trial. I don't
16 want them to sit here in trial for the first time and hear
17 all of the defense opening and that. And so I want them to
18 hear it. But usually there's a little bit more decorum.
19 But anyway, it was -- it was the usual. It very -- very --
20 very if not overly confident in his case.

21 Q. And so while he is giving that opening statement
22 everyone is in the room including Terry?

23 A. Yes.

24 Q. Okay. And then after that what happens, the parties
25 split off into separate rooms?

1 A. Yes.

2 Q. Okay. And that is where the offers kind of start
3 happening?

4 A. Yes.

5 Q. If you can, to the best of your recollection sort of
6 walk us through sort of what the demand offer process
7 looked like in this case as far as the numbers that were
8 going back and forth.

9 A. Right. So there's -- you know, what I recall is we --
10 we start. The plaintiff always starts in something like
11 that. And then I believe our first offer was around maybe
12 850 or 800. Maybe 750.

13 And the first defense offer was extremely low. I felt
14 insulted with it. I didn't feel that my initial demand was
15 inflated, was outrageous. I felt that the case was worth
16 every penny of that and that was a compromise even. I came
17 there to settle the case ---

18 MR. WHELAN: Your Honor, I have to object. Getting a
19 low offer in a mediation is -- or a high offer in mediation
20 is par for the course in litigation. It is not any bad
21 faith.

22 THE COURT: I am going to allow the question. Thank
23 you.

24 Q. And so you make your first demand.

25 A. Yeah.

1 Q. And talk to us about how you came to your initial
2 demand.

3 A. Well, I have a -- I have a process. And it is called
4 in the -- it is kind of unique to me, but I guess it is out
5 now. It is called the buffet paradigm.

6 And basically we take a series of averages, not just
7 from me but from other lawyers in my firm and other people
8 that aren't lawyers and lawyers in other firms and I poll
9 people, right. Best day, right, defense shows up and just
10 sleeps the whole time right, right, and the judge gives you
11 every ruling you want and you get the best jury you could
12 ever get what do you think the verdict is in that case,
13 right.

14 Worst day, right, you are feeling Terrryble, the judge
15 rules against everything you have asked for, and the worst
16 jury you could ever have in your entire life what is that
17 case worth, right.

18 And you do that with a series of different people.
19 And you kind of do some in-betweens. And also do focus
20 groups on my cases. Ordinary average people that would
21 mirror a jury I want to know what they think about the
22 case.

23 And so I put all of that information in. I put it in
24 a spreadsheet. I get it down to averages. And I get sort
25 of a pretty tight range, right.

1 And I explain this to my clients. Because in a case
2 like this and in any of these cases what is it worth, well,
3 you know, most lawyers will tell you it is worth whatever
4 12 people tell you what it's worth. And that is an easy
5 answer.

6 And I don't know, because I don't know what people --
7 you know I can't presume it. If I did that I would be
8 making it up. So I have got to have some sort of a way to
9 use something that is concrete that I can depend on and
10 that my clients can depend on. Because they are -- that
11 are -- I mean the things I say to them about the value,
12 whether I am making it up or whether this is the result of
13 a lot of research, they are depending on it either way.

14 And so that is another thing that I do coming
15 together -- well, in preparation for a mediation.

16 Q. Okay. And just to be clear, in Terry's case I think
17 you testified in your deposition that you hadn't done any
18 focus groups prior to the mediation yet in her case, right?

19 A. No. No.

20 Q. Okay. So when you go in and you make your initial
21 demand of whatever it was, 750 to 850, that is -- that is a
22 demand based on what the calculations you have run?

23 A. Yes.

24 Q. And is that demand -- do you overinflate that demand
25 to start with?

1 A. No. No. No. No. It is just not productive. If you
2 inflated a demand all you are doing is asking for them to
3 deflate their initial offer. It just takes too long. And,
4 you know, there's a time for bluffing. And that's really
5 ain't it.

6 Q. Okay. So when -- then USAA comes back with their
7 first offer, which you testified was low. What -- what
8 happens next?

9 A. We stuck with the process and went through just a few
10 more rounds. I reduced in good faith my demands or offer.
11 They increased their counteroffers.

12 Q. And where did that leave you by the end of the day?

13 A. So we -- not necessarily the end of the day, but the
14 last offer that I officially made was \$650,000. All right.

15 And oftentimes, you know, in a mediation you can -- we
16 stop making offers at a certain point and just start
17 talking. Sounds like you might be in this neighborhood.
18 You know, the mediator has conversations like that.

19 And the mediator comes to the side. Sounds like you
20 might be in this. So he is trying to figure out. Because
21 at that point I think we were probably about \$500,000
22 apart, right.

23 But a mediator going in there saying it sounds like
24 you are in this range to us and it sounds like you are in
25 this range to them, the mediator is figuring out in his

1 head they might only really be about \$100,000 apart. And
2 that is a bridge that a good mediator can usually can gap.

3 So we were having those kind of discussions along the
4 way. I remember at a certain point I think my response to
5 the mediator was something like something between three of
6 four hundred thousand is what it would take. And I don't
7 know what he -- you know, I don't know what he heard from
8 them.

9 But so that is kind of where we were at that point. I
10 had kind of -- the reason I do that calculation and that
11 whole thing going into mediation is because I want my
12 client ready. We are not just going there just to see what
13 happens. We are going there to try and settle the case.

14 And we are not going to have hard discussions about
15 whether or not to settle her case right then and there in
16 the heat of everything. I want those discussions in my
17 office with David and time that we can sit and ask
18 questions and just be very deliberate about it. Because
19 this is a decision you can't go back from.

20 And so I want that decision made before we get to
21 mediation. I don't want the pressure of mediation
22 impacting someone's decision-making process.

23 So we get that authority. And we talk about it in the
24 office before we go there. So that is how I kind of knew
25 were -- what kind of authority I had and where I wanted

1 this thing to go. And I could be open with the mediator.

2 And he knew that I knew where I was headed so.

3 Q. Okay. And what was USAA's -- what is the highest
4 offer they ever made at mediation?

5 A. The highest offer was \$200,000.

6 Q. Okay. And tell us how that came about. Did they
7 send the mediator in while y'all were sitting in your room
8 that ---

9 A. No, it wasn't that kind of thing. We were -- this was
10 a discussion that was had about where are y'all. And I
11 said three to four.

12 And I imagine he had had the same discussion with
13 them, it's not working, no reason to be here you know, we
14 are paying this mediator by the hour. And so we just -- we
15 are going to leave. And we tell them we are going to
16 leave.

17 So Jack Daniel walks in the room right before we are
18 going to leave and just says I want to put my full
19 authority on the table and it is \$200,000, that's all I
20 have got and I just want to put it on the table. And I
21 knew Terry and I were. And I -- give us a moment to talk.

22 So I discussed that with Terry. And, you know, when I
23 say -- when a lawyer says three to four hundred thousand a
24 lot of times that means three fifty. But three to four
25 hundred thousand you don't really float those things unless

1 you are willing to get into the bottom range and the top
2 range, you know what I mean, of that kind of range there.

3 So I discussed it with Terry. And I thought it -- I
4 thought it was low. I thought her case was worth more than
5 that. But Terry wasn't necessarily about money. She
6 wanted to get this done. And, frankly, she was tired of
7 just this -- this beat down. All of these accusations and
8 all of this kind of stuff, she was tired of it. And Terry
9 indicated to me ---

10 MR. WHELAN: Your Honor, I object to hearsay.

11 A. --- that if they would

12 THE COURT: I am going to allow it. Thank you.

13 A. Terry indicated to me that she would compromise to
14 \$250,000 if they would offer it. Now this was less than
15 the authority she discussed in my office. But I am going
16 to respect her wishes. And I went back to Jack, is 200 all
17 you have got? It is all I have got; it will never be more;
18 I can't get anymore; I'm putting it all on the table.

19 You know, you may get the sense through this
20 conversation there is a language that lawyer speak to each
21 other, right. Something in the neighborhood of, something
22 north of, something south of. We have a language that we
23 speak to each other that kind of passes hints.

24 Because we each have to work on our client, right.
25 The defense has to work on the insurance company to kind of

1 get the money and get the authority to say settle. I've
2 got to talk to my client and tell her what I think and what
3 is reasonable. So we have got -- we both have kind of got
4 work to do. So we are sending messages to each other.

5 But when a lawyer is very deliberate we mean to be
6 deliberate and we mean to pass a specific message. So the
7 message I got was 200 is all I have got, I won't get any
8 more, take it or leave it. So we left.

9 Q. Okay. What did you do after mediation when you go
10 back to your office or -- you know, what was your next step
11 that you took on this case?

12 A. Probably had a drink. I -- I -- I don't represent a
13 whole lot of people; but I get a little bit close and
14 attached to my clients, especially the ones that I like.
15 And so I internalize a lot of this stuff.

16 So anyway, after some time to cool down and some time
17 to kind of, you know, figure out what anger is appropriate
18 and what is not, I am piecing it together what has happened
19 with these two lawyers taking, you know, opposite positions
20 on the case.

21 I think it is bad faith. I think they are treating
22 Terry in bad faith. I don't ---

23 MR. WHELAN: Objection, Your Honor.

24 A. I don't think it is ---

25 THE COURT: Hang on just one minute. What is the

1 basis?

2 MR. WHELAN: Opinion testimony and ---

3 THE COURT: That is sustained.

4 Q. Let me ask you this, Kevin. Based on what had
5 transpired up to that point after the mediation, did you
6 give any -- Terry any advice about what she might should do
7 to protect her legal rights?

8 A. Hire a lawyer to sue USAA for bad faith. I didn't
9 know how to do it. It is not something I have ever done.

10 Q. And I guess eventually she did that. Because that is
11 why we are here today; right?

12 A. Yeah. Yeah, I mean I set somebody up -- Terry with
13 somebody I trusted.

14 Q. Now at any point, you know, between the time you left
15 the mediation and up to the time that she hired us and we
16 filed the bad faith lawsuit did USAA's offer ever increase?

17 A. No.

18 Q. Did you ever even get any indication from Jack or
19 anybody that there might be room for them to move above
20 \$200,000?

21 A. No.

22 Q. Eventually you had to take Terry's case all the way to
23 trial; in that right?

24 A. Yes.

25 Q. And does it cost money to get a case to trial?

1 A. It costs a lot of money to get a case to trial.

2 Q. Okay. And in Terry's specific case -- and I am not
3 talking about attorney's fees and that type of thing, but
4 just actual out-of-pocket expenses that had to be spent to
5 get the case to trial do you remember how much it was?

6 A. I think it was something in the neighborhood of
7 \$50,000.

8 Q. Okay. I am going to show you what was marked for
9 identification as Plaintiff's Exhibit 4. The last page is
10 the total there. And you were -- you were very close. But
11 just so we can read the actual total to the jury.

12 (WHEREUPON, document presented to witness.)

13 A. \$49,052.20.

14 Q. So the result of that trial what was the ultimate
15 verdict that the jury paid -- or came back with?

16 A. Two and a half million dollars.

17 Q. Okay. And then there has been testimony that that was
18 reduced for comparative fault?

19 A. Yeah, a jury found Terry was 49 percent at fault. And
20 what happens is the verdict then is reduced by 49 percent.

21 Q. And so that is a calculation that the judge makes, and
22 when you take 49 percent off of \$2.5 million you get \$1.275
23 million?

24 A. That's right.

25 Q. Okay. Now after the trial did USAA write Terry a

1 check?

2 A. No.

3 Q. Okay. What happened next -- well, let me -- let me
4 ask you this: The trial was in ---

5 A. December of '16.

6 Q. Okay. And it is my understanding that USAA did
7 eventually write Terry a check ---

8 A. No, no, no, hold on. The trial ---

9 MR. WHELAN: Your Honor, I object to this ---

10 A. --- was in December of 2016.

11 MR. WHELAN: --- as well. It is beyond what they ---

12 THE COURT: I think I made a ruling about this
13 previously. I don't remember what question you objected
14 to. But if you would move on to your next question. Thank
15 you.

16 THE WITNESS: Your Honor, can I correct the trial
17 date?

18 THE COURT: Sure.

19 A. I misspoke. It was August of -- no, it was October of
20 2017. I'm sorry.

21 Q. Okay. All right.

22 A. Hurricane season.

23 Q. And in fact -- well ---

24 A. Yes, it was a hurricane.

25 Q. But USAA did write a check to Terry at some point

1 after the trial, right? We don't want the jury to sit here
2 thinking that they have never paid any portion of that
3 verdict.

4 A. Eventually.

5 Q. Okay. And how much money did they write for her in
6 their check?

7 A. So they wrote the million dollars. Terry -- even if
8 the verdict was, you know, \$80 million, they owed Terry a
9 million because that is what her policy was.

10 So they paid her the million dollars plus they paid
11 \$23,000 in interest. The State of South Carolina
12 calculates interest on jury verdicts. So the longer you
13 take to pay it, interest accrues.

14 Q. All right. Kevin, we -- aside from this letter that
15 Terry wrote to the Kuck's, without your knowledge or
16 permission, over the course of this litigation and through
17 preparing Terry for the various steps in this case and --
18 what was Terry like as a client for you?

19 A. She was a pleasure. She was a pleasure. I -- you
20 know, I pride myself on representing good people, providing
21 good legal work for good people.

22 I fire as -- I fire clients left and right. If a
23 client lies to me or does something that I don't like -- I
24 tell them in the very beginning: We ain't getting married.
25 This ain't for better or for worse. If I'm not doing what

1 you like, you let me know. I am here to -- you know, this
2 attorney-client relation this ain't attorney-client. I am
3 the client. You are hiring me. If you don't like what I'm
4 doing then tell me and I will make a copy of your file and
5 make it get -- sure it gets to whoever you want to handle
6 it. Likewise if I don't like what you're doing I am not
7 going to represent you anymore.

8 There's just -- there is -- there is too many good
9 people with good cases out there to waste your time on the
10 bad stuff.

11 Q. And you feel like Terry was one of those good people
12 with a good case?

13 A. It was a pleasure to represent -- it was a pleasure to
14 represent Terry. It makes my job easy when she is trusting
15 and understanding. And I can see that this is not -- it is
16 not about the money. You know, a lot of times in these
17 cases the thing that we can accomplish as lawyers doing
18 this kind of stuff are changes. You know, you bust a big
19 trucking company or something ---

20 MR. WHELAN: Your Honor, I object to this.

21 A. --- like that.

22 MR. WHELAN: I object to this. It is relevance.
23 There is no foundation for it. He is talking -- he is
24 speculating about Ms. Hood ---

25 THE COURT: That is sustained. Move on to your next

1 question.

2 A. I'm sorry.

3 Q. That's all right.

4 A. I am passionate about what I do.

5 Q. Kevin, if you had a chance to represent Terry all over
6 again on this case or any other would you take it?

7 A. Sure.

8 Q. That's all the questions I have for you. Please
9 answer any that Mr. Whelan has.

10 **CROSS-EXAMINATION BY MR. WHELAN OF KEVIN SMITH:**

11 Q. Mr. Smith, how are you?

12 A. Doing good. Thank you.

13 It is the first time you have been over me (looking up
14 from witness stand).

15 Q. What did you say? That's right.

16 Now, Mr. Smith, you have been a plaintiff's lawyer for
17 17 years?

18 A. That's right.

19 Q. And you make your living suing insurance companies,
20 correct?

21 A. I do not -- I don't collect money from people. If
22 people don't have the money I don't -- that's not what I
23 do. I collect the insurance, yeah.

24 Q. That's right. And you have made a lot of money doing
25 that, haven't you?

1 A. I am good at what I do.

2 Q. And, yeah, you are a lifetime member of the million
3 dollar advocate forum?

4 A. Yes.

5 Q. A lifetime member of the multi-million dollar advocate
6 forum?

7 A. Yes.

8 Q. And your job is to get as much money from the
9 insurance company as you can, isn't it?

10 A. Well, I mean, you know, listen, like me, like you,
11 like every lawyer in here, the State of South Carolina puts
12 certain rules on us. Number one my job is to be a
13 professional, right, and represent the Bar with integrity.

14 Q. Sure.

15 A. Number two it's to represent my client to every --
16 within the rules. And to do that right. And if I don't do
17 that, I get in trouble. And it hurts us all, you, me,
18 those guys, all of us.

19 So I fight for my clients. And, you know, believe it
20 or not, Robbie, some clients -- this is the truth, all they
21 want is an apology. All they really want is an apology
22 because they have never had it.

23 So different clients want different things. But I am
24 in the business of what I do. I don't apologize. I am in
25 the business to make money.

1 Q. That's right.

2 A. So that's what I do.

3 Q. And in any given case your goal is to make as much
4 money from the insurance company as you can, correct?

5 A. My job is justice. And whatever that amount is,
6 whatever justice is, that is what I am looking for.

7 Q. All right.

8 A. Sometimes that is a lot. And sometimes that is a
9 little.

10 Q. But even if it is a little you want to get as much of
11 a little as you can?

12 A. Sure.

13 Q. And if it is a lot you want to get as much of a lot as
14 you can, right?

15 A. Sure. Yeah.

16 Q. Now you said you are passionate about this case. One
17 reason is because you are an interested party here today,
18 aren't you?

19 A. Interested?

20 Q. You are getting paid; if the jury awards some verdict
21 you are getting paid first, ---

22 A. Oh, ---

23 Q. --- right?

24 A. --- I have a -- listen, I have a -- I have a financial
25 and personal interest in this case.

1 Q. Well, I want to talk about your financial interest.

2 A. Well, may I explain?

3 Q. I am asking you about your financial interest ---

4 A. I know, but I would like to explain the answer to my
5 first question.

6 THE COURT: And, sir, ---

7 Q. Go ahead.

8 THE COURT: --- you have got very competent attorneys
9 representing Ms. Hood; so if there is something that he
10 needs to bring back out on redirect I feel certain they
11 will do that. So if you will just answer the question.
12 Thank you.

13 Q. Okay. So your financial interest is you and Mr.
14 Willie and Mr. Poulin are splitting the attorney fee on
15 this case, aren't you?

16 A. We are.

17 Q. You get half, they get half?

18 A. Yeah, it goes -- it goes further than that. There is
19 more to it than that.

20 Q. Are you talking about your personal feelings for Ms.
21 Hood?

22 A. No, I am not talking about my personal feelings. I am
23 talking about financial. There is more to it than that.

24 Q. You get more money than that?

25 A. No. Robbie, this -- this case, right -- the question

1 this jury is going to answer ---

2 Q. Sir, ---

3 A. --- is can --- no, no, no.

4 Q. --- you need to answer ---

5 A. I am starting my answer.

6 Q. --- my questions.

7 A. Please don't cut me off.

8 MR. WHELAN: Your Honor ---

9 THE WITNESS: Please don't cut me off.

10 THE COURT: Stop. Everybody stop. Answer the
11 question that he asks you. And, again, they are going to
12 get a chance on redirect to clear up anything that needs to
13 be cleared up. Please just answer the question.

14 THE WITNESS: Yes, ma'am. I am answering the
15 question. I said there is more to it than that and he said
16 what, so I started answering. And he didn't like my answer
17 and so then he cuts me off.

18 THE COURT: Okay. And please ---

19 Q. I tell you, what; go on. Come on.

20 THE COURT: Just -- please -- I need y'all to
21 approach.

22 (WHEREUPON, bench conference 6/27/19, 2:35 p.m.)

23 Q. All right, sir. Now you never told USAA that you
24 would settle this case for \$250,000, did you?

25 A. Correct.

1 Q. And you had authority to settle this case for \$250,000
2 up until the trial of this case, didn't you?

3 A. She gave me the authority at mediation. She never
4 revoked it. So technically, yes. But I mean I wouldn't
5 just do it without her knowing. But, yeah, she had given
6 me authority and she did not -- she did not withdraw it.

7 Q. Right. And you believed that you could -- you would
8 check with her before you inked the deal, but you had that
9 authority to \$250,000 up until the trial of the case;
10 correct?

11 A. Yes.

12 Q. And that would settle the whole suit, right?

13 A. Yes.

14 Q. And she sued Mr. Johnson for emotional damages, right?

15 A. I -- probably was in the complaint. I don't know if
16 it was the focus of what we did. But I don't know what
17 you're asking, but I think emotional damages are -- were I
18 am sure a part of it.

19 Q. That is right. And you asked the jury for mental
20 anguish, depression, anxiety; right?

21 A. I don't remember specifically. But it sounds like it.
22 I will take your word for it it's right.

23 Q. Now your lowest official offer was \$650,000, correct?

24 A. Yes.

25 Q. And what you said with respect to the 300 to 400 was

1 you told the mediator that if they could get to -- if they
2 could get to between 300 to 400,000 it would probably get
3 it done?

4 A. Yeah. You know, I think that's something we could do
5 and probably do it. Something in those terms. But that
6 was -- that would be the message I would be relaying.

7 Q. All right. And you just told this jury that the time
8 for bluffing is not at mediation, right?

9 A. The time for bluffing is not in your first offer. You
10 are not going to -- that is not the time for bluffing; you
11 know, go into a case that you think is worth \$40,000 and
12 demand 5,000,000.

13 Q. Okay. But when you say it would probably settle
14 between 300 and 400, it is okay to bluff then, right?

15 A. Well, you are kind of getting down to it at that
16 point. I mean my authority with Therese was between three
17 and four hundred. So there was -- there was no bluffing
18 there. We were getting down to it. She wanted to get the
19 case done. And I was telling him what my authority was.

20 Q. But you never told USAA anything other than it would
21 probably get it done if you got between 300 and 400,000?

22 A. Robbie, you know as well as anybody that is the lawyer
23 language. And that says I will settle the case for
24 \$350,000.

25 Q. Sir ---

1 A. Between three and four means it will probably get
2 settled for 350.

3 Q. Well, actually -- I tell you what. I was able to
4 depose you last night?

5 A. Yes.

6 Q. Now you told -- now John Tiller was the mediator,
7 right?

8 A. Yes.

9 Q. And you told John Tiller ---

10 A. Where are you -- where are you at?

11 Q. Well, I am not asking you first.

12 A. Oh, I'm sorry.

13 Q. But I am at Page 14 ---

14 A. I thought you ---

15 Q. --- if you would like to look.

16 A. Did you say 14?

17 Q. Yes, sir. But you told John Tiller that you would --
18 that you -- I'm sorry, excuse me. I asked you at -- I'm
19 sorry -- I'm sorry, Kevin.

20 A. Go ahead.

21 Q. All right.

22 A. I think it is on Line 5.

23 Q. All right. Actually I am down a little bit further.
24 I asked you -- you told John Tiller that you would settle
25 the case between 300 and 400; and you told me, yeah, and I

1 think the words I would use in that situation is we can
2 probably get it done somewhere between three and four
3 hundred; right?

4 A. Right.

5 Q. Okay. And so you had an official offer of \$650,000,
6 which means if they would pay 650 you would take that?

7 A. That was our last kind of official offer when things
8 just started to break down. There were no more offers
9 going back and forth. The mediator was just trying to
10 figure out what he could do so.

11 Q. Okay.

12 A. Yes, official last offer was 650. Last message to the
13 mediator when he is trying to figure out how far we are
14 really apart was, you know, 350. And that is -- that is
15 what it means when you say between 300 and 400.

16 Q. Now you didn't think that Jack Daniel did anything
17 improper as far as a lawyer goes in the deposition, did
18 you?

19 A. Nothing I would report him to the Bar for ethical
20 misconduct. Nothing like that. I don't want anyone to
21 construe that I would make that allegation or accusation.

22 Q. Sure. And if you felt that he was harassing or
23 abusing Ms. Hood in the deposition then you had the ability
24 to stop that under Rule 30, correct?

25 A. Yes.

1 Q. And you didn't do that; it didn't get to that level,
2 did it?

3 A. No, we -- you know, you take the chance to do
4 something like that, Robbie, and then the deposition is
5 only going to restart and you are going to have to go
6 through it all again. So we got through it.

7 Q. Well, when I asked you whether -- you said it did not
8 rise to the level of being improper, ---

9 A. Right.

10 Q. --- he was just disorganized; right?

11 A. He was disorganized.

12 Q. And didn't you also tell me that it worked out -- it
13 worked out in your favor because it gave you insight into
14 how Jack would cross-examine Ms. Hood at trial, right?

15 A. Did I say that last night? Yeah. Sure. I mean,
16 yeah, I think it is helpful for a client to sit there
17 and -- I don't like them to go through it. But again, just
18 like hearing the bad stuff in the opening of a mediation if
19 they can hear the defense lawyer's cross and kind of get a
20 sense of it and be prepared for it. It takes a toll on the
21 client. But sure, there is something that comes out of
22 that.

23 Q. Well, you said last night it worked out pretty good
24 for her; right?

25 A. Well, I mean we got a great result. Therese was --

1 let me tell you -- well, I don't want ---

2 Q. Sir ---

3 A. --- to go into what happened at trial. So I know that
4 is an instruction so. It worked out.

5 Q. Now at the mediation in -- the mediation was in
6 December of 2016, right?

7 A. Yes, I think 22nd.

8 Q. It was what?

9 A. The 22nd I believe.

10 Q. December 22nd?

11 A. Yeah. I think so.

12 Q. Okay. And USAA and -- or Mr. Daniel or Mr. Tiller had
13 told you that USAA had 200,000?

14 A. Mr. Daniel told me himself. He walked in the room
15 from the other room. We were leaving and his -- his thing
16 was I know y'all are leaving, I just want to put my full
17 authority on the table before you leave.

18 Q. Okay. And so earlier when Ms. -- so you had -- you
19 had said this 300 to 400 thing to Mr. Tiller ---

20 A. Uh-huh.

21 Q. --- and then after that Jack came to you with 200,
22 right?

23 A. Well, I think what happened was -- and I forget whose
24 range he got first, right. But I got the message that the
25 case isn't going to settle, right.

1 He had gotten my range, and he had gotten their range.
2 I got a message from the mediator it is just not going to
3 settle and we are wasting time being there. So I told them
4 we are leaving, right. So we are packing up our stuff, and
5 that is when Jack comes in and he gives us the \$200,000
6 offer.

7 Q. Well, that's right. So when you got the 200 you were
8 leaving; you are packing up, right?

9 A. Yes.

10 Q. You had done the 300 to 400 thing with Mr. Tiller; it
11 didn't work, right?

12 A. Correct.

13 Q. And so you left?

14 A. Right.

15 Q. And they came back and offered you 200, right?

16 A. Yes.

17 Q. And you still left?

18 A. I took some time to talk to Therese about it first;
19 but, yes.

20 Q. Sure. So this stuff about USAA being the last one
21 to -- or the plaintiff being the last one to make an offer
22 just isn't true, is it?

23 A. We were -- well, no, I guess if he made an offer as I
24 am walking out the door, ---

25 Q. Right

1 A. --- no.

2 Q. And you've never responded to that offer even though
3 you had authority just \$50,000 away?

4 A. No, I responded. I responded very -- this was, again
5 -- there is -- this was not the time for bluffing. This
6 was the time to be serious.

7 Jack told me take it or leave it, this is all I have,
8 it will never be more, I want to put my full authority on
9 the table, right. Therese is our client. We owe her that,
10 right. So I just want to put it on the table before we
11 leave.

12 My response after talking to Therese was no thank you.
13 I took Jack at his word. He told me there was no more,
14 that is all it would be. Therese was not willing to go
15 down that far at that point. So my response was no thank
16 you.

17 Q. Now you also went into the room with Jack and the
18 mediator because you were unhappy with where they were in
19 the negotiations and you told them that you were thinking
20 about a bad-faith lawsuit, didn't you?

21 A. Yes.

22 Q. And that was because you said that the -- Chris
23 Nichols had retained Woody Poplin, right?

24 A. USAA had retained Woody Poplin.

25 Q. Well, Chris Nichols -- well ---

1 A. The check to Woody Poplin was written by USAA. It
2 wasn't written by Chris Nichols.

3 MR. WHELAN: Your Honor, I object and move to strike
4 that. But ---

5 THE COURT: Well, I find that is not responsive to --
6 well, I think it was responsive to the question. And I
7 understand he is not privy to our pretrial discussion.

8 THE WITNESS: I'm sorry.

9 THE COURT: But, ladies and gentlemen, the -- I had
10 previously ruled that who paid Woody Poplin was not an
11 issue in this case. It was not an issue that would come
12 before you. And so I am asking you to disregard that
13 comment. Thank you.

14 Q. All right. But we know Chris Nichols was paid by USAA
15 to defend Therese Hood?

16 A. Yes.

17 Q. Now you told Jack and Mr. Tiller that you thought you
18 could file a bad-faith suit based on that action, right?

19 A. Yeah. Yeah. There's two alternate positions, right.
20 Both people USAA hired taking one position in front of one
21 jury and taking a different position in front of another
22 jury, yeah, I thought that was bad-faith. I thought it was
23 fraud. I thought it was all kinds of things. But -- yeah.

24 Q. All right. So you told them -- you told that to them
25 in the mediation; but you didn't get any more money for

1 that, correct?

2 A. No, they laughed at me. They snickered at me.

3 Q. The mediator?

4 A. The mediator and Jack Daniel.

5 Q. Okay.

6 A. We can do whatever we want to do. Bad faith will
7 never get past the judge. It will never see the eyes of a
8 jury. Is what they said. We know a jury won't like it,
9 but it will never get to them. We can do whatever we want
10 to do.

11 That was my angle, okay.

12 Q. I'm sorry?

13 A. That was my angle, right. I can't -- I can't live ---

14 THE COURT: Okay, Mr. Smith, I am going to stop you.

15 THE WITNESS: Yes, ma'am. I'm sorry.

16 THE COURT: Thank you.

17 (WHEREUPON, Defendant's Exhibit Number 13, request to
18 admit, was marked for identification.)

19 Q. So this was December the 22nd and you go back to your
20 office and you sign this. What is this document?

21 A. This is the request to admit.

22 MR. WHELAN: And I'm sorry, I always forget to write
23 the number.

24 THE COURT REPORTER: That was Defendant Exhibit Number
25 13.

1 THE WITNESS: And, Robbie, I don't want you to get --
2 it is Number 13, I think.

3 MR. WHELAN: All right. Your Honor, we would move
4 Exhibit 13 into evidence.

5 THE WITNESS: So Robbie, I don't ---

6 MR. WHELAN: Excuse me.

7 THE COURT: Just one moment, please.

8 THE WITNESS: Okay.

9 THE COURT: This was previously Plaintiff's Exhibit
10 14, I believe?

11 MR. POULIN: No, our exhibit I believe was the
12 responses.

13 THE COURT: So is this -- this is a separate document?

14 MR. WHELAN: Yes, Your Honor.

15 MR. POULIN: It is the same request. But before I --
16 I don't think that I have an objection to it coming in.
17 But it sounds like there might be an additional
18 foundational issue that -- I don't know what Mr. Smith was
19 trying to raise there.

20 THE COURT: First of all ---

21 MR. POULIN: Will you just ask him if this is an
22 accurate ---

23 THE WITNESS: It is.

24 MR. POULIN: --- copy?

25 THE WITNESS: It is.

1 MR. POULIN: Okay. Well, I have no objection to it
2 coming in then, Your Honor.

3 THE COURT: Okay. So this is Defendant's Exhibit ---

4 THE COURT REPORTER: Thirteen.

5 THE COURT: --- 13. Thank you.

6 (WHEREUPON, Defendant Exhibit Number 13 was admitted into
7 evidence.)

8 Q. So after the mediation you go back to your office and
9 you fill out this request for admission?

10 A. No.

11 Q. Okay.

12 A. That is what I was trying to tell you. I don't want
13 you -- I can just tell you if you want me to.

14 Q. All right. Is this your signature on this?

15 A. Yes.

16 Q. All right. Is it dated December 22nd?

17 A. Yes.

18 Q. Okay. And this is a request to admit to Antoine
19 Johnson who was being rep -- Jack Daniel was representing
20 as UIM carrier. And it says admit that plaintiff Therese
21 Hood was operating her vehicle with her headlamps
22 illuminated at the time of the collision, right?

23 A. That is what it says.

24 Q. All right. Now you knew that if Mr. Daniel admitted
25 that, that a jury would never get to hear from Mr. Johnson

1 saying that her lights were off, they wouldn't get to hear
2 from Mr. Lee saying that her lights were off, they wouldn't
3 get to hear from Ms. Kuck saying her lights were off, they
4 wouldn't get to hear from Mr. Tanrath saying her lights
5 were off, they wouldn't get to hear from any witnesses
6 saying her lights were off if Jack Daniel admitted this
7 request to admit?

8 A. That is kind of presuming a ruling. I don't know.
9 And a little bit of that was inaccurate, Robbie, off that
10 whole list. William Kuck was the one that said all I seen
11 was headlights coming right at me.

12 Q. Well, he told the police officer that first ---

13 A. Right, he told -- he gave three different stories to
14 the cops.

15 Q. Exactly. But what you are trying to do -- what this
16 would have done -- Jack Daniel's option was to either -- if
17 he admitted this then none of that would be relevant, a
18 jury wouldn't get to hear any of that? Because it would --
19 it would ---

20 A. I don't know. It's -- Robbie, you know if a defendant
21 admits liability in a case, that they are wrong in the
22 case, it doesn't mean that the jury never hears about how
23 the wreck happened. They still hear about how the wreck
24 happened. So I don't know. They still could have heard
25 those.

1 Q. Well, so ---

2 A. I mean it would have been the subject of a ruling by a
3 judge. I will admit that. And some of them would say to
4 keep it out and some of them would say to keep in but.

5 Q. Okay. And ---

6 A. Certain things just have a way of finding themselves
7 into the trial.

8 Q. All right. And on one hand you had -- let me -- let
9 me move on to my next exhibit which is I believe
10 Plaintiff's Exhibit 14.

11 A. Can I clarify with you about when this was sent,
12 Robbie? It is very simple.

13 MR. WHELAN: Your Honor, would you please ask him to
14 stop ---

15 THE COURT: Yes, Mr. Smith ---

16 MR. WHELAN: --- interrupting me.

17 THE COURT: Mr. Poulin is going to take care of that.

18 THE WITNESS: Okay.

19 THE COURT: Please just answer the question that is
20 asked.

21 Q. And, you know, I guess just go ahead and tell us,
22 but ---

23 A. Okay.

24 Q. But ---

25 A. It is not a big deal.

1 THE COURT: Again, Mr. Smith, I need you to just
2 answer the question that he asks you.

3 Q. Yeah, we know you are getting paid based on this; but
4 please ---

5 A. Is that a question?

6 Q. Please ---

7 A. Is that a question?

8 Q. It ---

9 THE COURT: Again, Mr. Smith, ---

10 Q. --- is not a question; you have already answered that.

11 THE COURT: --- please wait for an objection from the
12 attorneys. Thank you.

13 Q. All right. Go ahead and explain please what you
14 wanted to explain.

15 A. I didn't go back to my office and serve this on Jack.
16 I served it on Jack at mediation, right.

17 Q. Okay.

18 A. I knew what his answer would be. And that is why I
19 got so upset. This was served at Jack -- on Jack at
20 mediation.

21 Minor detail. But I just -- you seemed to think that
22 it was happening at the office. So I just wanted to

23 Q. Okay, so the difference is you didn't put it in the
24 mail that day, you handed it to him in mediation?

25 A. Yes.

1 Q. Okay. Now when Jack -- when you got Exhibit 14 and it
2 said denied, he did not admit that Therese Hood was
3 operating her vehicle with her headlamps illuminated at the
4 time of the collision; right?

5 A. He denied it, yes.

6 Q. That's right. That didn't surprise you, did it?

7 A. How could he -- how could he do it? How could he do
8 it? You know, his company USAA hired an expert that said
9 her headlights were on. They took a statement from a guy
10 saying that all I seen was headlights coming at me. They
11 are Therese's insurance company.

12 Q. Okay.

13 A. They've already given an official position in one
14 pleading that the headlights were on. How in the world
15 could he take an official pleading in a different case
16 saying the headlights were off? So I was surprised. I
17 mean how could you do it?

18 Q. All right. And so -- and so you thought the only
19 possible answer, the only evidence, the only possible
20 answer was admitted?

21 A. No, I mean it is not the only possible answer. I
22 just, you know

23 Q. And it angered you when you got this; that is what you
24 told this jury, right?

25 A. Yeah, I did.

1 Q. Now after that, you said you hired -- or -- yeah, did
2 you say you hired Mr. Willey after that?

3 A. I referred Therese to him.

4 Q. That is right. And Mr. -- you came to an agreement
5 with Mr. Willey where he would share 50/50 in the results
6 of the trial against Mr. Johnson, right?

7 A. Yes.

8 Q. And you would share 50/50 in the bad faith trial,
9 right?

10 A. Yes.

11 Q. And you never made a settlement demand to USAA after
12 that?

13 A. After what?

14 Q. After you -- after you did this request to admit deal?

15 A. Oh, no. No. I took USAA by their word that 200 was
16 all they had, it would never increase.

17 Q. All right, and you went through another year before
18 trial?

19 A. Yeah.

20 Q. And during that time you did focus groups to -- you
21 told them a little bit about what you do focus groups for.
22 You did focus groups ---

23 MR. POULIN: Your Honor, may we approach?

24 THE COURT: Sure.

25 (WHEREUPON, bench conference 6/27/19, 2:56 p.m.)

1 Q. Now you said that USAA was making a big deal out of
2 the headlights?

3 A. I'm sorry?

4 Q. You said USAA was making a big deal out of the
5 headlights earlier, right?

6 A. Yes.

7 Q. Okay. And you thought this Poplin report was
8 dispositive of whether her headlights were on or not?

9 A. It says the headlights were on so.

10 Q. Yeah, so you thought it was -- okay. Now you -- you
11 said that it was light outside when the wreck occurred?

12 A. It was 6:00 in the afternoon. And the witness
13 testimony was that there was enough light to see the trees,
14 the median, and the things that lined -- other cars with or
15 without headlights on.

16 Q. Okay. And the -- well, the testimony was a little
17 conflicting on that, wasn't it?

18 A. Ms. Kuck who -- that's where that testimony came from,
19 Ms. Kuck. She testified to that in her deposition. And
20 she never -- she never conflicted that. I think actually
21 she said that in her recorded statement also.

22 Q. Okay. But -- but ---

23 A. That never changed.

24 Q. All right, but other -- there was plenty of evidence
25 that it was difficult to see out there without headlights,

1 right?

2 A. Are you talking about in trial or before trial?

3 Q. Well -- well, at all -- at all of it. I mean the
4 police officer found her at fault, right?

5 A. Yeah. Yeah.

6 Q. And sunset was at 5:30.

7 A. 5:29.

8 Q. Okay. And this is in November?

9 A. Yeah.

10 Q. And you said that the wreck happened at 6:00?

11 A. Well, the call came in -- the first call came in I
12 think at 5:58. That is the first call. And the rule for
13 headlights is after 30 minutes after sunset. Sunset was
14 5:57.

15 Q. Now at trial you asked for ---

16 MR. POULIN: Your Honor, again ...?

17 THE COURT: That is sustained to the extent you
18 are ---

19 MR. POULIN: Object.

20 THE COURT: --- you are eliciting trial testimony.
21 Sustained

22 Q. Now on the mediation you wanted to settle for 250,
23 right?

24 A. I'm sorry?

25 Q. In mediation you wanted to settle for 250?

1 A. I didn't want to settle for 250.

2 Q. Ms. Kuch did -- I mean Ms. Hood did?

3 A. Ms. Hood gave me authority to settle for 250.

4 Q. All right. And then at trial the award after being
5 reduced by 49 percent ---

6 A. Right.

7 Q. --- was 1.275?

8 A. Correct.

9 Q. And Ms. Hood recovered \$1,023,000?

10 A. Correct.

11 Q. And she also had \$25,000 from Mr. Johnson's carrier?

12 A. Yes.

13 Q. And she had \$50,000 from her no-fault coverage?

14 A. That I don't remember.

15 Q. All right, that is all I have for you. Thank you,
16 sir. I do have some proffers to make later, Your Honor.

17 THE COURT: Okay.

18 Mr. Poulin.

19 MR. POULIN: Thank you, Your Honor.

20 **REDIRECT EXAMINATION BY MR. POULIN OF KEVIN SMITH:**

21 Q. Kevin, now despite the fact the testimony got a little
22 testy here in the courtroom this afternoon are you and
23 Robbie friendly with each other?

24 A. We are. Robbie is a good lawyer. I respect him. He
25 does the right thing. I -- he is a good guy.