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IN THE STATE OF SOUTH CAROLINA
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Unpublished Opinion No. 2023-UP-011 (S.C. Ct.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 IV

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Q. Okay. But you testified you have got an interest in this case that is not just financial but personal?
A. Yeah.
Q. What did you mean by that?
A. You know, this -- it is something that we live with, right. I assume when I am dealing with an adverse insurance company, right, the insurance company for the person who hurt my client, I am assuming I cannot trust those people, right.

They have their client to protect. And I get that. And they are entitled to do that. And I don't trust them. Because I don't think I should trust them. No reason for me to.

However, when I am dealing with an insurance company that is my client's insurance company, they have a duty to her to protect her ---

MR. WHELAN: Your Honor, I object to this.

THE WITNESS: I ---

THE COURT: That is sustained.

THE WITNESS: I can skip the ---

Q. Yeah, if you could -- if you could explain to us why you would have ---
A. Right.
Q. --- a personal stake ---
A. Right.

Q. --- without giving any opinions or legal conclusions.
A. Okay. My personal interest is I need to know personally that when an insurance company ---
MR. WHELAN: Your Honor, I object to this ---
A. --- says something, I can believe them.
THE COURT: Stop. Just one moment.
What is the basis of your objection?
MR. WHELAN: Mr. Smith is not a plaintiff in this suit. He may be getting money out of it, but that ---
THE COURT: Just state the grounds for your objection.
MR. WHELAN: All right. It is relevance.
THE COURT: That is sustained. Thank you.
MR. POULIN: Your Honor, may we approach on that ---
THE COURT: Sure.
MR. POULIN: --- and be heard on that issue?
(WHEREUPON, bench conference 6/27/19, 3:03 p.m.)
Q. Kevin, Robbie insinuated that the outcome of this trial here today will impact you financially, and you have admitted that that is true; is that right?
A. Yes.
Q. Okay. And you have also stated that the outcome of the trial here today will impact you personally?
A. Yes.
Q. So you have two reasons for being here today to testify, among probably others?

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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 4

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A. Absolutely.
Q. Okay. How would the outcome of this trial impact you personally?
THE COURT: And I believe that is the objection that I just sustained. So please move on to your next question.
Q. Let me ask you this, Kevin. Would your testimony be any different in the courtroom today if you didn't have a financial stake in the case?
A. Absolutely not.
Q. Would you feel any differently about USAA and what transpired in this case if you didn't have a financial interest?
A. No. No. I -- no. I am here for different reasons that I cannot go into. But, no, it is not about the money. It has nothing to do with the money.
MR. POULIN: That is all I have, Your Honor. Thank you.
THE COURT: Anything further, Mr. Whelan?
MR. WHELAN: None, Your Honor.
THE COURT: Thank you, sir. You can step down.
THE COURT: Okay. Ladies and gentlemen, we have had about an hour-and-a-half right now. I am going to let you take about a ten-minute break. Again please don't begin discussing the case.
MR. WILLEY: Your Honor, may we approach briefly

before you excuse them?

THE COURT: Sure. If y'all just bear with me one minute.

(WHEREUPON, bench conference 6/27/19, 3:06 p.m.)

THE COURT: Okay. Yes, sir?

MR. WILLEY: Plaintiff rests.

THE COURT: Now I am going to dismiss you. Otherwise, we would have had to dismiss you and then just bring you back in only to hear that the plaintiff rests. So I appreciate the attorneys bringing that to my attention.

I will tell you that we do have a number of legal matters which we are going to need to take up at this point. I am going to say that it may take us 20, 30 minutes.

So I just don't want you to wonder what we are doing back there. We are going to be working, but we just have a number of legal matters that we need to take up.

I feel like it is too early to dismiss you today. We have further work that we need to get through. But bear with us, please.

Again, please don't begin any deliberations.

(WHEREUPON, jury exits courtroom, 6/27/19, 3:06 p.m.)

(WHEREUPON, Court's Exhibit Number 11, deposition of Kevin Smith, marked for identification.)

THE COURT: Okay. Do y'all need a break before we --

I want to be cognizant of Mr. Smith's time. Do we want to do the proffer of him and then we will let you guys take a break and then go into motions?

MR. POULIN: That would probably be best, Your Honor, so that we can get back to that.

THE COURT: That would be fine.

Okay. We are still on the record. Mr. Whelan.

MR. WHELAN: Thank you, Your Honor.

PROFFER EXAMINATION BY MR. WHELAN OF KEVIN SMITH (IC):

Q. Mr. Smith, at the underlying trial you stipulated on the record that Ms. Hood's -- did not have headlights on?

A. I don't remember it that way. If I could see the transcript I could tell you.

(WHEREUPON, Defendant’s Exhibit Number 14, Page 553 of transcript, was marked for identification.)

(WHEREUPON, exhibit presented to witness.)

A. Now is this what you want me to read, or are you going to pull out something else next?

Q. I may pull out something else next.

A. Well, can I just see the whole thing? I have got Page 553. Can I see the next one and the one after that?

Q. Well, the -- yeah, we can. I mean we can get the whole transcript.

A. I mean just in fairness. The jury is not here.

(WHEREUPON, transcript provided to witness.)

A. Thanks.
Q. Sure. All right. Page 53, Line 11, you said, quote, if this witness is going to testify that Ms. Hood did not have her headlights on we stipulate to that; correct?
A. That is what it says.
Q. All right. And you ---
A. May I explain?
Q. Excuse me?
A. May I explain?
Q. Sure.
A. So what was going on at this point, Robbie, we had a hurricane coming down on the courthouse. The courthouse was closing in a matter of hours. The judge needed us to wrap it up.

This I believe was one of the last witnesses if not the last witness to testify. The point of this, and if, right, if this witness is going to simply testify to the headlights, we would offer in exchange for cutting off the testimony and letting the jury go out and deliberate and moving this case along we would stipulate. I was not taken up on that stipulation.

So unless there is another page where there is an offer and acceptance of the stipulation where the parties agreed, I would not contend that would be a stipulation. It was rejected.

MR. WHELAN: Well, this statement speaks for itself. And we would ask -- I mean if this was coming into evidence, Your Honor, we would like a jury charge on what a stipulation means, the legal effect of a stipulation.

This is in open court with an attorney, very experienced well-known attorney, stipulating on the record that her lights weren't on.

Q. Now you said that this was at the end of the trial, the last witness. But Ms. Hood herself testified that if all of these witnesses were going to say her lights were off she wasn't going to contest that, right?

A. She wasn't going to disagree with it I think was the term. Now she also said, Robbie, that she remembers she keeps her headlights on auto and the only way for her headlights to go off is to switch them manually. She doesn't remember doing that. She never does that. But she is just not going to disagree anymore. She has been beaten up over it enough. It doesn't matter.

Q. Well, sir, you asked -- you asked her -- you said, Ms. Hood, we have heard all of this -- let me just find it. So -- okay, Page 496, Line 5, Mrs. Hood -- this is your question to Mrs. Hood. Are you with me?

A. No. I'm sorry, 496?

Q. Yes, sir.

A. Okay. I am there.

Q. All right. Your question was: Mrs. Hood, we have heard from a lot of people this week, people saying no headlights but running lights. Mrs. Hood, if that is the testimony and we have heard that over and over again are you going to disagree with that?

She said: No, I am not.

Right?

A. That is what it says.

Q. And then you said: Can you accept that?

And she said: Yes, I can.

Right?

A. Yes.

Q. And we have heard -- we have heard this week about how important her credibility is to her and how much it upsets her to --

And I am not trying to be offensive to you, Ms. Hood.

But I am just trying to make my record, that the -- that the damages they are seeking in this care are damages for her credibility and impugning her and making her believe -- calling her a liar; but at trial she said she is not going to disagree with all of these witnesses.

A. Well, Robbie, if you back up and look at the page before that you see the context of the question.

Q. Well, that is right ---

A. Page 495, Line 22: And as you were driving did it

seem to you that you didn't have your headlights on? No, I always have my headlights on. I have newer vehicles that has automatic lights and I don't turn them off.

All right. Do you remember switching it to running lights? No.

And then we go into what you just said.

Q. Yeah, but then -- all right, well, I am not going to argue with you on that. But let me -- let me ---

A. I don't mean to argue with you.

Q. Let me just clarify. Let me just clarify. She said that her automatic -- she always keeps her automatically lights on?

A. Right, so when the car turns on the lights come on.

Q. Okay. But she is not going to disagree with all of these witnesses that you say we have heard over and over again that her lights were off?

A. I'm sorry, I was distracted by the screen.

Q. That's okay, it speaks -- the transcript speaks for itself.

MR. WHELAN: And I do believe that the trial transcript is in evidence.

THE COURT: It was a court's exhibit I think for the pretrial ---

MR. WHELAN: Oh, yes, it is not ---

THE COURT: --- motions.

MR. WHELAN: It is not in evidence. Should I mark that -- I believe that -- does Your Honor want another copy of the trial transcript?

THE COURT: I don't, honestly. But I think we need to -- I do think we probably need to mark it as a Court's exhibit as part of the record in the case.

MR. WHELAN: Okay.

THE COURT: If we can just say we are referring to what was previously marked as -- I can't remember. We had six court's exhibits during the pretrial motions, I believe. If we can just -- let's refer to that so we don't have to put two entire copies of the transcript to the lower court in there.

MR. WHELAN: Okay. So we will just incorporate that.

(WHEREUPON, clarification by the court reporter that the transcript is dated 9/5/17 and was previously marked Court's Exhibit Number 9.)

THE COURT: Okay. Then Court's Exhibit Number 9 is already part of the record. Thank you.

Any other questions for Mr. Smith?

MR. WHELAN: Yes, Your Honor, I do.

Q. Mr. Smith, Ms. -- Ms. Hood also testified at trial that her -- that she was separated from her husband, correct?

A. I know she was at a certain point. I don't remember

the -- if it was at the time -- I don't think it was at the time of trial. I remember David was there.

Q. Well, that is right. And you got -- so she separated dur- --

THE COURT: And I don't believe this was -- this was the subject of anything that I excluded previously.

MR. WHELAN: Yes, Your Honor, I started to ask him about this at trial and you said I can't get into anything at trial; so I told Your Honor that I was going to proffer it.

THE COURT: Okay.

Q. And so the -- you guys -- so, first of all, you know that they separated during the lawsuit; right?

A. At some point -- I mean it was a -- it was -- they separated. They got back together.

Q. I know there was some -- and Mrs. Hood testified that the -- testified that Mr. Hood left her because of the injuries that she sustained in the wreck, they separated for that reason?

A. Terry was a wreck. And Terry was a handful. So I can only imagine.

Q. Okay. And then at closing argument Mr. Willey referred to that separation, right?

A. Who?

Q. Mr. Willey in his closing argument referred to them

being separated?
A. I don't know. I don't remember that.
Q. It is in the transcript.
A. Where?
Q. And ---
MR. WHELAN: And, Your Honor, we think that is relevant to Mr. Hood's testimony.
THE WITNESS: Well, if you just tell me where in the transcript I can answer your question.
MR. WHELAN: Chris, do we have that ---
THE COURT: Again, the purpose of this is for you to proffer whatever testimony you would have elicited. But that -- my ruling is not going to change, but ---
MR. WHELAN: Sure.
THE COURT: --- the purpose of this is for you to be able to proffer whatever testimony you would have elicited.
(WHEREUPON, pause to retrieve document.)
Q. All right. Now on Page 508, Line 13.
A. 508?
Q. Yes, sir. This is the testimony of Mrs. Hood.
A. All right, this is not closing argument; right?
Q. We will get there. 508, Line 13, you asked Ms. Hood whether her relationship with David was affected by the accident. And ---
A. Yeah, I remember that.

Q. She said -- she said that it was hard for him to deal with her injuries, he got frustrated, would sleep, was her main caregiver, and they separated for a while; right?
A. Yes.
Q. And then at Page 624 ---
A. What was it again?
Q. I'm sorry, 624. I'm sorry. Line 24. Actually Line 22 Mr. Willey says: You have heard the testimony that now her husband helps around the house. So this is her one day in court. She doesn't get to come back if she loses David and asks for more. This is it.
Is that right?
A. That is what it says.
Q. Okay. And then if you turn to Page 625 Mr. Willey says: Who should bear the risk of the additional pain if she loses him of being isolated and having to do it alone?
Is that what Mr. Willey said?
A. That is what he says.
Q. And then at Page 627 Mr. Willey asks her about future damages, pain and suffering, the loss of enjoyment of life, and the fear of losing David and being alone; right?
A. Where are you? I'm sorry.
Q. I'm sorry, 627, Line 4.
A. Line 4? Yes.
Q. And Mr. Willie also made an argument in closing

argument -- oh, yeah, I'm sorry, go back to 622, Line 18. He talks about her past, present, medical bills. And then he says that take the 1,035 days since the wreck and he says you take every step of every day being home at -- at -- excuse me, of being alone at home and then her husband leaving her.

Do you see that?

A. Coming back, yes.

Q. That's right. But he asked for damages for Mr. Kuck leaving?

A. I don't know. I mean I don't know. I don't think he put a -- I wouldn't interpret that as asking for money because he -- because he had left and then come back.

Q. Well, he lists -- he lists that in his -- I mean he is talking about damages there and asks for compensation for her husband leaving and then coming back?

A. I would agree it is a discussion of what she has been through.

Q. And then when Mr. Daniel cross-examined Ms. Hood she continued to say that she was no longer contesting that her lights were off?

A. Can you say that again?

Q. When Mr. Daniel cross-examined Ms. Hood, Ms. Hood told Mr. Daniel that he was no longer contesting that her lights were off?

A. I don't know what word she used. But I am sure it was consistent with the question that I asked her, ---
Q. Right.
A. --- that you believe your lights were on, right, but you are not going to argue about it anymore.
Q. Okay. And you had done five or six focus groups leading up to trial, right?
A. After the bad faith lawsuit was filed I conducted some focus groups.
Q. Well, and you didn't do any focus groups before the bad faith suit was trialed -- was tried?
A. You probably have ---
Q. I'm sorry ---
A. --- the costs. So my costs would show it. I don't have them in front of me.
Q. Okay. And in fact you are asking the jury in this case to award you -- to award Ms. Hood the cost of those focus groups, right?
A. Costs, yeah.
Q. And you testified last night that the focus groups went really really bad for Ms. Hood, right?
A. Yeah.
Q. And you kept losing, right?
A. Sure.
Q. And it wasn't until the eve of trial before you

figured out how best to present the evidence?
A. Correct.
Q. And so these focus groups were members of the Jasper County community hearing the evidence, right?
A. Yes.
Q. And these people evaluated the case less than what you did; in fact, you got defense verdicts; didn't you?
A. There's a couple of questions in there. Evaluated the case for less than I did?
Q. Yes, sir.
A. Okay. Yes. That is always the case.
Q. Huh.
A. Focus groups, this is not real money, Robbie. Some -- focus groups can give $50,000,000 in a $20,000 case. They can give $50,000 in a $50,000,000 case.

The numbers in focus groups are -- it is not real money. So the fact that they evaluated mine, they don't compare. It is not real numbers. I am looking at different things in the numbers.
Q. Right. But when you told me last night that you kept losing and losing in these focus groups you are talking about losing the issue of liability, right?
A. It is more of -- yeah, it is more of an emotional index, to tell you the truth, Robbie. It is not really what they feel. It is how they feel about it.

I can have 100 percent liability in a case but if a jury really doesn't even care about the outcome of the case or the people or anything, there is not going to be any damage award. So that is -- that is a loser. That is getting killed.

Q. Right.

A. So I am more interested in whether or not people care about what they are hearing.

Q. And the mediation was what date?

A. Mediation was I think December 22nd of 2016.

Q. Okay. And what is Coastal Focus?

A. Let me see it.

Q. Do you know what Coastal Focus is?

A. Yeah.

Q. What is it?

A. It is a place that we would rent rooms from back in those days. I think we rented a room from them. They had it all wired up with cameras and microphones and all kind of stuff and we could test ourselves and record and ....

Q. Okay. So you were doing focus groups there?

A. We would do focus groups at that location. But we haven't honestly done focus groups there -- what was the date on that, Robbie? Because I haven't done a focus group there in a long time. I do them at the office now.

Q. Okay. It looks like June 16th, 2016.

A. $250. Yeah, it says focus group facility. So I will assume that that was noted correctly.
Q. Okay.
A. Two hundred and -- yeah, maybe we just rented the facility. I don't know if we conducted -- if this was a focus group or we were filming ourselves or what we were doing, honestly but.
Q. All right. So you don't know exactly what dates you did focus groups, right?
A. Well, I mean I can tell you that basically like the two weeks -- the two weekends heading up for trial we were -- we were running them a lot. I think Saturday and Sunday. We might have even done a Friday, Saturday and Sunday. I know I was doing focus groups the Saturday and Sunday before the Monday trial.
Q. All right.
A. And I think I had done them the weekend before that too.
Q. Okay. Do you remember any other -- the other focus groups you did do you remember without looking at that what the dates were?
A. Well, you gave it to me.
Q. No -- I mean you can -- if you need to refresh your recollection let me know. Stop.
A. Yeah, I do. Just give me a second.

Q. Okay. So you need to look ---
A. I am trying to answer your question, Robbie.
(WHEREUPON, pause for witness to review document.)
A. So I would have done one in May of 2017, June -- I'm sorry, July of 2017, August of 2017. I think that is it. At least that is when we -- we took the money out to pay the focus group participants.

I am sure we paid some of the other bills. The timings are -- this is when it is reflected in my accounting system. So I don't -- it is not exact as to when it happened. But we took the money out to pay the focus group participants, the last one on August the 11th, 2017.

Q. Okay. And the last thing that I want to ask you about is in your deposition last night you told me you did five or six focus groups. And I asked you what sort of numbers you got back. And you said you were doing really bad, doing really really really bad. Is that accurate?
A. That I -- that I said that?
Q. Yeah, was that the truth?
A. Yeah.
Q. All right.
A. Yeah. I mean the case was worth millions.
Q. And you said we were losing, we were losing -- so it was worth millions but you had authority to settle for 250?

A. Yeah. Yeah, that is how beat down Terry was. This was ridiculous that she was wanting to -- Terry wasn't about the money. Terry wanted this to be over. She was tired of the accusations, being called a liar. And then it turns out that they were the ones lying. So she wanted it over. And that is exhibit-A. Against my recommendations.

MR. WHELAN: Thank you, Judge.

THE COURT: Thank you, sir. You can step down.

THE WITNESS: Yes, ma'am.

THE COURT: Okay. Let's take a few minutes and give y'all a break. And then we will come back and I will hear motions.

(WHEREUPON, break 6/27/19, 3:32 p.m.)

(WHEREUPON, resume from break, 6/27/19, 3:42 p.m.)

THE COURT: Okay. Mr. Whelan, you have some motions for me?

MR. WHELAN: Yes, Your Honor, the defendant moves for a directed verdict on the plaintiff's bad faith claim, the plaintiff's negligence claim, and the plaintiff's claim for damages for emotional distress, and the claim for punitive damages.

With respect to bad faith USAA had a statutory right to assume the defense of the lawsuit, step into the shoes of Mr. Johnson and assert affirmative defenses Mr. Johnson would have for its benefit, its own benefit by statute.

This is the process and system put in place by the South Carolina legislature. The plaintiff should be in the same position, not in a better position, with her insurance company assuming the defense of the case. And defending it is not in bad faith.

Broom v. Watts talks about stepping into the shoes, 38-77-160 gives us the right. And I mean part of the issue is where does this -- if there is -- where is this duty that they are talking about ever going to end. If it is bad faith to contest a lawsuit against the company - which it was - then we can be sued for bad faith after this trial for questioning Ms. Hood's credibility. And then we can be sued for bad faith in the next trial after that for questioning her credibility.

And there just isn't -- there should not be a duty and the court should not recognize a duty under those facts.

USAA made an offer to settle the plaintiff's UIM claim prior to the trial and the verdict in the Hood v. Johnson's case. And that offer was rejected by the plaintiff.

There is no duty to -- the duty under Snyder verses State Farm, Ann Meyers verses State Farm, is that in a case of clear liability there may be a duty to make an offer of settlement where it is clear that damages have been suffered by the insured that are greatly in excess of the tortfeasor's policy limits.

Here this is not a case of clear liability. USAA did make an offer. And it is just the duty is just not applicable.

Again, duty is a matter for the court. The scope of the duty is a matter for the court. And there has to be some facts that give rise to a duty beyond just good faith and in error.

It is the plaintiff's burden to prove there was no reasonable basis to support some action by USAA in this case. There were plenty of reasonable bases for USAA's decisions.

And I believe that the issues that he identified that this case is about is, one, failing to offer the $250,000.

(WHEREUPON, pause to confer with co-counsel.)

MR. WHELAN: Right, the $250,000, and which was the full reserve. And, two, allegedly calling Ms. Hood a liar or questioning her credibility.

Questioning, talking about a witness's credibility, looking into a question, a witness's credibility, presenting evidence, gathering evidence, are all part of litigation. And there is no duty to forbear from doing any of those things, regardless of whether there is some other evidence that bears on the other side of credibility.

With respect to the 250, I talked about that with respect to Snyder versus Myers. But there was a reasonable

ground -- actually let me back up for a second. The duty of good faith says there is only a breach of the duty. So get -- going to breach. I'm sorry.

There is only a breach of the duty of good faith if there is no reasonable ground to support the insurer's actions. Now there were plenty of reasonable grounds to not admit that her lights were on. You have heard about all sorts of -- any -- even one witness would be a reasonable ground of not to do it. Here we had five witnesses who said that her lights were off. So there was definitely a reasonable basis to deny the request to admit and a reasonable basis to question liability.

And with respect to his argument that we should have offered 250 instead of 200, there was a reasonable basis not to do it. The parties were -- the last official demand was $650,000. And Mr. Smith testified that he told John Tiller he can probably settle between 300 and 400. So the parties were very far apart. And there was certainly a reasonable basis to offer 200. And that was within the evaluation of Ms. Moats and Jack Daniel.

And furthermore, Kevin Smith said he wouldn't give his bottom line. And he never did. The duty of good faith runs both ways.

And that gets back to if there was a duty on a party to offer its full authority in mediation there is no point

of mediation. Mediations will cease to exist. We will just -- everybody will exchange top and bottom numbers and that would be it. So we don't think there is a duty there. If there is, there was no breach.

I would like to point out to Your Honor that Crostley versus State Farm Mutual Automobile Insurance Company case at 307 SC 354 which said that it was not unreasonable for State Farm to investigate the medical history of an applicant who was diagnosed as having coronary artery disease the day after applying for a health insurance policy; we ascern no evidence to support respondent's claim that State Farm breached its implied covenant of good faith under the contract; if there is a reasonable ground for contesting the claim there is no bad faith.

And here there were many reasonable grounds to contest liability. And maybe the best evidence of that is the jury coming back at 49 percent. It can't be a case of clear liability if the jury finds that it is 49 percent.

Oh, also Jack Daniel's evaluations of liability find another reasonable ground to evaluate the case as State Farm did. And Ms. Moats testified that she had reasonable grounds to make the decisions she made. She talked about each of the witness statements that I showed.

And with respect to the -- to the duties that they are arguing, again, Snyder, Myers and Collins, which we had

cited to Your Honor before and I believe you read it, are exactly on point. They deal with essentially the same -- the same arguments where an insurer is the same. But there was a negligent evaluation, which is essentially what they are arguing here. And those cases hold that there is no duty unless there is, again, clear liability and damages clearly exceed the policy limits.

With respect to negligence there is no duty outside of the contract of insurance. There must be a duty for there to be negligence. And here this is a contract matter that has an implied duty that becomes a tort under bad faith. But there is no law to support a separate duty outside of the contract of insurance in the -- in the insurance -- in the insurance context. Otherwise the tort of bad faith would be irrelevant. There is just no support for that.

Now with respect to the -- actually let me point out that the -- if there was a duty, if there was a breach, it did not cause damages to Ms. Hood. She said that her economic damages were this $50,000 in cost. That is the only thing that we heard about.

But we also heard that she made $773,000 as result of the, quote, bad faith, or the, quote, negligence. So you can't have -- I mean you cannot have USAA acting in, quote, good faith, and her settling for $250,000; USAA acting in, quote, bad faith, and her getting $773,000 - more

than that - and have any actual damages. You have to subtract ---

THE COURT: Well, then ---

MR. WHELAN: --- the 50 from that ---

THE COURT: Well, then when would you ever be able to bring a bad faith case, because -- unless it was just an outright denial of a claim. Because if the jury comes back with less then you are not going to be able to maintain a bad faith claim. If the jury comes back with more, if you also can't get a bad faith claim to a jury where in the underlying action the jury gave you more then when would we ever have a bad faith cause of action?

MR. WHELAN: Yeah, I think that -- I think that damages are a big issue -- I mean that is an unknown in this tort of underinsured motorists negligent evaluation. I mean it is a hole. It really --

THE COURT: So you are saying you just -- you can't get -- you can't go against the insurance company whether you get a lower verdict in the underlying case or where you get a higher verdict in the underlying case?

MR. WHELAN: No, Your Honor, that is not what I'm saying. I am -- I am saying that the only area that duty has been recognized is if there -- you know, if you have clear liability and if you have damages that exceed.

And if you do that then the insured still has to show

damages. We have no case law on what those damages could be. It just it doesn't exist. But ---

THE COURT: I mean you can process consequential damages.

MR. WHELAN: Well ---

THE COURT: If you can show that the insurance company acted in bad faith you can get consequential damages.

MR. WHELAN: Well, Your Honor, you have to look at causation of damages. So if she -- if the -- if the failure to offer $200,000, quote, caused her to go to trial, and that -- you have to look at what the result of that was, what was the cause of that conduct.

And I think that the amount that she made, I don't think she can double dip on that. She can't say that you committed bad faith, I got all this money - I mean she got so much more than what she was willing to settle for at trial - and then I also get the $50,000 on top of that.

THE COURT: Tell me your position on emotional damages.

MR. WHELAN: Yes, Your Honor. There should be no emotional distress. There has been no showing of any physical injury or manifestation. And we should be entitled to directed verdict.

The only evidence of emotional distress is litigation induced emotional distress from the lawsuit against Antoine

Johnson. She talked about the mediation. She talked about the deposition. That is not a recoverable element of damages, even if she could show a physical injury; which she hasn't.

She has to show some actual emotional damages. They have to be tied to some injury. And I would -- for the proposition that -- or the rule that you cannot recover litigation anxiety, stress, or other unpleasantness, I would refer the court to the Nussman versus Maryland case at 272 Federal 3rd 625.

And that was a case actually involving a grievance process. But -- that was required. Just like a lawsuit in a UIM case is required.

THE COURT: Okay. Thank you.

MR. WHELAN: Also, Your Honor, we move for directed verdict on the issue of punitive damages. In order to withstand a directed verdict motion on the issue of punitive damages the plaintiff has to present clear and convincing evidence that USAA acted recklessly, willfully, or wanton.

Simple negligence affords no basis for an award of punitive damages. And as the plaintiff stated on the record last week, quote, this is a simply negligence case.

The conduct they are complaining of is, A, allowed by statute. We have the right to defend ourselves in this

suit. In the Kuck suit they are complaining about conduct in answering a complaint by Mr. Nichols representing his client, Therese Hood, and stating exactly what she said up until the trial.

This is stuff that happens in every courthouse, in every law office, every day. And we don't think it supports any damages. But it certainly doesn't support punitive damages.

I mean, again, if there were, there would be no way to negotiate in good faith in mediation.

And I think that is it, Your Honor.

THE COURT: Thank you.

Mr. Willey.

MR. WILLEY: Your Honor, I think we went over a lot of these arguments at the summary judgment phase over my objection. But I would reference those arguments and incorporate them by reference into the arguments here so that we don't have to tread the same water. Specifically with respect to the duties.

We spent a lot of time on duty. And of course the standard at the directed verdict stage is pretty clear and it’s within the discretion of the trial judge and your decision will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.

So a scintilla at the summary judgment phase on duty, there either is a duty or there isn't a duty. And there is a duty in this case. We have already gone through that.

THE COURT: So at this point you still want it to go to the jury on both negligence and on bad faith?

MR. WILLEY: Yes.

THE COURT: And then -- I mean if they came back with a verdict on both you would still only get one verdict. That is my understanding. You can't ---

MR. WILLEY: That is right.

THE COURT: --- recover on both of those.

MR. WILLEY: That is right, Your Honor. I think there's different elements of each. And so I think that they are entitled to consider the causes of action separately. But I think that there would be one actual damages award if they found either.

THE COURT: Okay. I am not as troubled by it going to the jury. I am talking about the bad faith in particular.

MR. WILLEY: Okay.

THE COURT: I do think there is evidence from which it is a jury question as to whether or not they are taking the disparate positions as to the headlights in the two separate lawsuits. I think that is a jury question that they can reasonably weigh that evidence.

What does concern me, however, I am not seeing where

they're -- they had any duty to in the settlement negotiations offer a specific amount of money.

And so we have got some case laws generally -- I mean federal case law that says, you know, we need to give as much flexibility as possible to the parties during mediation and absent just this overwhelming liability and they have got injuries that far exceed your policy limits there is no duty to tender that. And that there is no -- the insurance company is not acting in bad faith by making you go to court.

So talk to me about that. Because ---

MR. WILLEY: Sure.

THE COURT: --- that is one item ---

MR. WILLEY: And it is a ---

THE COURT: --- I was having difficulty with.

MR. WILLEY: --- separate situation where a lot of those cases involve liability insurance. This is a UIM case. Ms. Hood is not only an insured at USAA, she is a member of USAA. And so they have an increased duty to her that they would not have to a third-party who is making a claim against one of their insured's for proceeds under the liability policy.

And so I think ---

THE COURT: But these are cases in the context of bad faith ---

MR. WILLEY: Right. Right. And I agree with that. And so I think the question in this case is what they did reasonable. And we have testimony in this case from Ms. Moats that the reserve for US- -- and it could have been Ms. Howard. So if I misspoke on that, excuse me.

But the reserve in this context, is there a reasonable valuation of what they owe the insured. And she is the insured. And so in this case to not offer that, that is separate from a case where I would contend they can take a position and attempt to negotiate with a third-party to whom they have no duty at that time. So as long as they are not putting their insured in jeopardy.

And that's where we get into the Tyger River context. So in a liability case they can negotiate all day long with the tort -- with the victim. You know, if they were -- if they are the tortfeasor's insurance policy.

But what our court has said, if they do that and the injured party makes an offer to settle within the limits and they don't accept it, the insurance company has then essentially rolled the dice and are responsible -- can be responsible for the excess.

Here it is not as complicated. Because here we have no question. In those cases what was the amount that should have been offered, there is no -- there is no indication in those cases what the amount should have been.

There was just a disagreement on the valuation.

Here there is no disagreement on the evaluation. USAA has said the $250,000 is our reasonable evaluation of what she should be paid in in this case to be compensated based on everything we know. And despite that they still didn't offer that amount to their insured.

And so it is a -- it is really an apples and oranges context. I would agree in the liability posture that the insurance company is entitled to negotiate and try to get the case resolved for the lowest possible amount.

However, if in that scenario the injured party made the offer to settle within the limits and they rejected it, then the insurance company, our law is, would be on the hook for whatever the excess was in the verdict. They would be responsible for that. Not their policy holder.

Here -- and to distinguish some of these federal cases, here we have testimony on what USAA actually valued the case at. They actually thought the 250,000 was what she was entitled to. And they never offered it. And so I think the jury is entitled to consider whether or not that was reasonable. That is the question.

Under these -- under this context and -- with their duty of good faith and fair dealing, given the posture of the settlement negotiations when they have admitted this week that that was the reasonable evaluation of the claim,

that was the amount to which they thought she was entitled, they should have offered it in order to end the case.

That is distinguishable from the other cases in my opinion. And it also goes to -- I mean that goes to the negligence cause of action as well. I think that would be potentially a question under that cause of action.

But I think -- you know, the question overall is reasonableness. And here they have said that was a reasonable amount. They have said we never offered it. And so I think -- I think that is a jury question.

THE COURT: Tell me what your position is as to what damages she suffered where her verdict greatly exceeded the -- I mean if they had settled with her for 250 she would have lost out on the additional money she received from the verdict. So how do you have any damages?

MR. WILLEY: Well, you have damages because what -- a couple of different ways. One, you are entitled to consequential damages, which we have discussed under the case law. And so she has consequential damages in this case.

She is entitled to recover emotional distress damages in a bad faith action under the same Fourth Circuit law that Mr. Whelan cites.

And I think the jury is entitled to decide whether or not her reduction in that verdict is something for them to

consider in damages.

So here is how it works. The verdict -- what the jury said in the underlying case is that Ms. Hood was damaged in that car wreck to the tune of two-and-a-half million dollars. That is what her damage was.

That was reduced because of positions USAA took which were disparate from the positions that they are currently taking in another case, which was supposed to go to trial this week, by 49 percent, to 1.275 million.

USAA paid a million of that 1.275 million. They got a set-off for the 25,000 from Geico. And so that leaves 250,000 of an unpaid verdict. And so the question for the jury is when an insurance company like in a third-party case decides to roll the dice should they be responsible for the full amount of the verdict or should they get the benefit of going in and rolling the dice and just pay the policy that they should have paid all along.

And I think Mr. Whelan is correct in that we don't have appellate law on this. But if you read the third-party-liability-in-excess cases, the Tyger River case and its progeny, if an insurer acts unreasonably in refusing to resolve a case within the policy limits and the verdict is in excess of that the insurance company is responsible for that verdict. Even ---

THE COURT: That's -- I mean that is a far stretch to

call that a consequential damage ---

MR. WILLEY: Well, ---

THE COURT: --- don't you think?

MR. WILLEY: --- it is a consequential. I mean it is -- that is an element of the damage. I think that is an element of the damage that the jury is entitled to consider.

You know, part of the -- part of the question is a whether or not there are additional -- you know, and essentially my understanding of Mr. Whelan's argument with respect to the consequential damages is, oh, well, she would have had them anyway because we were just doing what we were allowed to do.

Well, the distinction is, doing what you were allowed to do when you knew it was wrong. When you knew that the case could have resolved -- or -- or had an amount of money that the case could have resolved for and never offered it who bears that risk?

Should the insured bear that risk? Because if that is the case, there is no more incentive in a UIM case than in a liability case for the UIM carrier to come in every time and just roll the dice.

If all they would ever have to pay, all they would ever have to pay in these cases, is the amount of the policy ---

THE COURT: Well, I mean what they would have to pay is consequential damages ---

MR. WILLEY: Right.

THE COURT: --- and then if their conduct was egregious enough they run the risk of a punitive damages.

MR. WILLEY: Right. And I -- my position is that as part of that consequential damages, just like in the liability context, it is the excess verdict. That is part of the actual damages ---

THE COURT: I am not going to allow that to be an element of damages, the excess -- the difference between the policy limits and what the verdict was I am going to have to disagree with you there. I don' think that that is a proper element of damages.

So let me tell you kind of where I am.

MR. WILLEY: Okay.

THE COURT: Because then I need to hear from you.

I do not think that there is any question for the jury regarding the conduct at mediation. I don't think that there is a duty to offer the full amount of their evaluation or the full amount of their reserve where the parties are $450,000 apart.

I do think there is a jury question as to whether or not taking the desperate positions in two law suits regarding the same exact fact scenario. I think that is a

jury question as to whether or not that is bad faith.

I think that her economic damages are basically limited to her litigation costs in the underlying action. What I want to hear from you about -- and frankly at this point I feel like punitive damages is an issue for the jury.

What I would like to hear from you on is the evidence of emotional damages. At this point Ms. Hood her testimony was that the mediation was difficult for her because she did not want to relive the accident.

I did not get any testimony from her that indicated that her emotional distress was anything over and above the general litigation anxiety.

Her husband testified this whole thing had been devastating for her. When they first started this whole thing they took a police report and turned it ten different ways. He testified he couldn't protect her from this.

And then he went on to say that they were not legal experts, they didn't understand the legal process, every time something happened then the lawyers would have to explain to them what happened.

And then Kevin Smith talked about the fact that pre-deposition that he said Terry was a wreck, that she was was extremely anxious about the deposition, because of the Parkinson's that she was embarrassed and concerned.

But I understand his testimony to be that that was before the deposition when they were preparing for it. And the case law says this has got to be emotional distress specific to the bad faith content and not the general anxiety of litigation.

And I am speaking specifically to I think it was State Farm v. Barton the people's house burned down and the court said, yes, there was a lot of testimony about emotional distress but it was related -- there was nothing to differentiate it from the stress that a normal person would have when their house burns to the ground. This is State Farm versus Barton.

So tell me what I -- what evidence supports an emotional distress damage going to the jury.

MR. WILLEY: And, Your Honor, I agree with you on the statement that any emotional distress from the car wreck is not an element of damages in this case. And so with respect to this case ---

THE COURT: Or the normal stress of preparing for litigation. I mean she -- you had litigation -- I mean she would have had some stress with the litigation regardless.

MR. WILLEY: Well, I disagree with that in part. I think that normal stress of litigation of just being part of the process I would agree with you on.

But the testimony in this case particularly from Mr.

Smith was, you know, they were calling her a liar, she was beat down by it all. She moved her authority even at the mediation all the way down to 250 when they had started much higher as a result of being beat down by it all, by being called a liar repeatedly.

And that is really what this case is about. I mean what this case -- and Ms. Hood testified. She testified that every time she, you know, has anything to do with USAA it all comes back. Because now she knows that all of this, calling her a liar, saying she was wrong, they knew it was wrong the entire time.

And so the emotional distress that comes from that. She talked about them questioning her sanity on the headlights issue, about them calling her a liar. And Mr. Smith talked about that. I would agree that any minor amount of just anxiety about giving a deposition ---

THE COURT: Or being sued by the Kruck's -- or the Kuck's ---

MR. WILLEY: Right.

THE COURT: --- and being sued counterclaim by Mr. Johnson. I mean that was all ---

MR. WILLEY: Right. And that is separate -- that is separate and apart from this. What weren't -- I think what we are solely focused on here is what were USAA's actions and how they impact her. And she did testify to that. Of

course I don't have the transcript.

But my notes indicate that beat down by it all, being called a liar, she indicated that she was extremely stressed by that specifically. Which is the unreasonable act that we complain of here.

And so to the extent that the jury is looking at that act I think they are entitled to look at emotional stress -- distress damages that flow from that act. And she testified to that.

I -- you know, I understand the court -- what I understand is concern of the court about conflating the two. I don't intend to do that in my closing. And I think we can address that with a charge that the emotional distress damages can only be damages that stem directly from USAA's actions in this case that are complained of.

Because I agree with the Court on that. And I do understand the Court's concern about -- there is a lot of distress when you go through this process, and so separating that out I agree is important.

I will just respond briefly on the must be tied to some injury. That is all fraud stuff again. And that's not the case law with respect to bad faith. It doesn't have to be tied to an injury. We've addressed that. I just want to put it on the record.

But I think we can take care of the Court's concern

with the charge on emotional distress damages and making sure the jury understands the difference in the two. Because there is testimony in this case.

I mean, you know, Mr. Hoods' testimony was we have been USAA members for X-number of years and they were always a good company and then they treated us like this. Specifically.

And with respect to Mr. Daniel's actions, those are imputed to USAA through an agency theory. And so they don't get -- you know, ---

THE COURT: Well, I mean there's two different things you are talking about. There is testimony, okay they treated us badly. What I am looking at is testimony that because they treated us badly it caused us to -- or it caused her to have these emotional -- have this emotional distress.

And that -- there was testimony that they did not care for the way they were treated, but I am still seeing a lack of testimony that because of that this caused me these specific emotional ---

MR. WILLEY: Right, and I think if you ---

THE COURT: --- so.

MR. WILLEY: If we went back and looked at Ms. Hood's testimony in the order that I took those questions with her, we were talking about all of the unreasonable acts.

And we talked about it. And I said, well, how did -- how did that make you feel. How did -- I don't know my exact words. Obviously I don't have the benefit of the transcript. But how did that make you fell, you know, what USAA did. And she talked about the emotional distress and the impact that it had on her very specifically.

And, you know, that testimony is on the record. I mean I was very careful to make sure I elicited that because I knew obviously that would be an issue.

So I feel confident that that testimony is there. Now whether Ms. Hood ever specifically said their unreasonable actions is what caused the emotional distress, in that order, I don't know.

But certainly through the presentation of the evidence and the ordering of the questions that is the way that it worked, you know, and the responses that she gave.

And in fact, you know, the -- we -- we talked about, you know, how she's doing now. And she didn't -- when we talked about that there was no conversation about the Kuck's lawsuit which is ongoing.

You know, she is not -- she is not complaining of anything that is going on with that in this trial. She came back to every time I -- you know, USAA, how they treated me, how they called me a liar. That is what this case is about, them calling her a liar when they knew it

wasn't true. Or at least that enough information to determine that it wasn't true. They never shared that.

So I do think it is important to draw that distinction for the jury, but I do think that the evidence is there on emotional distress damages coming from these specific acts by USAA.

With -- and I will -- I agree with the Court there are other mentions of emotional distress damages throughout the course of the trial that are probably not related to the cause of action. And so I think it would be important in the charge to splice that out.

And I will be -- we saw portions of my closing argument. I won't talk -- I won't be talking about her fear of, you know, being without Mr. Hood or her injuries or anything related to the litigation. We will be specifically talking about their posture in this case, calling her a liar on that issue, and the distress that she had as a result of that.

THE COURT: Do you want to respond, Mr. Whelan?

MR. WHELAN: Yes, so he is -- he is tying it all to them calling her a liar. And there has been no evidence that they did call her a liar. What they are referring to is the litigation, the deposition, the request to admit. It is all litigation related stuff.

And it's -- that would be -- that gets me into the

whole issue that -- of the disparate positions. And they didn't call her a liar, number one. Number two, if it had happened it would have happened -- it must have been in litigation.

The request to admit I assume is what they are talking about and the deposition. I don't think she said the request to admit caused her any emotional damages whatsoever.

I think she may have said the -- she felt bad in the deposition or something like that. But that is litigation related. I don't recall whether she said that or not, Your Honor.

But there is -- there is no evidence to tie emotional damages to what they claim is the bad faith conduct in this case. And if this -- if this big liar thing is the issue then we should have been able to say, well, actually he stipulated that they were off indeed.

THE COURT: Well, the only direct testimony -- and I don't know if it was figurative or literal. But Mr. Smith testified that Jack Daniel basically called her a liar and questioned her sanity.

But what I am struggling with is when you say they called her a liar, I mean there were several other people that were saying that the headlights were not on.

So I mean if you have, you know, three different

witnesses who are saying the headlights aren't on and USAA saying the headlights are not on, then I don't think we can say, well, she was -- her emotional distress was not because of what the other people were saying; it was only because of what USAA was saying.

MR. WILLEY: Well, and with respect to that if Your Honor would look -- well, I don't think you need to -- I will just read it to you.

Under the Fourth Circuit, you know, law, emotional distress damages are recoverable in a bad faith action. If I understand the argument it's now we are at the point where any emotional distress that happened during the litigation was Mr. Whelan's argument wouldn't be recoverable. And that is just not the law.

In a bad faith action the emotional distress would have -- would have had to occur during the underlying litigation because that is the period of time for which the bad faith action is relevant.

And so, you know, the idea that you can't get any emotional distress if it was a result of the ongoing litigation is not correct. It is the emotional distress as a result of the bad faith or unreasonable position that they took in the underlying litigation. And so that I think is what is important to splice out.

Under the theory of if it occurred in the litigation

it is not recoverable, you would never be able to get emotional distress damages in a bad faith action unless it was just an outright denial and, you know, no suit -- no suit was ever filed in the underlying case. Which, you know, doesn't really happen. Except in the health care context which is the case we cited Nussman as a healthcare case. It is not -- it is not a car wreck case.

But the law -- and, you know, we can go -- we can go to Fourth Circuit. But 333 of Supplement 2nd 479 which is the University Medical Association's case specifically says emotional distress damages are recoverable from that period of time.

We just have to splice out for the jury -- it can't just be emotional distress damages because her leg was hurt or because she -- her husband left her or any of that. It has to be emotional distress damages from the conduct of USAA in the underlying litigation.

And that's -- that's what we have here. We have the testimony in order to be able to submit it to a jury. But I do agree with the Court that it is important to make that clear in the charge so that the jury is not confused. We would be glad to work with Your Honor or Ms. Beeks on that.

MR. WHELAN: And another issue, Your Honor, is they have a -- I mean they have to -- a jury would have to determine damages with a reasonable degree of

particularity. Or rather they have to prove their damages with a reasonable degree of particularity. It doesn't have to be --- (cough in audience), but when they are just talking about (cough in audience) ---

THE COURT: I'm sorry, it doesn't have to be ...?

MR. WHELAN: Certainly.

THE COURT: Thank you.

MR. WHELAN: They don't have to prove their damages with certainty. But they have to prove it with a reasonable degree of particularity.

And if there were any mental damages that were compensable here, I don't see any way that the jury could determine what those are when they're just mixed in with all this other stuff that is related to all the different witnesses that said that her lights were off. I mean that is the source of her, quote, being called a liar. And her ---

THE COURT: Okay. I am ready to make a ruling. With respect to the bad faith claim, again, I believe there is a jury question as to whether or not USAA acts in bad faith in taking the disparate positions in the two lawsuits.

I am granting the directed verdict motion to the extent that relies on -- that the bad faith or negligence claim relies on conduct regarding mediation.

Again, I do not believe they have a duty to offer the

full amount of their evaluation or their reserve where the parties are that far apart in their negotiations.

I am denying the directed verdict motion as to the negligence cause of action. I think there is sufficient evidence for that to go to the jury.

As to the damages, again, I believe that the economic damages are limited to the litigation costs. I do not feel that there is sufficient evidence of emotional damages for that to go to the jury. That would have to be specifically tied to the bad faith action of the insurance company. So I do not find that that is a proper element of damages.

And I do believe that punitive damages that there is sufficient evidence for that to go to the jury.

MR. WILLEY: And, Your Honor, just ---

THE COURT: So that would be my ruling.

MR. WILLEY: Thank you. And just so I am clear, the emotional distress damages are granted as to the extent of the bad faith action; but of course we can still recover compensable elements under negligence?

THE COURT: My previous ruling was that they're -- they are still -- the only -- the only cause of action that carried an emotional distress element was bad faith.

MR. WILLEY: Right.

THE COURT: That the negligence action emotional distress damages are not recoverable in the negligence

action where there is no accompanying physical injury. That was my ruling pretrial. And that is still my ruling.

So it is 4:26. Tell me what our game plan is. Plaintiff has rested.

MR. WHELAN: Your Honor, we have one witness who will be rather lengthy I think.

(WHEREUPON, scheduling discussions regarding remainder of the day.)

THE COURT: Let's start Mr. Daniel.

MR. WHELAN: Your Honor, may I just say one other -- one thing on that. I mean part of my motivation is with Your Honor's ruling and the narrowing of the case I think I can possibly narrow my direct of Mr. Daniel, but I need some time to do that. If Your Honor wants me to go ahead, we can go ahead; but I think it would be cleaner to start him in the morning.

THE COURT: Well, I think we need to -- I think we need to move forward.

(WHEREUPON, comfort recess 6/27/19, 4:30 p.m.)

(WHEREUPON, resume 6/27/19, 4:36 p.m.)

THE COURT: Okay. Are we ready to bring the jury in?

MR. WHELAN: Yes, Your Honor.

THE COURT: Okay. Yes, sir.

(WHEREUPON, jury enters 6/27/19, 4:38 p.m.)

THE COURT: Okay. Mr. Whelan.

MR. WHELAN: Thank you, Your Honor. The defense calls Jack Daniel.

(WHEREUPON, the witness was duly sworn.)

THE CLERK: For the record please state your name, spelling your last.

THE WITNESS: It is Jack Daniel. Last name D-A-N-I-E-L.

MR. WHELAN: Good afternoon, Mr. Daniel.

MR. DANIEL: Good afternoon.

THE WITNESS: The chair is ....

[Whereupon, position of witness chair slides lower).

MR. DANIEL: Stay where I am.

DIRECT EXAMINATION BY MR. WHELAN OF JACK DANIEL:

Q. Good afternoon, Mr. Daniel.

A. Good afternoon.

THE WITNESS: The chair is ....

[Whereupon, position of witness chair slides lower).

THE WITNESS: Stay where I am.

Q. Mr. Daniel, what do you do for a living?

A. I am an attorney here in town.

Q. Okay. And where are you from originally?

A. I grew up here in Charleston. I grew up over in West Ashley.

Q. Okay. And where did you go to school?

A. I went to high school at Middleton, which is no longer

around. And then the Citadel for undergrad. And then, you know, went on to law school over in Georgia at Mercer University.
Q. Okay. Great. And what did you do after law school; where have you -- well, actually let me ask you this: How long have you been an attorney?
A. Since -- time flies. Since 2002.
Q. Okay. And where have you -- how many places have you worked since 2002?
A. I started out -- I guess you could -- depending on how you look at it, either three places or two places. But I started out in Berkeley County as a solicitor. Which is, you know, South Carolina an assistant district attorney or prosecutor. And then I came down here in Charleston and was a prosecutor in the Solicitor's Office here for Ralph Hoisington and Scarlett Wilson for a couple of years. And since then I have been out in private practice.
Q. Okay. What year did you start in private practice?
A. It was probably I guess it was right around '06 ---
Q. Okay.
A. -- or so; '07.
Q. And where do you work?
A. Carlock, Copeland, and Stair.
Q. Okay. You handle cases for the plaintiff or the defense, or both?

A. A little bit of -- I primarily do civil defense on the defense side. I have represented plaintiffs. I had a small plaintiff's case just recently. But I would say the large majority of it is the defense.
Q. Okay. And do you work for insurance companies?
A. Yes.
Q. Okay. Did you -- actually let me ask you this: Have you handled -- we have talked to this jury a lot about liability insurance and underinsured motorist coverage. Have you handled cases for liability coverage and for underinsured motorist coverage?
A. Yes, I have handled both.
Q. Okay. Tell the jury -- so just to make sure, liability insurance when you are defending somebody under liability insurance who is your client?
A. If you have a liability case it could be -- you know, for instance, say you were to get in an accident and, you know, USAA or State Farm that they insured you, that they -- you pay that premium, there is a lawyer that then they hire to defend you; you would be my client in that situation. So my -- in a liability case there is an actual person that is my client.
Q. Okay. And the insurance company would pay your bill; is that right?
A. That is correct.

Q. Okay. But do you -- when you fill out an answer do you -- you are answering for me or the insurance company?
A. I would be answering for you as my client.
Q. Okay. Now how does defending an underinsured motorist case differ from that?
A. It's -- there are quite a few differences. But the biggest is that this is insured. There is no person, you know, a Robbie Whelan, so to speak, that I would be defending in that situation. It is really the insurance company is the actual defendant.

But then, you know, for the purposes of a trial and the way it works -- this is probably nationwide. I am not a hundred percent sure on that. But at least in South Carolina if a case like that, a UIM case in this instance, is to proceed to trial, juries -- you know, our law, insurance is not supposed to be introduced or, you know, talked about in the trial. So really the way a jury would see it is there is an actual defendant there, but in reality the lawyer defending the UIM claim is really defending an insurance carrier or insurance number.
Q. Okay. But you are standing in these shoes of the defendant?
A. That's exactly right.
Q. Mr. Daniel, the plaintiffs -- I want to show you -- I am going to hand you what has been marked as Exhibit 12,

Plaintiff's Exhibit 12. That is an answer of Ms. Hood in the -- as case filed by the Kuck's. Is that William Kuck?
A. Yes, sir.
Q. All right. And what attorney filed that answer?
A. Chris Nickels here in town.
Q. With Clawson and Staubes?
A. That's right.
Q. And then under -- under his signature block it says who he represents, right; what does that -- what does that say?
A. He represents Therese Hood, Ms. Hood.
Q. Okay. And when he files that answer does he have an ethical obligation to speak on her behalf?
A. Absolutely.
Q. Okay. I am now going to hand you what I have -- what the plaintiffs have marked as Exhibit 13. And was is that?
A. This is a conditional answer, notice of appearance, for it looks like probably for USAA; the one that I filed, my firm filed.
Q. So that is a UIM answer; is that right?
A. That is right.
Q. And it says on your signature block who is your client?
A. It is USAA General Indemnity Company.
Q. Okay. And the -- this whole UIM system where you're

standing in the shoes of the defendant, is that governed by state law and state statute?
A. It is.
Q. All right. And when you -- when you entered that notice of appearance in the Hood case, Hood against Mr. Johnson, Mr. Johnson was currently being defended; right?
MR. WILLEY: Your Honor, I am going to object to the leading at this point. I have allowed him some latitude but.
THE COURT: Sustained.
Q. So when you -- when you entered -- when you made your appearance in the Hood versus Johnson case what was the status of the litigation?
A. Antoine Johnson had been sued personally. And I believe Toland Sams down in Beaufort was his lawyer. So, yeah, he was an active defendant in the case at the time.
Q. Okay. And had the answer been filed?
A. An answer had been filed, yes. That is my recollection.
Q. Okay. And do you recall what Toland Sams who represented Mr. Johnson what his position was, what Mr. Johnson's position was, as far as whether Ms. Hood's lights were on or off?
A. I think the position was that they were off.
Q. Okay. Now do you recall receiving a request for

admission in the case of Hood versus Johnson?
A. Yeah, it seems like I did. But I have not looked at that in a long time.
Q. Okay. I am going to hand you what has been marked as Defendant's Exhibit 13. What is that document?
A. This is a request for information from plaintiff's counsel. And it is in the under limit case, the UIM case, Kevin Smith.
Q. Okay. And is -- what is Plaintiff's Exhibit 14?
A. This is my response to the request for admission.
Q. Now what is a request for admission?
A. It is really simply it is a question or a statement, a factual statement, from one party in a lawsuit to another where they are asking their opponent, the other side, to admit, you know, to certain facts.
Q. And what would be the effect of admitting that exhibit that you have?
A. This was the biggest issue probably in the entire case I would say.
Q. Okay.
A. So if you admit that -- admitting that would basically be admitting liability.
Q. Now tell us, Mr. Daniel, what did you think about the liability in the case; what did you think when -- what did you think about the likelihood that a jury would find Mrs.

Hood some portion at fault in the trial in Jasper County?
A. I was looking back at -- you know, we -- you send reports in a case where an insurance carrier is involved. And, you know, I am -- just can't -- I was involved in this case for a couple of years. And I remember I was very -- I felt very firm in my belief that Mrs. Hood was responsible for the accident and there was a strong chance that a jury would agree with that position.
Q. Okay. And was your evaluation -- what was your evaluation based on generally?
A. Well, there was a witness we found, Dustin Lee, who maybe in my view he might have been probably one of the most compelling witnesses. We got his 911 call. You know, I -- off the top of my head I can't remember whether he -- you know, he said that he had called within, you know, a minute and thirty seconds, two minutes, two-and-a-half minutes, or something like that, from the moment of the accident.

But essentially he is right behind Mrs. Hood as the accident occurs and so he sees it all taking place as Antoine Johnson was pulling out to make a left. And he calls in and essentially says it was, you know, really dark out; you know, Mrs. Hood had been tailgating him, didn't -- she didn't have her lights on; and it was something to the effect of the car or the vehicle that was pulling out onto

the roadway probably that driver probably couldn't see that SUV, the SUV being Mrs. Hood's vehicle.
Q. Okay.
A. So that -- there was that.
Q. Well, let me ---
A. But there were other witness too.
Q. Let me stay with Dustin Lee for just a second. What was his profession?
A. He is an attorney down in I believe Beaufort, Bluffton, area. I think he practices plaintiff's law. But he is also a part-time magistrate judge.
Q. And as a magistrate judge does he hear -- what sort of cases does he hear?
A. I believe he handles traffic cases and, you know, other, you know, citation type cases, as far as I know.
Q. And did you find him to be a credible witness?
A. I thought he was very credible, yes.
Q. Now what other witnesses did you consider in your evaluation?
A. There was Mary Kuck and William Kuck; and, you know, the couple that was also involved in this accident, they were the third vehicle, their SUV it was hit head-on.
So I thought -- you know, especially Mary Kuch I thought what her testimony and what she had to say was very compelling.

William Kuch, you know, he kind of -- I believe his recollection was like kind of shaky. But, you know, Mary Kuck had been adamant from the beginning. Because I think she was interviewed by the police officer either at the scene or at the hospital. She had been adamant about Mrs. Hood's lights not being on at the time.

And then there was Kerry Tanrath who was -- he was an ex-military guy down in Savannah who worked out on Hilton Head or something like that. Real sharp kind of precise guy. And he kind of had -- I mean his view was at an angle; but he could see the passenger side of Mrs. Hood's SUV, and he said that her lights were not on.

So there was -- there were those witnesses.

Q. What about the defendant?

A. Antoine Johnson really -- I met with him several times before the actual trial of this case. And he is a really nice young man and kind of soft-spoken. And didn't -- was the kind of guy that didn't really overstate things or try to -- you know, he wasn't like a pit -- you know, he was just a very understanding guy. He was to me very compelling and believable and said, you know, if she had her lights on I would have seen her.

So all of those -- all of those eyewitnesses were consistent.

Q. Now we've heard a lot about a report by Woody Poplin.

When did you ---

MR. WILLEY: Your Honor, I am going to object at this point to relevance and cumulative. We have been through all of this. It is what USAA knew. His letters are in there. It is what he did. I don't -- I am just ---

THE COURT: I am going to allow the question. Thank you.

Q. I'm sorry, Mr. Daniel, had you -- actually hold on just a second. Let me mark this.

[Whereupon, Defendant's Exhibit Number 15, Poplin report, marked for identification]

Q. And this is Bates Number Plaintiff 10 through 74.

THE COURT: I'm sorry, what was -- this was defendant's number?

[Whereupon pause for the Court]

MR. WILLEY: Fifteen.

Q. All right. Mr. Daniel, what is Defendant's 15?

A. This looks like Mr. Poplin's report for -- I guess it looks -- it says v. Hood. I am not sure whether this is her -- the case that I was involved in. It looks like it probably is.

Q. All right.

A. But it is his -- it is his report with respect to this accident.

Q. Okay. And there is an Exhibit 8 on it because it was

an exhibit in the plaintiff's bad faith suit; but you received this -- or you found out about this report from who?

A. I want to say it was Kevin Smith. You know, sitting here right now I would probably, you know, have to go back through a banker's box or two of files to know for sure.

But I believe Kevin and I talked at some point and, you know, I learned that Woody Poplin had been retained. I don't know if he had been retained directly by Kevin or -- I think he may have been retained by Chris Nickels who was defending Mrs. Hood.

Q. Okay. So and I will hand you Defendant's Exhibit 11 which is a letter you wrote on August 22nd. You can refer to that. Does that refresh your recollection as far as where that report came from?

A. Yes. It looks like at the top of it, it is my understanding it came from Kevin Smith.

Q. Okay. Now what does black box data what is your understanding of what can be obtained from a black box?

A. Yeah, I mean it is like -- it is called like CDR data or CRD -- it's -- yeah, I use the same slang term, black box data. But there is certain information that newer vehicles I think most any new vehicle they have a recorder that captures certain information that if you brake really hard or there is an extreme change in direction in your

vehicle the thing is kind of always running. Think of like a camera in a gas station or something, a security camera that is kind of always on a loop but the data is not being saved; it is saved when there's certain triggering events.
Q. Okay. And could you pull up Page 47, please.
A. Sure.
MR. WILLEY: Your Honor ---
THE COURT: Have you moved this into evidence?
MR. WHELAN: Oh, I'm sorry, Your Honor. We offer this as Defendant's 15. Thank you, Judge.
MR. WILLEY: Oh ---
MR. WHELAN: Forty-seven -- or Page 47.
[Whereupon, bench conference 6/27/19, 4:57 p.m.]
MR. WHELAN: Okay, can you blow up the bottom box, please.
[Visual display adjusted]
MR. WHELAN: There we go.
Q. Now, Mr. Daniel, is this a report that you reviewed and evaluated in your -- in the case?
A. It is.
Q. All right. And what was the understanding of the significance of this information?
A. There's a bunch of different, you know, stats or I guess data that was pulled from the accident. It looks like this is Event One. Which I am not sure if that --

that might have been the first impact, the impact between Antoine Johnson's vehicle and Mrs. Hood's Chevy Equinox.

Again, the brake switch circuits data, that just indicates that -- this is Mrs. Hood's vehicle as well. But that indicates that she never hit her brakes. And then, you know, the -- I think the -- as far as just the other most significant thing is that the vehicle speed at the time of that impact, the moment of the accident, which is 62 miles an hour.

Q. Okay.

A. Ms. Hood's vehicle.

Q. Do you recall what the speed limit was on the road?

A. I believe it is 45. But -- I think.

Q. It is on the police report. And do you recall what Ms. Hood testified under oath her speed was?

A. In her -- at the trial or in her deposition or ...?

Q. Well, in her deposition and in the recorded statement she gave to USAA.

A. I think she said around 30 or ....

Q. Okay. And if we could go to Page 3, please. I'm sorry, this is going to be Page -- let's go to Page 14.

A. Okay.

Q. And here Mr. Poplin found, if you look at the bottom summary, his opinion was that the high beam -- what was his opinion?

A. Yeah, his opinion was that Mrs. Hood's high beam headlights were on. And, you know, I would have to look through the whole thing. I want to say that he couldn't test -- maybe he only tested one side or one set of -- you know, one high beam unit headlamp and -- because the other one was demolished or destroyed.
Q. Okay.
A. But that her -- I think he also -- his other opinion was that her low beams were off.
MR. WHELAN: Yeah, if we could go back one page Alex and look at that.
[Whereupon, complied]
MR. WHELAN: Thank you.
Q. So the middle paragraph, bottom sentence, what did Mr. Poplin conclude about the passenger side low beam?
A. Yeah, the passenger side low beam he was able to examine and inspect that. And based on, you know, what engineers call hot shock or cold shock, he did not see any evidence of hot shock was my recollection.
So that means that -- you know, based on that his finding was that the low beam headlights for Mrs. Hood's SUV were off at the time of the accident.
Q. Okay. Now how did that -- how did Ms. Hood's low beams being off, according to Mr. Poplin, and high beams being on, comport with the evidence that you were aware of

when you received this report?
A. Well, you know, it is not uncommon for -- you know, in cases you will have competing evidence; but it was just -- to me it was -- it struck me you have got all of these eyewitnesses that say they didn't see any headlights on.
And I don't remember whether it was when I got this report or after Mr. Poplin's deposition, I mean he just kind of stated to me -- I want to say it was after his deposition, but he kind of just stated to me in a matter of fact way, well, that is just how it works when you turn your high beams on the low beams turn off, that is just about any vehicle.
And I just in my head was thinking, you know, I am not an engineer but that doesn't really sound right. And I remember, you know, maybe that evening going out and, you know, putting my car in park and once it was dark and I activated low beams and then activated high beams, and when my high beams came on in my car the low beams stayed on. So that was -- it was just kind of an inconsistency and, you know, to me seemed questionable.
So we ended up -- my staff and I, we ended up pursuing that trying to figure out whether that really is how it works for a Chevy Equinox.
Q. Okay. So what did you do to make that determination?
A. First, Mattison Suttie in my office the associate that

was working with me on the case she was down in Beaufort for another matter and our paralegal her husband works at a car dealership here in North Charleston. He set it up and got permission for her to go over and she just -- it was during the daytime so she took a quick just on her phone like a video of the guy at the dealership flipping -- it was just I think the same year, same make and model Chevy Equinox, flipping the high beam -- or low beams and then the high beams.

And based on that video - it wasn't the best quality - but it did look like the low beams stayed on when you turned the high beams on.

So we ended up then following up and trying to do a more definitive test. And we had a videographer, a team go up to a car dealership up in the mid state. I don't remember exactly what town it was in. But we went into -- they were nice enough to let us use like one of their bays for detailing or repairing vehicles. And so we shut the garage on that thing. Shut the lights off. And it was pitch black dark inside the bay. And we -- he had a camera set up and these guys had a camera on the inside of the vehicle where with this Chevy Equinox, same year, same make and model, they kind of ran through the cycle of lighting.

And sure enough when the high beams were activated the low beams would stay on when you had it in the manual

setting.
Q. Okay. And did you also -- did you talk to another engineer?
A. I talked -- we did talk with Tyler Black. We hired him kind of just as a consultant.
Q. Okay. And what did -- what did you ask Mr. Black to do?
A. We had him looking at the case. I really don't remember when we retained him. But we were kind of having him evaluate things, just liability aspects of it. And then really when -- before I went to take Mr. Poplin's deposition he was helping me kind of here is a question you should ask, here is what the crash -- he was looking at the crash data helping him interpret that and put together some good questions.
Q. Okay. So after you considered all of this evidence what did -- I mean what was your evaluation as far as what a Jasper County jury might do with this case from a liability standpoint?
A. I thought we had a solid case, a defendable case, and one that we could present to a Jasper County jury and win on, get a defense verdict.
Q. Okay. And, by the way, how much comparative fault does it take to get a defense verdict in South Carolina?
A. So you say 51, but really 50 -- if it is 50.0001

percent or something in our state for comparative involvement. In other words the plaintiff is, you know, just a little bit more than 50 percent at fault then there's -- that is considered a defense verdict, there is no recovery from the plaintiff.

Q. Okay.

MR. WHELAN: Your Honor, I would like to -- I have a -- we have a CD, a recording produced by the plaintiff. It is Plaintiff Production 4050 of the 911 call from Mr. Tanrath. Mr. Rosen is prepared to play that. The plaintiff produced this. I don't think there is going to be an authenticity objection.

I would like Mr. Daniel to listen to this recording and tell the jury whether this is a 911 call from Mr. -- excuse me, Mr. Lee.

So ---

THE COURT: First of all, this is marked as Defendant's Exhibit Number 16?

THE COURT REPORTER: Correct, we are going to.

MR. WHELAN: Thank you.

[Whereupon, Defendant's Exhibit Number 16, CD, was marked for identification.)

THE COURT: I know you are not offering it into evidence at this point, you are going to ask him to identify it. But I need to hear from you now before it is

played obviously.

MR. WILLEY: Your Honor, I have several objections. One, to authenticity. Two, to the fact that he has already testified as to what Mr. Lee said. I don't intend to cross-examine him on that. It has nothing to do with the case. So there is no need to spend more time doing this.

I mean I -- and I don't think he can authenticate it. I mean he didn't take the 911 call so he doesn't know who is on there.

THE COURT: I am going to ask you to lay some foundation for -- I mean I don't know ---

MR. WHELAN: Sure.

THE COURT: --- if he has ever heard this before or what.

Q. So, Mr. Daniel, you said that Mr. Lee was an important witness in your evaluation; right?

A. He was.

Q. Okay. And his statement concerning liability was -- excuse me, what is the first statement you are aware of that Mr. Lee made concerning this accident?

A. He called 911. You know, as I said, it was within a minute, two minutes ---

Q. Okay.

A. --- of the accident.

Q. And were you able to obtain the 911 call?

A. We did. We either send out like a FOYA, Freedom of Information Request, to law enforcement down in Beaufort County or subpoena. And we got the 911 dispatch records for the 911 call. I think -- there may have been multiple calls, but we definitely -- we were -- we obtained Dustin Lee's call into 911 about this accident.
Q. Okay. And did you rely on that in your evaluation of this case?
A. Absolutely. Thought it was one of the more compelling pieces of evidence.
MR. WHELAN: All right, Your Honor, we would like to publish this recording at this time.
MR. WILLEY: Same objection is it is still not authenticated. He can say what it says. There is no dispute about what it says. We are not trying the car wreck case. He has already said what it says, and I don't disagree with it; and I don't intend to disagree with him. So, you know, playing a three-minute tape that he can't authenticate I don't think is productive.
THE COURT: I am going to allow it. Thank you.
(Whereupon, publish Defendant's Exhibit 16, 911 call]
Q. Okay. Was that the 911 call that you heard?
A. Yes, it was.
Q. All right. And what were the -- what was the evidence concerning the lighting conditions that evening?

A. Dustin Lee -- you know, it was -- it was pretty close to dark. I mean it was really dark out. And, you know, when I talked with him the few times I talked with him and then during his deposition and I think at trial -- you know, it was his view that to drive safely you needed to have your lights on for other drivers to see you at that time.
Q. All right. And did you rely on the police officer at all in your evaluation? I don't think we mentioned her.
A. Yes. I mean I think she may have even testified that, you know, she wasn't at the scene when it happened; but, you know, I can't remember how quickly she got there. But based on her recollection she said, yeah, by this point in time the accident happened it was -- it was dark enough that you needed to have your lights on.
Q. Okay. Now Mr. Daniel, did you ever call Mrs. Hood a liar?
A. No.
Q. Do you evaluate credibility as part of evaluating the case?
A. Absolutely.
Q. All right. And what does credibility mean?
A. Believability. You know, there's -- people can either misremember or, you know, they kind of profess to remember more than they really do. They can be dishonest or -- you

know, or people can be very compelling and credible, someone you believe.

Q. And Mr. Daniel, have -- have you ever been -- actually let me ask you a different question.

I think that's all I have for you, Mr. Daniel. Thank you.

A. Okay.

MR. WHELAN: Your Honor, with the exception that I need to make some proffers concerning the trial issues that you already ---

THE COURT: Okay.

MR. WHELAN: Thank you.

THE COURT: Can I get you all to approach?

[Whereupon, bench conference]

THE COURT: Okay. Ladies and gentlemen, once again, it is usually not our practice to split up a witness's testimony. And I am sure Mr. Daniel would probably prefer to get it over with today and not have to come back tomorrow. But I am afraid if we start the cross-examination that we may be keeping you here a while, so I am going to go ahead and send you home for the evening.

If you will please be back at 9:30 tomorrow? We will have I am certain a few matters that we will take up at 9:00 a.m. and then try our very best to start promptly at 9:30. Again, please don't begin discussing the case this

evening. And have a good evening.

[Whereupon jury exits courtroom 6/27/19, 5:16 p.m.]

THE COURT: Can we go ahead and do the proffers?

MR. WHELAN: Sure.

THE COURT: Proffer whatever testimony you want to proffer at this point.

MR. WHELAN: Okay.

PROFFER BY MR. WHELAN OF MR. DANIEL:

Q. Mr. Daniel, how did Ms. Hood's testimony at trial differ from her testimony during the entire discovery process of the case?

A. Yeah, during her deposition I remember she kept going back to the fact that she had, you know, an automatic setting on the lights and that they would come on if, it was dark enough out they just would have automatically come on.

It was clear though there's -- you could switch that vehicle to a manual setting where those lights wouldn't automatically come on. But she was adamant.

I think at some point maybe near the end of the deposition Mr. Smith, her lawyer, may have even asked her like is there any doubt in your mind your lights were on. And she said no. That was in her deposition.

Through the course of the trial all these witnesses -- plaintiff as a strategic matter called the witnesses that

we were planning on calling, and there was a lot of testimony about from these eyewitnesses that we have already discussed that Mrs. Hood didn't have her headlights on. And she testified after those folks did, after those witnesses. And her testimony was, well, now that I have heard all of these people maybe I didn't have my lights on.

So it kind of impacted the way we presented our -- the defense of the case. You know, she essentially conceded that she very well could have been driving without her lights on on a dark road.

Q. And her attorney said -- maintained the position that her lights were on, the entire case up to trial?

A. The first time we -- you know, there was -- her testimony and the concession at trial that maybe her lights were off, that is the first time we had heard that.

Q. Okay.

A. On the defense side.

Q. Do you recall Kevin Smith stipulating that Ms. Hood did not have your headlights on?

A. I don't remember if he stipulated or he was willing to stipulate. He may have -- he may have well stipulated, yeah.

Q. All right. Look at Page 553, Line 11 through 13.

THE COURT: And if you will for the record tell us what you are handing him.

MR. WHELAN: I'm sorry, Your Honor. I am handing Mr. Daniel Page 553 of the trial transcript. This is where Mr. Smith stipulated that the lights were off.

THE COURT: And this is what we have previously marked as Court's Exhibit 2, I believe?

THE COURT REPORTER: I believe we have Defendant's Exhibit 14; is that what you ---

MR. WHELAN: Well, this isn't in evidence. It would ---

THE COURT REPORTER: Right, for ID.

MR. WHELAN: Okay.

THE COURT: This is the trial transcript I believe is Court's Exhibit 2.

MR. WHELAN: Do you have the court's exhibits?

THE COURT REPORTER: Court's Exhibit 2 is a check.

THE COURT: I'm sorry, I know it was a court's exhibit.

MR. WHELAN: We could just mark another copy.

THE COURT REPORTER: Tell me what Defendant's Exhibit 14 is, Defendant's Exhibit 14.

MR. WHELAN: Oh, you are right; this is it. Okay.

So is this in evidence?

THE COURT REPORTER: No, it is for ID.

MR. WHELAN: Okay.

Q. So I have handed you Court's Exhibit 14.

THE COURT REPORTER: Do you want me to mark it as a court's exhibit? Because it was previously marked as a defense exhibit for ID.

MR. WHELAN: Oh, for ID. Okay. I'm sorry.

THE COURT REPORTER: Yeah, should I switch it to a court's exhibit?

THE COURT: No, that's fine.

THE COURT REPORTER: You are good with that. Okay.

Q. All right. Does this refresh your recollection as far as what Mr. Smith said at trial?

A. Yeah, I am looking at it says Page 533 I guess of the trial transcript. And, yeah, Line 11 through 13. If this was a witness -- yeah, they -- plaintiff's counsel at trial was willing to stipulate that Mrs. Hood had her headlights off at the time of the accident.

Q. Okay. All right. Thank you, Mr. Daniel.

MR. WHELAN: Thank you, Your Honor.

THE COURT: Okay. Thank you, sir. You can step down.

THE WITNESS: Yes, ma'am.

MR. WHELAN: I am sorry you have to come back.

MR. DANIEL: Back at what time?

MR. WHELAN: Do you want him at 9:30, Your Honor?

THE COURT: Yes, sir.

MR. DANIEL: Yes, Judge.

THE COURT: Thank you.

Okay. Anything else we need to address before we adjourn?

MR. WHELAN: So I suppose we will -- we are going to email the jury charges tonight; is that right?

MR. POULAN: I think that would be a good idea. Just so you know, it will probably be -- ours might come to you a little bit late. So if you want to send yours late too.

I mean I will probably be reading -- I will probably be looking at them in the morning. I am a morning person. I will probably be able to -- if I am reading yours. But I mean we are not going to send them at midnight, but it will probably be 7:00 or 8:00 before we send them to you.

THE COURT: We don't need this on the record.

[Whereupon, off record 6/27/19, 5:21 p.m. to address scheduling]

[Whereupon, resume trial 6/28/19, 9:07 a.m.]

THE COURT: I see that y'all did both send some proposed charges. And you have hard copies for me?

MR. WHELAN: I do, Your Honor.

MR. WILLEY: I do, Your Honor.

[Whereupon, a recess is taken from 9:08 a.m. to 9:18 a.m.]

THE COURT: Okay. We have got about thirteen minutes I'm showing before our jurors are going to be here. Do you want to go through the jury charges now?

MR. WHELAN: That makes sense.

CHARGE CONFERENCE

THE COURT: Okay. First of all, let's just start with maybe plaintiff's proposed charges. And Mr. Whelan, we can go through them one-by-one, or if you want to tell me any ones that you have particular issue with.

MR. WHELAN: I have an issue with their corporation charges. This is a membership, not a corporation.

[Whereupon, counselors confer]

THE COURT: Okay. Let's just take them in turn. It looks like Number 1 is straight out of the bench book. I don't see any problem with that. It looks like preponderance of the evidence is straight out of the bench book. Credibility of the witnesses looks like it's straight out of the bench book. Deposition testimony, as well.

MR. WHELAN: Yeah, the next one is -- an objection. It can say company. As a person, perhaps. But the thing -- corporation just has a bad connotation. I don't see a problem with saying company on this one and the next.

THE COURT: And so what would you -- what's the form of USAA; a member ---

MR. WHELAN: I think it's a -- it's a reciprocal exchange. It has a fancy legal name, Your Honor. But it's -- I don't believe it's a corporation. It's a -- I

cannot remember exactly what it's called. It is some sort of reciprocal exchange is the corporate structure, I believe. But ---

THE COURT: Well, I mean, I don't think saying a company -- I don't know that that's legally accurate to say that no distinction is made between a company and an individual. It depends on what the company form is.

MR. WHELAN: What company form would not be treated as a ---

THE COURT: Well, I mean, you're just a d/b/a. And I'm Kristie Curtis, and I'm -- judges have them. Retail store -- but it's just me.

Mr. Willey, what's your thought, sir?

MR. POULIN: Your Honor, I mean, I think I agree with you on the legality of it. I think -- I believe USAA is structured as a corporation, although I don't know that for sure. It is -- it is an individual member benefit corporation or something. I don't know the exact legal term. But I think legally it is operated like and probably taxed like a corporation. And I mean I think that's ---

MR. WHELAN: I think it's an interim insurance reciprocal exchange, is what pops up.

THE COURT: Okay. Well, can we just substitute: In our courts no distinction is made between an insurance company and an individual?

MR. POULIN: I think that's fine, Your Honor.
THE COURT: Instead of using the word corporation?
MR. WHELAN: Yeah, I think that's -- I think that's fair enough.
THE COURT: And I would assume you're -- as to request to charge, Number 6, your issue would be the same?
MR. WHELAN: The only issue here is -- yeah, I think that's fine, Your Honor.
THE COURT: I'm looking at Number 6 is: A corporation can only act as agents or employees; therefore, a corporation is responsible for any negligent acts or omissions of its agents or employees.
So I understand you're in agreement. We'll change that to insurance company.
First of all, you don't have any objection to the substance of it?
MR. WHELAN: No, I don't, Your Honor. I'm fine with that change.
THE COURT: Okay. Number 7?
MR. WHELAN: Yeah, I object to that charge. The Court should charge the law, not the purpose of the law.
THE COURT: Yeah, I'm not going to charge Number 7.
MR. POULIN: Your Honor, that's the -- that is the -- that comes directly from restatement second of the law. And that's what the jury is doing here is to make the

plaintiff whole, which is the actual damages.

THE COURT: And I think that's covered within the body of the charges on negligence and on bad faith.

MR. POULIN: And the deterrence factor, as well, is the -- is the purpose of tort law.

THE COURT: And, again, that's going to be covered in your punitive damages charge.

MR. POULIN: But deterrence is also a purpose of actual damages. What the courts have said is that one -- that if a company, or anybody, can harm somebody else and not have to make them whole, that makes it more likely for them to continue harming people in the future. So there's two different elements of deterrence.

The one deterrence is if you hurt somebody, you've got to make them whole. Punishment, as to punitive damages, is another element of deterrence on top of that. But deterrence is also a purpose and an element of actual damages.

THE COURT: I'm not going to make that statement about the purposes of tort law.

Going on to Number 8. That looks to me like a fair -- it just lists the elements of good faith and an implied duty of good faith and fair dealing.

MR. WHELAN: Well, I think that in the first paragraph, the next sentence should say: The defendant

denies the breach of any duty to the plaintiff.

THE COURT: I don't have any problem adding to the sentence: Plaintiff claims that defendant breached this duty and defendant denies that it breached this duty?

MR. WHELAN: Exactly. Thank you.

I do have an issue with the -- on Number 2, I don't think a refusal by the insurer to pay benefits due under the contract is at issue here. I think that -- I think Your Honor can rule that an issue remaining in the case as to whether the disparate positions taken in the case was a result of bad faith. I don't think that's a refusal to pay benefits due under the contract.

THE COURT REPORTER: I'm sorry, if you could just speak up just a little bit. You're fading off. Pull the microphone down. I am having a little trouble hearing. Thank you.

MR. POULIN: Your Honor, I would just point out that's one of the big elements of bad faith. I mean, I took -- this is actually, I believe, directly from the bench book; and I believe the four elements come directly from the Nichols case. It's an element of the cause of action.

THE COURT: Yeah, I mean it's one of the elements, for sure. What are you proposing, Mr. Whelan; that we just don't include that particular section?

MR. WHELAN: Well, I'm just not sure how -- I guess --

I guess really this goes to my directed verdict question as far as the existence of a duty under these facts. So I guess -- I guess we could address that with a directed verdict motion.

I also have an issue with the last paragraph of the jury charge on this page. This is citing the Tadlock case which said there was a duty to -- outside the confines of the contract in a third-party liability kind of case, which this is a -- this is a first party kind of case. And I do not believe that Tadlock has been extended to certainly a UIM case. So ---

MR. POULIN: Well, I don't think that's accurate, Your Honor. I think that -- and this is a direct quote from Tadlock. I think the important part of this is -- and perhaps Mr. Whelan can -- we can word it in such a way that it is less objectionable to you.

But the damages that's stem from a bad faith -- if the jury finds bad faith, the damages that stem from that are not limited to those solely expressed in the contract. And I think it's important to charge the jury on that because USAA has paid a million dollars for this -- for their insurance limits; but that doesn't mean that, you know, the 50,000 in litigation cost is not a damage outside of that.

And we don't want the jury to get confused and believe that because they paid the million dollars they are legally

presumed to not be responsible for any damages on top of that.

So -- and that's in all the UIM law as well. So the benefits due an insured are not limited. Maybe could be reworded to the damages -- the damages suffered by an insured are not limited solely by those expressly set out p in the contract. And I think -- I think that would be a reasonable change that I would be okay with.

THE COURT: I mean I think what the case law -- the case law specifically states that paragraph and then goes on to say that if you can show the insurance company acted in bad faith you can also recover consequential damages.

MR. WHELAN: Correct. Well, his next charge says that. So -- so he's got a standard charge of bad faith, and he's added Tadlock to that. And he's saying Tadlock needs to come in to get him the consequential damages. But that's already covered under the next charge.

MR. POULIN: Well, that is -- I mean, the next -- charge Number 9 does say actual damages are not limited by the amount set forth in the insurance contract. Which is what we would like to charge. So if we charge it in nine instead of eight, I'm fine with that.

MR. WHELAN: Well, Your Honor has already ruled on that. We've already said that the damages -- the damages in this case are the consequential costs to take the case

to trial. And it sounds like he's trying to get into the difference between the judgment and the contract amount, which you've already ruled on.

MR. POULIN: Now, I just want the jury to understand that because they've paid the contract amount doesn't mean that they're not responsible for the consequential damages.

And I think that's an accurate charge in Number 9. The last sentence of the first paragraph of our request Number 9, that actual damages are not limited by the amount set forth in the insurance contract.

THE COURT: I agree. So I'm going to delete the last paragraph of Request to Charge Number 8.

Other than what we've just discussed, did you have any objection to Number 9, Mr. Whelan?

MR. WHELAN: Yes, Your Honor. I think that the second paragraph should say plaintiff proves by clear and convincing evidence the insurer's conduct.

THE COURT: And I think that's covered later on, but I don't mind adding that.

MR. POULIN: Yeah, Your Honor, I think we would prefer that in a -- it is accurate that that is a different standard, and that is covered later in punitives. I think, then, we would probably prefer just to take -- just take that paragraph out of this part of the charge so we can deal with the actuals first, and then we'll charge them

with punitives when we get there.

THE COURT: All right, I am deleting the second paragraph of Request to Charge Number 9.

Any issue with Number 10?

MR. WHELAN: I'm not sure about the statement with the -- this charge goes for three pages. So looking at the second page, long paragraph, it says the plaintiff must prove that some injury from the defendant's negligence was foreseeable but does not have to prove that the particular injury that occurred was foreseeable.

I'm not sure if that's the law. I think it's confusing. And I think that the only injury is the -- the only injury that's left is these consequential damages of $50,000. So I don't think that it is needed.

THE COURT: Well, I mean, that's straight out of the bench book. It has to be foreseeable, but particular harm does not have to be foreseeable. And I think there's case law that says costs of litigation are foreseeable in a bad faith case.

So I don't -- I don't see any problem with that particular portion.

Moving on to Number 11.

MR. WHELAN: I'm fine with 11.

THE COURT: Number 12 on actual damages?

MR. WHELAN: Give me just a second, Your Honor.

[Whereupon, Mr. Whelan reviews documents]

MR. WHELAN: Well, with respect to the punitive damages charges ---

THE COURT: Well, let me ask you first, because 12 is on actual damages. Did you have any issue with 12?

MR. WHELAN: I might not have that in mine, so ---

[Whereupon, Mr. Whelan reviews documents]

MR. WHELAN: So I have 10 is the long negligence charge.

MR. POULIN: I might have missed a number here, Robbie. I was just handwriting them in. It says actual damages at the top.

MR. WHELAN: And that is number what? The actual damages?

MR. POULIN: Oh, I'm -- yeah, that should be 10 -- or 12. I'm sorry. I just misnumbered yours. That's what Judge Curtis is referring to is 12.

MR. WHELAN: So is there a new charge?

MR. POULIN: This is exactly what Judge Curtis ---

[Whereupon Mr. Whelan and Mr. Poulin confer]

THE COURT: What I'm showing is 10 was the long one on negligence. Eleven is evidence of negligence.

[Whereupon, Mr. Whelan and Mr. Poulin confer]

MR. POULIN: That's why your numbering is off.

MR. WHELAN: Did you add anything besides that?

MR. POULIN: No. So that becomes 11. And then this becomes 12.

[Mr. Whelan and Mr. Poulin confer]

MR. WHELAN: So we have no problem with 12.

THE COURT: And just to be clear, 12 is on actual damages?

MR. WHELAN: Correct. Yes.

THE COURT: So how about 11, were you still okay with that?

[Whereupon, Mr. Whelan and Mr. Poulin confer]

MR. WHELAN: So on punitive we prefer our jury charge.

MR. POULIN: And I will tell Your Honor I took this punitive damages charge directly out of the bench book.

THE COURT: Yeah. I mean, it -- I don't know that there's a lot of difference between the two proposed charges, but 13 does appear to be straight out of the bench book.

MR. WHELAN: Well, I think we -- we cited Anderson on punitives, and the statute -- the statute on punitives.

THE COURT: What I would suggest is I insert, before I start Number 13 -- and I don't have numbers on yours. But your punitive damages charge that starts: Before you can award punitive damages you must first find the plaintiff is entitled to actual or nominal damages.

I don't see any problem with inserting that before the

punitive damages charge. I think ---

MR. WHELAN: Your Honor, I don't -- I don't need that one. I'll withdraw that one you just read.

THE COURT: Okay.

MR. WHELAN: We would like the next charge.

THE COURT: Okay. And tell me when you say the next one. I've now gotten mine out of order.

MR. WHELAN: This begins with: There is no right to punitive damages.

Do you have that one?

THE COURT: I think the second paragraph is covered. Basically everything but that first sentence is already covered. So I will add that first sentence.

MR. POULIN: Well, Your Honor, that's the sentence we take issue with from that charge. I think -- I think that's -- and you'll notice that's -- this is a charge they kind of crafted by citing cases rather than coming out of a bench book.

I think that to some extent it's an accurate recitation of the law, Your Honor; but I believe it's kind of argumentative and prejudicial in the way that it's presented. So the jury charges should present the law very neutrally. And I think the regular charge, first of all it says you may consider an award of punitive damages. It goes on to say that you can only do that if plaintiff

proves x, y, z, et cetera, et cetera, and you don't have -- you know, what -- what -- the charge should just lay that out neutrally.

Now, Mr. Whelan can get up, obviously, in his closing and say you do not have to award punitives. The charge says that you may award, if you consider this, that, or the other.

But I think to come right out and say in the charge that if you -- you do not need to award punitive damages, even if you find the standard from opposing punitive damages has been satisfied.

THE COURT: Yeah, initially looking at this I thought that was straight out of Anderson.

MR. POULIN: It is not. That part is not.

THE COURT: I understand.

I think the punitive damages -- again, the section in plaintiff's Request to Charge Number 13 is straight out of the bench book and accurately reflects what the law is.

And I'm looking at the additional -- defendant's additional request to charge on punitive damages. I'm looking at the one: In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence. I

And we do have a definition of clear and convincing evidence covered.

And it appears that everything in your next one, that's the long one on punitive damages ---

MR. WHELAN: Yes.

THE COURT: Again, it looks like everything in here -- let's double check here.

[Whereupon, the Court reviews documents]

THE COURT: I don't see a definition of recklessness. I'm just missing it.

MR. POULIN: We can add that in, Your Honor.

THE COURT: What I would say is the paragraph in defendant's request to charge that starts: To recover damages plaintiff must prove by clear and convincing evidence that defendant's actions were willful, wanton, or reckless. The words recklessness, willfulness and wantonness are synonymous. Terms are used to describe a conscious failure to exercise and observe reasonable or due care.

And then the next paragraph which defines recklessness. And the final paragraph in that, I would add those in.

MR. WHELAN: Okay. Since their charge, I don't see it referring to the highest burden of proof and into the civil.

MR. POULIN: Well, that's not your -- it talks about the burdens of proof. And it says it's greater than

preponderance but less than reasonable doubt. And this is on the bottom of the first page of the punitive charge, plaintiff's charge Number 13, that bottom paragraph talks about it's more than a preponderance, on the other hand, not as high as the burden of proof in a criminal case.

And then it defines it. That it establishes in your mind not only the fact that it's probable, that it -- but that it is highly probable.

THE COURT: And, again, I'm looking at the bench book which describes clear and convincing evidence that that degree of proof which will give you a firm belief as to the facts sought to be proved, more than a preponderance but less that beyond a reasonable doubt.

So I do think that's covered in defendant's -- or plaintiff's 13.

MR. WHELAN: Well, Your Honor, we just ask that you add the sentence from Anderson that says, as you consider the issue of punitive damages the highest burden of proof known to the civil law is applicable.

MR. POULIN: But, again, that's kind of -- that's confusing and argumentative, Your Honor. It's kind of -- it's -- it may be the highest burden known to the civil system, but it's not the highest burden of proof. Beyond a reasonable doubt is the highest burden of proof.

And that's why this -- I think the standard charge

kind of -- it shows where -- the standard charge avoids confusion by showing where clear and convincing fits on the scale. It says it's more than preponderance, less than reasonable doubt; and then it defines what it is.

And they go on and say, but it is the highest standard in civil court, that confuses and conflates the issue. It's -- I think it's much clearer when you explain where it fits on the scale from the least high burden to the most high burden, which is how it is set forth in plaintiff's Number 13.

THE COURT: Again, I think 13 is okay as is.

And I'm not going to get to the last ones, because we're going to go over the verdict form in a little bit. But let's turn to defendant's request for jury charges. I hope that I have not purposely gotten these out of order. I'm looking at the first one, this equal justice charge.

MR. POULIN: Yes, Your Honor. I believe that's already covered in plaintiff's charge Number 6 -- sorry -- 5. The corporation is a person in the eyes of the law. A corporation is entitled to the same consideration and to justice by the same legal standards as an individual.

THE COURT: I agree.

MR. WHELAN: What about the second paragraph in the justice charge?

THE COURT: I just think that's already covered in the

charge that you treat a corporation just the same way as you treat an individual. I don't want to comment on the facts.

The next one I'm showing is the duty to investigate.

MR. POULIN: Yes, Your Honor. And we're okay with that one. And I was thinking probably between plaintiff's 10 -- I'm sorry -- I don't know. I'm thinking probably somewhere between Plaintiff's 11 and 12 is where we would stick some of these.

Like in a normal jury charge you would talk about plaintiff's allegation and then the defendant's defenses, just to kind of keep it in order.

And I think the next couple of theirs probably go to their defenses. I think -- and I'm okay with this particular one. And I think probably the best place to stick it in would be between 11 and 12, plaintiff's 11 and 12, is just my thought on it.

THE COURT: Okay. The next one, liability insurers.

MR. POULIN: Yeah, I do -- I do have a problem with that one, Your Honor. That's actually not the law in South Carolina. There is a tripartite relationship. And, in fact, the Supreme Court in the Maybank case that just came down really kind of shed light on that and put the impetus on it.

The -- even though the attorney is hired to represent

the individual in a liability claim they still owe a duty and responsibility to the insurance company, so much so, in fact, Your Honor, that if the attorney messes up and does something to hinder the claim malpractice-wise, even if that does not harm the insured, who they are supposed to be representing, the Supreme Court said in the Maybank case that the insurance company could sue the attorney for the damages that that attorney caused to the insurance company. And that wasn't in a liability setting. So I just don't believe that this accurately reflects the law.

MR. WHELAN: Well, Maybank was a -- Maybank analyzed it more like a third-party beneficiary. It said that -- I mean, if there -- if they were an agent, then the insurer could -- you wouldn't even need to get into all the analysis and the very limited ruling the Maybank court made to allow that lawsuit against the attorney, provided that various preconditions were met in such a lawsuit.

I don't think Maybank goes for -- to the proposition that an attorney, much less an expert witness hired by an attorney, representing the insured, is an agent of the insurance company.

MR. POULIN: And as Roy just pointed out to me as well, even the case they cite doesn't -- doesn't really stand for the proposition that they editorialize in their charge. It is -- it's the sole -- simply says the sole

client of an attorney is its insured.

It looks like they're trying to get an agency. And there is -- there is an agency charge in the bench book. I thought that it was probably not necessary and overly confusing, but I think -- I think it's been well argued and understood throughout this case that Mr. Nickels was technically representing Terry in the underlying lawsuit, the Kuck lawsuit.

And I think it's also been pretty well understood and argued throughout the case that USAA was paying him. And that's -- and Mr. Whelan had his flow chart and was talking about actually one of the benefits you get under a liability policy is they hire you an attorney and defend you.

So I think this is a misstatement of the law. And I think all of that has been pretty clearly set out to the jury already.

MR. WHELAN: Well, I don't -- I think it is the law. And I think that the plaintiffs have tried to confuse the law by continually to elicit from their witnesses that this was USAA's expert and USAA's attorney and asking in their questions about that ---

THE COURT: What I would propose is that we say that when a liability insurer hires an attorney to defend an insured for claims made against its insured, that lawyer's

client is the insured, not the insurance company. Or the client is the -- the insured is the client.

MR. WILLEY: We'd be okay with something like that, Your Honor.

MR. WHELAN: The only -- the problem, Your Honor, is they're putting in their charges that USAA is responsible for the accidents agents, bound by the accidents agents, all of that. So that's why we want the specificity that the lawyer is the agent of the insured, not the insurance company.

THE COURT: All right. I am --

MR. WILLEY: Again, that's not accurate. But the insured is the client. We -- that is the law. And I think Your Honor's charge on that is accurate and not objectionable for us.

THE COURT: All right. I'm just going to look at these -- I'm going to look at this case on the -- that you've cited that talks about the sole client of the attorney is the insured. But I'll take a look at that before I make a final determination.

Okay. The next one I'm looking at is law pertaining to uninsured motorist coverage.

MR. POULIN: Yes, Your Honor. With respect to this one and the next one, again, they're sort of editorializing and specific to the case where it talks about Mr. Johnson

and, you know, it's not -- what I think we should do here, Your Honor, is just go ahead and charge them with 38-77-160. So at this point Your Honor says, I will now charge you on the statutory law that establishes underinsured, or whatever, South Carolina Code Annotated 38-77-160 says. And then that whole first paragraph of that law talks about their right to defend and to stand in their shoes.

And I think there could be a more accurate description of the law pertaining to underinsured motorist coverage than just simply charging them that statute.

MR. WHELAN: I do agree that Antoine Johnson's name should come out of the charge. But otherwise, I think it's an accurate statement of the law. And I think just reading the statute, that statue is pretty confusing and complicated. It's not designed as a jury charge.

THE COURT: All right. I'm going to -- I'm going to look at the statute in connection with those two proposed charges.

MR. WILLEY: I've emailed the statute just now to you.

THE COURT: I added it in yesterday on mine, and then I somehow didn't save that version. So the next one is on bad faith. Looks like the next three are on bad faith. I'm looking first at the -- an insurance company acts in bad faith only when there's no reasonable basis to support its decision.

MR. POULIN: And, again, Your Honor, I believe this one is basically an argument, not a law. We charge them on the law and bad faith and what it is. And the whole -- that's the purpose of closing argument then, is that Roy's going to get up and say what they've done is bad faith per the definition that the judge gave you. And Mr. Whelan is going to get up and say, well, we've had all these reasonable bases to support our decision so it's not bad faith.

THE COURT: Well, I mean, the jury -- the whole reason we have the jury is to determine whether it was reasonable or not.

MR. POULIN: Right.

THE COURT: So you're both going to be arguing, yes, it was reasonable, no, it wasn't. But this is an accurate statement of the law, straight out of the case law. So I don't see how I cannot charge that.

MR. POULIN: Right. Right. But -- yeah. I mean, again, that's -- it's still argumentative. If there's any reasonable basis to support his decision, it's not bad faith. You could reword that and say there's -- I mean, that's the law; right, if there's any reasonable basis to support his decision?

MR. WHELAN: No, that's not the law. The law is there's bad faith only when there's no reasonable basis to

support the decision.

[Whereupon, plaintiff counselors confer]

MR. POULIN: Yeah, I just don't think -- and, I mean, this is a -- this is a denial healthcare benefits case as well.

THE COURT: Well, I mean, it's coming out of Howard vs. State Farm: If there's a reasonable ground for contesting a claim there is no bad faith. I

So I think that one comes in.

The next one is a miscalculation?

MR. POULIN: Yes, Your Honor. We would have the same argument as to that one and the next one, which is estimating likely jury verdicts. I believe that based on the directed verdict rulings yesterday those are not issues in the case anymore.

THE COURT: Yeah, I feel like I'm getting close to commenting on the facts here. So I would not be in favor of those next two on estimating jury verdicts.

MR. WHELAN: Well, my comment would be they are right out of Snyder. And the plaintiff has put so much emphasis throughout this case on this miscalculation in estimating likely jury verdicts that I do think the jury needs to be told that that is not bad faith.

THE COURT: Well, I think the Court was commenting on the particular facts of those cases. And, again, I think I

am wandering into making comments on the facts there. So I'm not going to charge those two.

And ---

MR. WHELAN: Your Honor, I would ask -- my next charge, we did -- we did not discuss this specific charge earlier, but we were discussing the clear and convincing evidence standard. And the charge that begins: In any civil action where punitive damages are claimed plaintiff has the burden of showing them by clear and convincing evidence. I

And then it says: Which is -- which is evidence that produces in your mind a firm belief or conviction without hesitancy as to the truth of the allegations sought to be established and the evidence should not be ambiguous, doubtful or contradictory.

We would ask that that be included in the Court's discussion of of punitive damages.

THE COURT: Let me look at it with the other punitive damages charge. And I don't think that there's anything wrong in this. I just don't want to muddle, if there's already portions of that covered.

MR. WHELAN: Okay.

THE COURT: And then we've discussed the one that begins with there is no right to punitive damages.

MR. WHELAN: Correct.

THE COURT: The next one I am showing is I charge you that whatever does not make any difference does not matter?

MR. POULIN: I mean, I just don't -- I don't see how that fits in or is necessary.

THE COURT: Yeah, I'm failing to see the ---

MR. WHELAN: Well, I think that the -- I think that's basically a causation. So it fits in with causation. But it also goes to -- I'm not sure what Mr. Willey is going to argue, but he -- I suspect he will argue things that do not matter in this case. And I'd like the Court to rule on that.

I mean the other thing is the dis- -- so the sole issue left, which is the disparate positions allegedly taken, didn't matter. They just did not result in -- they just are what they are. And the -- that's why I think that this charge should be included.

THE COURT: I'm not going to charge that one.

And then I think we've covered -- the next two I'm showing are punitive damages that we've already talked about. I think I've hit all of yours.

MR. WHELAN: Okay. Your Honor, could you also -- could you also charge the jury about what the matters are left in dispute in this case?

There has been, again, so much discussion and far-reaching evidence concerning these other broad duties and

alleged breaches that Your Honor has granted us a directed verdict on. And I do think it would be appropriate to let the jury know that the issue remaining in the case is whether the disparate positions in the lawsuit by USAA was in bad faith.

THE COURT: Well, again, I don't want to make a comment on the facts. Because I've made that ruling, neither Mr. Poulin or Mr. Willey are going to argue in closing argument to this jury that something they did in settlement, or that the failure to settle, constituted bad faith. Because I've already made a ruling on that.

So if you can tell me how I can craft a jury charge that isn't me commenting on the facts ---

MR. WHELAN: Well, I think it's -- I mean, I think it is a common after the Court rules on directed verdict and eliminates issues that have been tried to the jury or sometime to instruct the jury what happened because there's been all this evidence and now nobody is talking about it.

And so I do think the Court should say that -- I don't -- I don't know exactly how to phrase it. But the issue of unreasonable settlement and -- had been ruled upon the Court; the sole issue remaining for the jury is the disparate position argument of the plaintiff. Something like that.

And also I think that the same thing should be done

with respect to the claim for mental damages. Because there's been so much of that testimony and so much evidence on that. So I think that needs to be explained to the jury as well.

THE COURT: Well, I'm not going to charge them on emotional damages. And Mr. Willey is not going to argue in closing that she's entitled to emotional damages.

MR. WHELAN: Well, actually, and maybe a better way to do it is not include it in the charge but inform them of that either at this point before we rest or before we start closing argument. But I do think they should be informed of that fact. Because that's what we've been talking about for the last four days. I mean ---

THE COURT: Mr. Willey?

MR. WILLEY: Your Honor, that would be a comment on the facts. It's improper. Your charge covers that. You're going to tell them that you are the judge of the law, they should not consider anything that you do not charge them on.

You're going to charge them on the damages that are recoverable. You're not going to talk about emotional distress.

And I -- you know, I think that that would be improper and unfairly prejudicial comment on the facts, basically, to the jury.

MR. WHELAN: Well, they need to -- they need to be informed. After all of this evidence you can't just leave a vacuum. It would be inappropriate just to leave a vacuum concerning this claim ---

MR. WILLEY: It's not a vacuum.

MR. WHELAN: --- and their ---

THE COURT: Mr. Whelan, I'll tell you what. If you give me a proposal on what you propose I would tell this jury, and we'll look at it.

MR. WHELAN: Okay.

THE COURT: The other one that I had included in my jury charges is a charge that whether an insurance company is liable for bad faith must be judged by the evidence before it at the time it either deny the claim or by the evidence it had before it at the time suit was filed.

And that's what we've been going under this whole time.

MR. WILLEY: I don't have any objection to that. Yeah.

THE COURT: And I'm assuming you don't have any objection to that, Mr. Whelan?

MR. WHELAN: I don't.

THE COURT: Okay. Let's hold off on the jury verdict form. It sounds like we're going to bring the jury in basically --

Do you have another witness this morning?

MR. WHELAN: I don't.

THE COURT: Okay. So it sounds like we're just going to bring the jury in to tell them that you're resting as well, and basically send them back out?

MR. WHELAN: That's right, Your Honor.

MR. WILLEY: And, again, I'm happy to have you tell them that Mr. Daniel came this morning and I have no questions. But if we want to go through the whole rigmarole of dragging them in again ---

MR. WHELAN: Well, they have to hear me rest anyway, so it's not ---

THE COURT: If you'll go ahead and bring the jury in. Thank you.

[Whereupon, break awaiting jury 6/28/19, 10:07 a.m.]

[Whereupon, the jury enters the courtroom 6/28/19, 10:10 a.m.]

THE COURT: Good morning, ladies and gentlemen. Thank you again. I'm sorry to keep you waiting this morning. We did have some legal issues to address. Again, it's going to make things go a little smoother and a little more quickly a little bit later in the day. So, again, thank you for your promptness this morning.

We ended with Mr. Whelan's direct examination of Mr. Daniel.

Mr. Willey?

MR. WILLEY: As I told you this morning, I don't have any questions for this witness.

THE COURT: Okay. Thank you, sir. You can step down.

MR. DANIEL: Thank you, Your Honor.

[Whereupon, Mr. Daniel exits the witness stand]

MR. WHELAN: The defense rests, Your Honor.

THE COURT: Okay. Ladies and gentlemen, you've heard all the evidence at this point. But what we have to do still is you're going to hear the closing arguments of both attorneys and then I'm going to give you the instruction on the law.

We've dealt with quite a few legal matters this morning. We have a few more we need to deal with before we move to that portion, so I'm going to send you out for a few minutes while we tackle our last few issues. When we bring you back in we'll move straight into closing arguments and jury charges. Again, please don't begin any deliberations yet. Thank you.

[Whereupon, the jury exits the courtroom 6/28/19, 10:10 a.m.]

THE COURT: Okay. I think all we have left to talk about now is the verdict form.

MR. WHELAN: Well, Your Honor, the defense moves for a directed verdict. I can address that now or after we talk

about ---

THE COURT: Go right ahead.

MR. WHELAN: So, Your Honor, at this time I would refer to and incorporate by reference our argument the previous directed verdict motions with respect to the remaining issues in this case as well as our arguments in the motion for summary judgment before Your Honor on this.

THE COURT: I thank you, Mr. Whelan. I appreciate your arguments. They were certainly well made. I am going to respectfully deny your directed verdict motion on the remaining issues.

MR. WHELAN: Okay. And Your Honor can I have one clarification on the jury charges. The punitive damages charge that has the numbered list, this is on the Defendant's request in determining the amount of punitive damage the jury may consider, all relevance -- excuse me, all relevant evidence including -- there's 11 items on there. Is that -- are you charging that?

THE COURT: I believe that is covered. Let's just double check.

MR. WHELAN: I just didn't know if you had ruled on that one or not. I wanted to make sure.

THE COURT: Okay. I am looking at in Plaintiff's Number 13. Some of this is covered. The reprehensibility of the conduct, the harm caused, the degree -- or the

defendant's awareness of the conduct's wrongfulness, the duration of the conduct, and any concealment.

I don't have any problem -- it looks like that would basically substitute on Plaintiff 13 that starts with "you must first consider the relationship between any punitive damages awarded and the harm caused".

It looks like most of that is covered there. It looks like there might be a few items here.

Mr. Poulan, do you have any thoughts? You are standing. Is that in response to what I'm talking about?

MR. POULAN: Well, I do -- I do -- I do think it is all or mostly covered in Plaintiff's 13. What -- the problem is they are -- basically they are structured kind of in a different order type of thing.

So if I understand Your Honor you are contemplating if we take out the paragraph that says “you must first consider” and just replace that with these 11 bullet points -- it sounds like that is what you are contemplating. I think the problem with that thought is that the next paragraph, secondly, and then the next two paragraphs, the next and the finally, they go back and hit some of those bullet points again.

It is just structured in a different form. So I think if we go -- I think everything that are in these bullet points are in Plaintiff's 13.

And what I would like to avoid, obviously as the plaintiff, is restating the hurdles that I have to overcome more than one time in the charge. So that would be my concern with just removing that paragraph.

I believe all of these 11 points are covered in the plaintiff's charge.

If -- Mr. -- Robbie, if there's one or two of these points that aren't covered I think then what we can do is we could just take Plaintiff's 13 and figure out where we would stick that back in rather than just trying to plug this whole list into the charge that is already there.

MR. WHELAN: Well, Your Honor, I think we should -- I think -- I am okay with that. I would like to add the profitability of the conduct of the defendant into the charge. Maybe that can go into Charge Number 13.

MR. POULAN: I believe that is in there, Robbie. It is on the last page of our charge at the end of that first paragraph. Is that what you're talking about?

MR. WHELAN: Well, it is just it's -- it's -- no, that is different.

MR. POULAN: Oh, okay. So you are talking about six on your charge you want to add into my charge?

MR. WHELAN: Right.

MR. POULAN: Which I am fine with that. We can figure out. Why don't we ---

MR. WHELAN: I tell you what, this -- where do you want to put it?

MR. POULAN: Why don't we add that between secondly and next. Where it says consider their profitability. And then here it says you can also consider if any profit was derived from the improper conduct. And then it kind of -- you know what I mean? But we can consider if they profited, is what you wanted to say, ---

MR. WHELAN: Uh-huh.

MR. POULAN: --- kind of right there (pointing). And then it says and if they did profit consider that too. Somewhere -- that is probably the place where it needs to go.

MR. WHELAN: Yeah, I am fine with that.

So, Your Honor, I think we agree to add it on Plaintiff's 13 at the end of the paragraph that begins "secondly" the statement "you may also consider the profitability of the conduct to the defendant".

THE COURT: Okay. Anything else as to charges?

MR. WHELAN: No, I think we are ready for the verdict form.

THE COURT: Let me find where I put the verdict forms. Okay. I have got the verdict forms in front of me. Glad to hear from whoever wants to tell me something first.

MR. WHELAN: I don't have a copy of the plaintiff's

verdict form. But I did look at it. And I think that -- I do think that with the -- all of the -- especially given the claims that have been denied on directed verdict some direction as to a specific breach of issues should be provided on the verdict form, which is why we have structured ours the way that we have. And I think this -- I think that makes it easier for the jury to follow. And I think it is more appropriate than the plaintiff's.

THE COURT: Well, assuming that I agree with that, we have got, number one, did they breach the duty. Number two, if so, state the amount of damages. And then it looks like we are going back to did they breach the duty again in number three.

MR. WHELAN: Well, I think that is the negligence versus the bad faith.

MR. WILLEY: And, Your Honor, that is really my problem with their verdict form is like many of the charges I mean it is editorializing and I think commenting on the facts.

I think the question for the jury is did the insurance company breach its duty of good faith and fair dealing or otherwise act in bad faith, or are they negligent. If so, they look at damages.

And if they put a number in the damages box that means they determined by your reading of the law that there were

damages from those causes of action. And then punitives. I think it is a very simple verdict form.

I think this verdict form (pointing) is very confusing and inserts things that are not part of the charge and, you know, really unnecessary.

I mean the question is do they find them liable under this cause of action or this cause of action; and if so, were there any damages that stemmed from that.

MR. WHELAN: Well, I think this (pointing) makes -- I think this makes the issue which is for the jury to determine clear to the jury. And I think Mr. Willey's does not. So ---

MR. WILLEY: Your Honor, that is what closing arguments are for, first of all. And, respectfully, I don't think he can say we spent a lot of time presenting all of this evidence when he represented to the court during directed verdict there was no evidence and Your Honor in fact found there was no evidence presented on this thing. So I don't think we can have it both ways.

MR. WHELAN: Well, no, I mean there was -- there was a lot of argument concerning the mental damages that you contended were the result of USAA's breach of contract ---

MR. WILLEY: Right, and ---

MR. WHELAN: --- and a lot argument concerning the alleged duty to settle. I mean that was half of the

case ---

MR. WILLEY: Well ---

MR. WHELAN: --- or two-thirds of it.

MR. WILLEY: The jury will be charged that. And the argument is not evidence as well. So I think that covers that.

THE COURT: What I would like to do is basically do a version of the plaintiff's verdict form where we ask do you find by preponderance of the evidence that the defendant USAA breached the duty of good faith and fair dealing.

We ask do you find by a preponderance of the evidence that the defendant was negligent. If the answer to either of those is yes, we go to number three, actual damages. And then before punitive damages, did the plaintiff prove by clear and convincing evidence that USAA's bad faith was reckless, willful, wanton or malicious; and, if yes, then the amount of punitive damages.

MR. WHELAN: Well, Your Honor, I think that -- I think that with respect to duty that gets us back to the duty being a matter -- the scope of the duty being a matter of law for the Court. I think Your Honor has defined the scope of the duty that remains concerning the disparate positions taken.

So I do think that -- again, I would ask you to include that in the verdict form.

THE COURT: Again, you -- give me a charge where I can charge that to the jury in a way that I am not commenting on the facts and I will take a look at that. But as to -- I don't want to put that in the verdict form.

Yes, sir?

MR. WILLEY: Your Honor, I agree with the court's proposal. The only addition that I would ask is in the punitives with reckless, willful, and wanton if we could also just add the word intentional. If there acts were intentional then we are entitled to punitive damages. And that is part of the bench book charge as well.

MR. WHELAN: Well, just ---

THE COURT: Did y'all email me the verdict form or can you email me the verdict form?

MR. WILLEY: I did not. But I can. And I am not going to be arguing maliciousness to the jury. So if you wanted to take out that word and shorten it that is fine too.

MR. WHELAN: I think maliciousness should stay in.

MR. WILLEY: Are you going to argue that they were malicious?

MR. WHELAN: I am going to argue they weren't malicious.

MR. WILLEY: Oh. Right. And I am not going to argue that so.

THE COURT: Okay. We are going to break for just a minute so I can kind of get these in order. Again, if you want to craft something that you would propose to me I will be glad to consider that. But let's break for a minute so I can get together what we have done thus far.

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

MR. WILLEY: I am emailing those now.

(WHEREUPON, break 6/28/19, 10:27 a.m.)

(WHEREUPON, resume 6/28/19, 11:00 a.m.)

THE COURT: Mr. Whelan, anything you want to hand up to me, sir?

MR. WHELAN: Your Honor, I was just going to read it, Your Honor, if that is okay.

THE COURT: Sure.

MR. WHELAN: I think it would be helpful if Your Honor informed the jury that the Court has determined as a matter of law that you - excuse me - that due to a ruling of the Court the only issues -- I'm sorry, Your Honor, I am all over the place, okay.

Due to a ruling of the Court the only issue that remains with respect to USAA's liability is whether it breached a duty to the plaintiff by allegedly taking disparate positions.

I would also ask that you inform the jury the plaintiff's claim for emotional distress are no longer at

issue in the case due to a ruling of the Court.

THE COURT: Mr. Willey.

MR. WILLEY: I don't -- I don't think that is appropriate, Your Honor. It never happens in a trial. I mean we have summary judgment motions. We have directed verdict motions all the time. Your charge to the jury is going to be you are to listen to me as to the law of this case, the elements and the damages and the proximate cause and all of that. So you are going to explain that.

Of course we are not going to argue that part of it with respect to the evaluation. But, you know, frankly, the jury is entitled to find another breach that is not that breach. You know, we can't tell them what breach they have to find in order to come to a verdict.

And so I don't think that that would be proper. I think it is a comment on the facts. And I think it is unfairly prejudicial because it seems to indicate -- or it does indicate that the Court agrees with the defendant essentially. Which is why we have directed verdict motions outside of the presence of the jury.

THE COURT: Yeah, I am still leery of giving that specific charge. Again, I think it is I am wandering into the facts.

What I do think would probably be appropriate is under the actual damages section where I talk about actual

damages putting her as near as possible in the same position she was in before the incident occurred, actual losses and expenses which the plaintiff has suffered because of the defendant's negligence, and that emotional damages are not an element of damages in this action. I think that is fair.

If I can hand y'all a copy of the verdict form.

MR. WILLEY: And just for record purposes, of course I would object to that because I think they are. But I understand the court's ruling. I am arguing just preserving it.

THE COURT: Yes, sir.

MR. WHELAN: And when are we going to -- we also need to address Exhibit 7, which my understanding was we are taking the front page off of Exhibit 7.

MR. WILLEY: Redacted.

MR. WHELAN: And we were talking about that.

THE COURT: I don't think this is a big issue in the case.

(WHEREUPON, Exhibit 7 provided to the Court.)

THE COURT: If you can redact the first page, the entire section, injury detail, in such a way that they can't see through it. I think that needs to be redacted.

MR. WILLEY: And the second -- the part of the second ---

THE COURT: But the first line of -- or there is a line up there -- well, I guess anything in that top line plus the additional notes needs to come out.

MR. WHELAN: Okay. So can we do this, I would like to use the second page with the jury and then before it goes back to the jury we can redact the first page. Or we can do that now.

THE COURT: That is fine if you will just redact that top part of that page. It goes into just a little bit of medical.

THE COURT REPORTER: And if we can keep that as 7A as the original and then a separate one for redacted. We will do a 7B so we can see what the original was before it was redacted. Don't scratch on the original.

THE COURT: Perfect.

MR. WHELAN: Okay.

(WHEREUPON, extra copy of exhibit provided for redaction.)

(WHEREUPON, Defendant’s Exhibit 7B admitted into evidence.)

MR. WILLEY: I just have a small issue.

THE COURT: And, Mr. Whelan, we have got one issue with the verdict form.

(WHEREUPON, pause for Mr. Whelan to provide exhibit for redaction to assistant.)

THE COURT: Okay.

MR. WILLEY: Just on number five. If the answer to

question four is yes, state the amount of punitive damages to be awarded against USAA. I think "if any" should be removed because if the answer is yes they have to award punitives. So that would be my only correction there.

MR. WHELAN: So, Your Honor, I would again request that the jury be instructed on the specific duty that they are being asked to determine and that the actual damages be separated by causes of action so they can elect his remedy on either breach of contract or -- I'm sorry, either a negligence or a bad faith. So I just want to state my objection on that basis.

THE COURT: Well, under the theory of what doesn't make a difference doesn't matter, I mean we can have them I mean go through this whole exercise with both causes of action; but they are only going to be entitled to one recovery. So I don't know that it makes a difference.

I think that tends to confuse the jury as to whether they are getting double recovery or what the issue is. I think this (pointing) is just cleaner.

MR. WHELAN: Okay. I understand your ruling.

THE COURT: Anything else we need to address?

MR. WILLEY: Is it possible just to have a printed one of these for closing?

THE COURT: She has emailed it.

MR. WILLEY: Just multiple computers.

(WHEREUPON, break for the Court.)
(WHEREUPON, resume.)
MR. WHELAN: Judge -- Judge, shouldn't we say -- Judge shouldn't we say on these that at the end of both of these "and the breach proximately caused damages to the plaintiff" ---
MR. WILLEY: No ---
MR. WHELAN: --- on both of those?
MR. WILLEY: That is what the charge on damages takes care of. They are entitled to find breach. And then if they did not find damages basically in the charges, they would put zero. I mean that is the point of that. They don't have to answer the question twice.
THE COURT: So what are you proposing?
MR. WHELAN: I would like it to -- I would like one and two to end with comma "and proximately caused damages to the plaintiff".
MR. WILLEY: And that -- and that just -- I mean it is not appropriate because there -- it's already questions, question number three. They have to find proximate cause to award actual damages, as Your Honor is going to instruct them.
And they may find, for example, duty in breach with no damages. That is a determination they are allowed to find. And we would deal with that post trial. But if we put it

all in one then we have no way of knowing.

THE COURT: I mean you would basically have to put between -- or before number three something to the effect of do you find the defendant's conduct proximately caused -- or was the proximate cause of damages to the plaintiff. I don't ---

MR. WILLEY: I don't -- Your Honor, I don't think that that is necessary or appropriate. I mean if -- if they find duty in breach and award an amount for damages and they have they are entitled to put zero there. But the -- you know, the issue of making them essentially answer in the affirmative twice I think is an additional potentially com- -- I mean comment on the facts. Proximate cause is an element that has to be proved in order to get damages so.

MR. WHELAN: I don't think that is a comment on the facts. That is something that they have to consider.

MR. WILLEY: And if they find duty in breach in this case I don't think -- there's been no dispute about the fact that she did suffer consequential damages. At least those litigation costs so.

THE COURT: All right. What I would propose is for number three we put if the answer to number one or two is yes, yes, list the amount of actual damages, if any, caused by defendant's conduct.

MR. WHELAN: And I think that is helpful.

MR. WILLEY: I just have the same objection. I think it is covered in the charge.

(WHEREUPON, Court confers with law clerk.)

MR. WILLEY: And on the last one you just handed us, "if any" on number five is still in there. I don't know if it just printed the wrong one probably.

(WHEREUPON, Court confers with law clerk.)

MR. WILLEY: Your Honor, my one additional point on that would be I think under this cause of action if they found yes to one or two they would have to award nominal damages. And so I would take the position again that "if any" there is also inappropriate. I hope there is not going to be any dispute about the consequential damages at least in the case so.

THE COURT: Well, no, they could find that they acted in bad faith but it didn't cause her any damages.

MR. WILLEY: I disagree with that, based on the evidence, is all I am saying.

THE LAW CLERK: Roy, you have the old one.

MR. WILLEY: Oh, okay.

THE LAW CLERK: That's why.

(WHEREUPON, Court confers with law clerk and pause awaiting printout of verdict form.)

(WHEREUPON, redaction of Plaintiff Exhibit 7 was submitted.)

MR. WILLEY: Your Honor, this (Exhibit 7) still has mention of the injuries in here. It says plaintiff had complex foot fracture and complications. It is in the next, the very next section. I would just ask we redact that. Your ruling was any mention of her injuries.

MR. WHELAN: Well, her injuries are in evidence through Jack Daniel's letters.

MR. WILLEY: No, just.

MR. WHELAN: They are entered into evidence.

(WHEREUPON, pause for the court.)

THE COURT: Go ahead and just delete that, plaintiff had complex foot fracture with complications.

MR. WHELAN: Okay.

THE COURT: I don't know who it helps or who it hurts, frankly but.

(WHEREUPON, pause for Court to confer with law clerk.)

Okay. Now my issue is do we need -- okay -- so if they don't find any actual damages then they would not go to this question number three.

I just don't want us to end up with an issue where there is a zero here (pointing) and there is an amount here (pointing). But of course if there was then we would -- I guess I would throw out the damages unless they found actuals.

(WHEREUPON, break for the Court, 6/28/19, 11:21 a.m.)

THE COURT: Okay. Are we ready for the jury?
MR. WILLEY: We're missing one attorney.
[Pause awaiting counsel]
THE COURT: That's fine. And I think we had the one exhibit. Are we good to go on the exhibits?
MR. WHELAN: We do need to redact this.
MR. WILLEY: Did we pull the ones that aren't in evidence?
THE COURT REPORTER: No.
MR. WILLEY: Okay. Can we do that?
THE COURT REPORTER: You want -- do you want those out of the way?
MR. WILLEY: Yeah.
THE COURT REPORTER: Defendant's Number 14 and 15; Plaintiff's Number 4, 9 and 10?
MR. WHELAN: Okay.
THE COURT REPORTER: And then 7 [7A], the original will not go back. 7-B will go back. That's it.
[Whereupon, break 6/28/19, 11:18 a.m.]
[Whereupon, resume 6/28/19, 11:18 a.m.]
THE COURT: Okay, now are we ready for the jury?
Yes, sir.
[Whereupon, pause awaiting jury]
[Whereupon, jury enters 6/28/19, 11:23 a.m.
THE CLERK: The jurors are all present.

THE COURT: We are ready for closing arguments. Mr. Willey.

MR. WILLEY: Thank you, Your Honor. May it please the court.

THE COURT: Yes, sir.

Mr. Willey?

CLOSING ARGUMENT

MR. WILLEY: We've made it, to the end of what for you was a four-day process of finding out about a lot of information. A lot of information about what happened in the case involving Terry Hood and a lot of information that you didn't need to know to do your job when you go back behind those doors in just a little while.

For Terry this process has taken 1,694 days to get to this point. That's how many days have passed since November of 2014, when she was in that wreck, seriously injured.

And your part in this process is important. It's important because this is Terry's one day in court. This is Terry's one opportunity to be made whole in this case. And the 12 of you hold that power.

Jury service goes all the way back to the Magna Carter. And today we are one of the very few countries in the world that allows a jury of our neighbors, community members, people down the street, to come in and decide how

large national corporations have to behave in our community. That doesn't happen everywhere in the world. But it happens here. And it happens here because we have determined that the good common sense of our neighbors and community members is really the best protection we have against large corporations that would take advantage of our community members.

A jury trial is protected in the Seven Amendment to the Constitution. And it's also protected in the South Carolina Constitution.

When y'all stood up at the beginning of this trial, you took an oath. You took an oath to follow the law. And nobody else on this jury can make you serve on a jury that doesn't follow the law. So what I'm going to do for the next little while is give you a way to arrive at your verdict that is based on the law and based on the facts and disregards what doesn't matter. Because at the end of the day, what doesn't make a difference, it doesn't matter.

And this case is about equal justice under the law. This is the only place, the only place, in America, where a company that brings in 30 billion dollars a year has to sit next to a disabled veteran and answer for the way that they treated her. It's the only place. This is the only place, and you are the only people who can tell them what conduct we expect of insurance companies.

And that's important, because equal justice under the law means that corporations have no more rights than people. They have no more rights than any one of us, any member of our community. They have no more right to lie, to cheat, to steal, than any of us does.

And you're going to hear, when the judge charges you on the law, that a corporation acts through its agents and employees. And you've had the opportunity to hear about some of this corporation's agents and employees over the course of this trial; in this case, Jack Daniel, Chris Nickels, Kathy Moats, Missy Howard, Ron Vestal, paid expert Poplin, paid expert Black. And although it is not a part of this trial, Mr. Whelan today is an agent of USAA. He is working for them.

One of the things you're going to get to consider in awarding damages in this case is the defendant's awareness of its conduct. And that means the awareness that its agents had that what they were doing was wrong.

And you heard in this case, when Kevin Smith testified, what Jack Daniel told him when he said I'm going to advise her to get a lawyer to bring a bad faith claim. And Jack Daniel said this: It will never get past a judge ---

MR. WHELAN: Your Honor, this has nothing to do with the only issue that's left in the case.

MR. WILLEY: It does.

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

MR. WILLEY: And you're going to hear the judge. And I'll read the charge to you. Here's what she's going to say when she talks about these damages: The defendant's awareness of the conduct's wrongfulness. The defendant's awareness of the conduct's wrongfulness. And this is what their agent, this is what that corporation, through Jack Daniel, said: It will never get past the judge. It will never see the eyes of a jury. We know a jury won't like it, but we can do whatever we want to do because a jury will never see it.

Ladies and gentlemen, here we are. You're that jury. They knew it was wrong when they were doing it, and they know it's wrong now. And this is the only opportunity to hold them accountable.

And you better believe, we litigated almost the entire case. And we're going to talk about that in just a moment. A lot of stuff that doesn't matter. Every little point. Headlights, what this person said, what that person said. We listened to a 911 call that has nothing to do with what USAA did in the underlying case. Nothing. Zero. It's pointless.

This goes to the heart of the matter. But what we didn't hear when we called -- when Mr. Daniel was on the

stand yesterday in this chair, if you could see him. He never said, I didn't say that, that's not true. You better believe if it wasn't true, he would have told you that.

And, in fact, I wasn't sure what he was going to say. There's been a lot of misrepresentations in this case, a lot of things said that were not true in the underlying case. I fully expected, frankly, him to take the stand and say, no, I didn't say that, he's lying.

But he decided not to do it. He decided not to tell one more lie.

Sixteen hundred and ninety-four days. I want you to remember that number. Because for 1,694 days they have delayed, they have denied, they have defended the indefensible, and they have ---

MR. WHELAN: Your Honor, I have to object to this as well. May we approach on this?

THE COURT: Sure.

[Whereupon, an off-the-record bench conference is held 6/28/19, 11:31 a.m.]

THE COURT: Thank you.

MR. WILLEY: For 1,694 days, they have tried to hide the truth. And it's amazing the lengths they will go to to hide the truth; in denying, delaying, defending, and then calling her own insured a liar in this case.

And you'll remember what this case is all about. This

is it. It's about Ms. Hood, USAA's insured, member, customer, making a claim for her injuries, which were obviously serious injuries, against Geico and USAA.

Geico paid. Done. That's what they should have done. They did it. Geico is not part of this case. They upheld their duties.

Mr. and Mrs. Kuck made a claim against Geico and USAA. The same thing. Geico paid. What they were supposed to do. USAA, did they pay the Kuck's? Because, after all, if her lights are off they would owe the money; right?

No, that case was set for trial this week. It's still pending in Jasper County. And they're still going to go in that courtroom and take that position, despite everything you've heard here this week, if you don't make them stop.

So certainly if they were going to take that position and there's only one true set of facts, they would just -- they would pay Ms. Hood, right? They have to pay one or the other. I mean, they were on or they were off. There's one true set of facts.

But of course we know, no, they didn't. They didn't. They called her a liar, despite there are paid experts to the contrary.

And so what did they do instead? What did -- what did they do instead, for those 1,694 days? What did they do instead? Well, they hired lawyers. They hired experts to

try to get them to see if they would agree with them. And that didn't work out. Because the expert, they ended up hiring an associate; so, no, that expert in that case did a pretty good job. Lights were on. It's pretty clear.

And so hired Mr. Whelan. So that's why we're all here. That's why we're all here.

The timeline of the case is 1,694 days. I want to remind you of just a few important facts. The wreck was in November of 2014. The lawsuit was filed in March of 2015. And during that period of time Missy Howard, who you heard from by deposition, was handling the underlying case, the BI file.

That file, their internal evaluation, was 80-percent liability on Johnson, 20 percent on Hood. Ms. Moats was assigned to the case. She never changed it. The reserve was set at $100,000.

What's important is that Ron Vestal was the manager of both of those files. He had access to all the information in the BI file, where they were allegedly trying to defend Ms. Hood but we know really just trying to protect their liability money. Because this isn't about Ms. Hood. They have to pay, not her.

And they had access to everything in the UIM file, where they were trying to keep the money that she paid the premiums for all those years, from her.

Mr. Vestal is the manager of both of those claims. He knew all the information throughout. And what you'll see is throughout this case when he changed the reserve to 250,000, what did Ms. Moats tell you? She said, oh, that's very rare; this was my biggest case; very rare for my manager to go in and change my reserve.

But he did it. And he did it two days after he got the Poplin report. Because even he knew that wasn't a good look if we're going to go in there and try to say the headlights were off. Delay. Delay, delay, delay. Never offered her --

We keep going. The reserve bumps up to 250,000. Now Ms. Moats is handling it. But guess what? Mr. Vestal is still the manager overseeing both of the claims.

What did Ms. Moats tell us in her testimony? The biggest part of my job is going to mediations, the biggest case that I ever had. And then she told us, I never talked to the third-party adjuster who was attending on my behalf.

We said, well, why not? Well, Ron didn't see the need for it; he didn't see the need to pay for me to go to mediation; I didn't talk to the third-party adjuster; I wasn't all that familiar with South Carolina law.

And still, ladies and gentlemen, to this day she's the litigation manager on that claim.

They tried to explain it as, well, we had this

mediation in August but of course we found out that the mediation was scheduled for before that reserve was changed on August 19th of 2016 and then we found out that they agreed to cancel it with Mr. Smith on August 7th.

So the first explanation about why all that occurred was a lie, which was easily provable through their documents. That they put into evidence, by the way.

Eventually, there was a mediation in December. And we had a conversation about that. And then in September of 2017, so almost three full years after the wreck, Ms. Hood finally after going through everything she went through, having the medical bills that you heard about outstanding, et cetera, gets her verdict.

So what does USAA do? Wrote her a check, right? That's not what they do. They continue to defend. And it takes them three months, December 21st, 2017, to write this check for $1,023,993, which included the interest that they owed since the verdict.

So if they made $24,000 on that money between September and December, think about how much they made on it in the three years prior to that.

Beginning to see what this case is about? This case is about them protecting their money. Because the whole time they keep it, they get to make money on it. They get to earn interest, and all they have to pay back is the

difference between the time that the actual verdict was rendered and the time they write the check.

There's how many months, by the way. One of the things the judge is going to charge you on is considering the profitability of the insurance company's actions to itself. So how much profit they would make off taking the actions that they took in this case.

And you'll recall way back here, that little ambulance up there in November, 2011, that's the wreck. Those scales of justice, those are when the suit is filed the next year. We get the reserve up to 250 and the report down here in 2016. The second expert confirms in 2017.

And then we go to trial in 2017, where a jury finds Ms. Hood is entitled to damages in the amount of 2.5 million dollars. Four months later they get around to paying a million bucks and some change on part of that verdict. And then all the way over here in 2019, at the end of June, that's us. Almost five full years, just for this day in court, just to do what they should have done all along, just to tell them you can't send your lawyers into one courtroom to say one thing to protect your money and then send them into another courtroom to say another to protect your money.

If you think about that interest, just from the time of the verdict to the time they wrote the check, it's

almost $8,000 a month. So think about how much they profited by holding that money for all those months before it. It's a lot of money. It almost pays for itself, just by delaying it. And they're still doing it to the Kuck's and earning interest on that money. So that's why we're here.

An insurance company is not allowed to gamble with its insured being made whole. If they do and as a result the insured is harmed, they are responsible for all of the harm. It's that simple. The defense does not get to determine what amount is reasonable for Ms. Hood's harms and loses. A jury does. And in this case you do.

The judge is going to instruct you on the law, and she's going to tell you that in a civil case the burden is by a preponderance of the evidence.

We talk about criminal cases all the time. We heard beyond a reasonable doubt. That's a much higher burden. Our burden in this case is a simple preponderance of the evidence. And if you think of a set of scales, it simple means what is more likely true than not.

In other words, if you had a set of scales and they were perfectly even and a feather dropped on one, we would have met our burden. That's all we are required to prove in this case. And I'm going to take you through the law and show you how we have proven a lot more. But all we're

required to do is just tip the scales ever so slightly in our favor.

Now, in attempting to confuse that burden in the law, we've had all sort of stuff all week thrown up on the wall. We've had people testify that were pretty well irrelevant to the facts that you are going to have to determine.

We've got exhibits up here. And you'll see them and you'll have them all back there, including the 911 call; which I still don't see how that has anything to do with this case, but let's just address it briefly.

This is how the record occurred. We all know Mr. Johnson ran the stop sign, T-boned Ms. Hood. Of course, you're going to have those photos back there. But, again, these are not important; so we're not going to spend a lot of time.

But you can clearly see where she was T-boned. She did not hit him. He hit her. And, in fact, the front of his car pretty well shows where the impact occurred. Pushing her into oncoming traffic, which resulted of course in devastating injuries to her car.

And what we've heard all week is a re-litigation of the case. His fault, her fault, their fault, anyone's fault, just not our fault. That's what we've heard.

Every time we say, well, at trial, at trial, at trial, and the judge has to keep saying this is not -- you know,

no, stop, we're not doing that again.

They don't get to come in here and roll the dice again, okay. They got to go down to Jasper County and roll the dice once, and it didn't work; and they don't get to come and roll them again.

This case is about whether or not when they know they're wrong and they know they owe a number of our community money, whether they get to roll the dice. That's what this case is about.

And it's patently ridiculous: Well, the cop said she went back and reviewed dash cam and confirmed Terry's headlights were off.

That's what Ms. Moats told you.

Really? Because when you look at Ms. Hood's car, there are no freaking headlights. I mean you'll have the pictures back there. She looked at the dash cam to determine the headlights were off? Yeah, I would agree there were no headlights on when if she looked at her dash cam when she arrived five minutes after the wreck. It's pretty clear. Okay?

Dustin Lee was the most compelling witness? Why we listened to the 911 tape, which had nothing to do with anything. Chrysler Pacific, a flip three times. Well, first of all, it's a Chevrolet Equinox; which if she were, quote, tailgating him, I would think he'd be able to tell

the difference between a Chevy bowtie and the big Chrysler thing that goes across the front. But in any event, just look at the hood of her car. Is it a car that flips three times? No. Her car never flipped. And that's what all the evidence in the case showed. And we already tried that case.

So they spent a lot of time this week on that. But it's not what it's about. They don't get to roll the dice with a different jury.

And then we had in opening, well, where we're going to show this and we're going to show that. There were so many promises made I asked the court reporter to get me a copy of the transcript so I could read you just one of them.

The evaluation was maybe somewhere between 100,000 and $250,000. And then he says: And Mr. Poulin is right, Kathy Moats was respon- -- was primarily for this case. And you will hear about it. You will hear from her, and you will hear why she thought that the value was between 100 and $250,000.

Well, that's not what the reserves show. The reserves show, and she testified, 250,000 is what it was increased to. And what did she say about that? What did she say about that: We're trying to make an appropriate evaluation of the case based on the evidence we have to offer, a fair and reasonable value of the claim, which apparently we

believe was set at 250.

Okay? And I could go on. But that's not what this case is about. And what doesn't make a difference doesn't matter.

This case is about their duty to Ms. Hood of good faith and fair dealing and how that duty has to be put above their profit.

This case is really about our community. It's really about the good faith and fair dealing of this insurance company to Ms. Hood.

But as the juror -- the judge is going to instruct you, it's also about other insurance companies and how they can treat their insured's. And the question is, this insurance company has an ethos. They put it on their wall, is the testimony; honesty, loyalty, integrity.

The one she forgot, by the say, is service. How do you think the service that they provided Ms. Hood in this case was? Is that the service we should expect from a reasonable insurance company? Should they be able to do this on every claim, whether it's an automobile claim, a homeowners claim, a flood insurance claim, a life insurance claim where someone dies and their dependents are trying to get the money, should they be allowed to do that on every claim? That's what this case is about.

Did they act with honesty, loyalty, and integrity

toward Ms. Hood? I mean, it's so obvious that they did not.

And the judge is going to instruct you on the law, good faith, and fair dealing. And it's very simple. It requires four things:

The existing of a contract of insurance between the plaintiff and the defendant. Well, that's admitted. Everyone agrees she was insured by them.

Refusal by the insurer to pay benefits due under the contract. That's obvious. For almost four years. Just looked at that.

Resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract.

And that's the question. Do y'all think an insurance company should be able to go into two different courtrooms and take two different positions, just to save their money from their insured? That's the question, then. Is that how we want reasonable insurance companies to act, or is it not? And that's up to you. You get to decide that.

Causing damage to the insured. And what the law says is a bad faith claim may exist even in the absence of any violation of an insurance contract provision, as the benefits due an insured are not limited solely by those expressly set out in the contract. Are not -- the benefits

due an insured are not limited solely by those expressly set out in the contract.

She's entitled to the damages for what they did to her even though they're not covered in that contract because they have a duty of good faith and fair dealing to her, their insured, their client, their customer.

And then you're going to hear about the second cause of action, which is negligence. Kind of the way I describe it, as a step down. Negligence means that a person has done something that a reasonable person, or in this case an insurance company, that an insurance company has done something that a reasonable insurance company would not have done or has failed to do something that they would have done in the same situation.

And, again, this is what you get to decide, is this reasonable, do we believe what they did in this underlying case to her for 1,694 days is reasonable or not.

And there's four parts of that that the judge is going to tell you about: duty, breach, causation, and damages. The duty and breach we've been through. We'll get to damages. Causation just means this: fancy legal term called proximate cause. And you'll hear a part of that charge that simply says this: Was the breach -- were the actions by USAA a cause of the damages to Ms. Hood. That's what proximate cause is. It doesn't have to be the only

cause. It has to be a direct cause and a legal cause. Which, of course, a legal cause just means it follows the law. Okay? That's it when you hear about proximate cause.

Negligence also says that when a defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, a jury may consider such violations as evidence of negligence if they are a proximate cause of the plaintiff's damages.

So what did we hear? We heard -- we heard from Ms. Moats and Ms. Howard, stand by our insured; we should pay what we believe a reasonable evaluation is; never comingle BI and UIM files. They did all of it in this case.

Loyalty, honestly, integrity and service. Is it loyal when you have two experts saying her lights were on and you're taking the opposite position in another case to try to throw her under the bus and have a good day in court where she gets zero when she was obviously injured, and paid premiums all those years so she could be compensated if, God forbid, something like that ever happened to her? Is that loyal? Is it honest? Is that the kind of integrity that we expect in our community? I don't think so. And it's certainly not good service.

And they knew it was wrong. They knew it was wrong. And they didn't care because they thought the judge would let them keep rolling the dice.

You have the dice, and you're going to have the opportunity to decide what happens to them.

There was some talk this week about the UIM statute. And I think we quoted like three words from it. So I just thought I'd show you the whole thing.

This gives the UIM carrier in the case -- what it actually says is: The insurer has a right to appear and defend in the name of the underinsured motorist in any action which may affect his liability. The evidence of service upon the insurer may not be made part of the record.

So, in other words, the jury can't know which insurance company has to pay their verdict. Okay? And they have the right to step in and defend. There's no dispute about that.

What they don't have the right to do is lie. That's what this case is about.

This case was a civil case where Terry Hood was trying to be compensated for her injuries from a coverage that she paid the premiums for, to her insurance company, where she is a member.

And what did they do? They hired all these lawyers like they were prosecuting a criminal, instead of just paying what she was owed.

An insurance company is not allowed to call its

insured a liar when they know it's true and are taking the opposition position in another case. That's what your verdict for Terry in this case will say.

If you award Terry a verdict for what's happened in this case you will be telling them and every other insurance company that they are not allowed to call their insured a liar when they know it's not true, and take the opposite position in another case. And an insurance company is not allowed to lie to its insured. Pretty simple. Seems pretty straightforward.

So remember, when I sit down in a little while Mr. Whelan is going to stand up. And I don't know what he's going to talk about. We're going through all of this (indicating) and more.

When you go back in that jury room and if somebody says, well, what about this guy said this and this guy said that and do you really think this happened or do you really think that happened, that's not what this case is about. This case is about their duty of good faith and fair dealing in the underlying case, and their negligence. This is not a re-litigation of a car wreck. That has been decided.

And so compensatory damages in the case are basically a debt created and owing. There's an economic and non-economic in our law of -- these are damages that go to

compensate Terry for damages that she suffered as a result of their actions.

And I always think about it like this: Damages are in a box. And there are certain legal damages that are recoverable. And you can't take into account outside reasons.

So, for example, you can't consider sympathy in your verdict. You may feel sympathy for Terry, but you can't consider that in your verdict. Just like you couldn't consider, if you had USAA and that -- you know, you were a member and that might -- I don't know, they barely pay anything back. You'll have Exhibit 1 out there.

But presumably, if you got one of those checks every year, maybe your 12.98-cent check would go down to $12.92 or something. I don't know. But you can't consider that. That's an outside reason.

Just like when Mr. Daniel put in all his reports, that you'll have back there, that she's unsympathetic, he knew a jury would never be able to consider that in the underlying case. Just put it in for a kick. It's not part of the damages.

When they said, well, we think -- and you heard testimony from Ms. Moats about this. We thought, well, because she was heading to her timeshare in Hilton Head perhaps the jury would think she's an affluent and

therefore not give her any money for her injuries because she's an affluent and she's not like them. That's outside the box. They couldn't consider that and shouldn't consider that. And she knows that.

We heard a lot about damages from Ms. Moats. What did she talk about? Kind of like we were going to the casino. Well, you know, they say, might be a good day, might be a bad day, we'll see what happens.

And you say, well, what's a good day? A good day is when the insured doesn't get any money. A bad day is when we have to pay them.

That is not what our insurance law is about. Our insurance law is about compensating people what they are actually owed for the damages they have sought.

Then she said, well, she profited from going to trial. And, now, this is where she got it backwards. That's what we call a Freudian slip. I'm sure y'all have heard the term. She didn't profit. That jury determined she was due 2.4-million dollars in damages. She got a million and a little interest because of the delay in paying her. What she meant to say is, if we didn't have to pay her, we would have profited. Because that's how they look at it. They look at it from the perspective of we're not trying to make this person whole, we're going down to roll the dice and if the dice roll our way, we profit. But Ms. Hood didn't

profit. She's still out, according to that jury, even if you take into account a reduction at the 1.275, she's still out a quarter million dollars.

MR. WHELAN: Your Honor ---

MR. WILLEY: But that's their argument.

MR. WHELAN: USAA does not owe those damages. Those were caused by Mr. Johnson. USAA did not cause the -- you've already ruled on this.

MR. WILLEY: We don't need speaking objections. I agree. I'm not arguing ---

THE COURT: If y'all will approach.

[Whereupon, an off-the-record bench conference is held 6/28/19, 12:01 p.m.]

MR. WILLEY: And so if you take it with the reduction, at 1.275, she still is out $250,000. Because she got the million. She got the 25,000 from Geico. Remember that pretty much right away.

MR. WHELAN: Your Honor, that is not an element ---

THE COURT: That is sustained.

MR. WHELAN: --- of damages ---

THE COURT: That is sustained.

MR. WHELAN: --- against USAA.

THE COURT: That was sustained.

MR. WILLEY: It's still missing. So when they talk about all of this with the verdict, the point is this: It

doesn't matter. It doesn't matter because what matters is the litigation costs at the bottom, the cost of inconsequential damages for their acts. We aren't re-litigating the first case. We aren't litigating the case about the car wreck in determining whether the damages were appropriate or not appropriate.

MR. WHELAN: Your Honor, I ---

MR. WILLEY: That is not ---

MR. WHELAN: Excuse me. I object to this slide (display). This balance is ---

MR. WILLEY: Do you want to approach? You're going to have your opportunity.

MR. WHELAN: But this is -- this is a mischaracterization ---

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

[Whereupon, next slide is displayed]

MR. WILLEY: The next side is this -- that x'd out, okay. Because it doesn't matter. What doesn't make a difference doesn't matter.

They will do everything to keep the truth from you. But at the end of the day, what doesn't make a difference doesn't matter.

And this is not that case. This is this case. And you heard about the litigation costs Ms. -- remember Ms.

Hood couldn't read the document. She said they were about 50,000. Mr. Smith gave you the exact amount, $49,052.20 were the litigation costs in that underlying case, not including her attorneys' fees. That's what she had to pay to get the case to trial. Court fees, et cetera. All along, they knew they owed the money.

Litigation costs and consequential damages. The judge will charge you on that.

And then -- and I'll just show you, Madam Forelady, because this is going to be your job to fill out this verdict form. And when she fills out this verdict form, it's not just her opinion. All 12 of you have to agree. And South Carolina has to be a unanimous jury. You all have to agree.

Nobody can make you serve on a jury that doesn't follow the law. Nobody can make you serve on a jury where you don't agree with the verdict.

So what you will do when you go back behind those doors in a little while, and she finally tells you you may discuss the case, is you will discuss the case. You will tell your perspective on each of these questions and why you feel that way, and then you will come to a verdict.

And the first question is do you find by a preponderance of the evidence that Defendant USAA breached its duty of good faith and fair dealing of Therese Hood.

Just like I told you would be the question.

And, again, that is did the plaintiff prove by 50.1 percent, a feather on the scales, that they breached their duty to Therese Hood. And of course in this case you will mark yes.

Number two, do you find by a preponderance of the evidence that the Defendant USAA individually or through its agents was negligent. In other words, did they have a duty and breach; and that is a step down from the bad faith. Of course the answer is yes.

And we've talked about that. She's their insured. She's their member. Calling her a liar. Taking two different positions in two different courtrooms to protect their money. She was damaged. She had to pay -- out of this money she got, she ended up having to pay that 50 -- almost 50,000 and other things back.

So if yes to either one or two, or both, go to Question 3. Okay. So if either one of these is yes, you go to Question 3. And that's just simply says this: If the answer to Number 1 or 2 is yes, the amount of actual damages, if any, caused by defendant's conduct. And so you'll fill that in. You'll determine what the amount of actual damages that she's owed are. We've told you one piece of that determination, the 49,000-and-some-change on the litigation cost that she would not have had if they had

paid earlier. And that's for you to determine.

And after you determine that amount, Number 4 simply says did the plaintiff prove by clear and convincing evidence that USAA's bad faith was intentional, reckless, willful, wanton, or malicious. And so I'm going to spend some time to talk about what that means.

So punitive damages are damages that are designed to deter conduct. Okay? So the actual damages are what they owe, what they owe to her, what they have to pay anyway.

And I always use this example: You know, when I was young, throw a baseball out in the neighborhood, break somebody's window, well, if you replace the car window that amount out of your allowance is the actual damages. Okay?

If mom and daddy decided that you really shouldn't have been playing baseball in the front yard where cars are parked all around it, they were going to make you go to the neighbor's yard and mow the grass for the next two months. Okay? Those would be punitive damages. Damages to deter.

The actual damages make Ms. Hood whole. And the punitive damages are what sends the message to tell them we aren't going to allow this to happen in our community.

And that's important -- because you'll have this back there with you. But Plaintiff's Exhibit 1 -- and we'll talk more about this, is their report to the members. And you can see, when you flip through here, what you'll see.

And I want to be very clear about this, is they have their revenues, their loses and benefits for this particular year. And these numbers are in millions. Okay? So when it says revenues for this particular year ---

MR. WHELAN: Your Honor, this is -- this is irrelevant. May I approach?

[Whereupon, an off-the-record bench conference is held 6/28/19, 12:05 p.m.]

MR. WILLEY: So when you look at this, what we're actually talking about are billions. And on the front -- excuse me -- on the last page you'll have that which shows her assets, liabilities, and net worth. And when you look at net worth, for example, it says 30,608. But that dollars is in millions. 30,000 millions is 30 billion, with a B. Okay?

If this corporation were a country, it would have the 95th highest GDP in the world. This is a big company. And so I just want to make that clear. And if there's any question about that, you can just remember the net-worth number; because on the front they actually write 30 billion in net worth, and so you'll be able to see that when you're looking at that document.

And so punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing

the offense in the future.

Moreover, they serve to vindicate a private right by requiring the wrongdoer to pay money to the injured party.

Clear and convincing evidence is a standard. And this standard is different. It's not like a preponderance of the evidence. It's somewhere between preponderance of the evidence and the criminal standard. And the judge will tell you that when she talks about the charge.

And that simply just means not is there a mere probability, is in more likely than not, but is it actually probable; is it probable that these damages are due in this case and need to be awarded in order to stop them. I

And when you look at their net worth and you determine the litigation costs of $50,000, you can make the determination of whether or not that would be any kind of punishment to make them stop.

Let me just tell you this: Thirty billion dollars, the equivalency of that is somebody who makes $30,000 a year. If that person had to pay one dollar in punishment, that's like a 30-billion dollar corporation paying one million in punishment.

And so you determine whether somebody making $30,000 a year, if they go into court and lie and they're punished with a one dollar fine, is that going to deter them from that conduct?

That's what they would be getting away with. They'd be celebrating, because they're a 30-billion dollar company. If somebody made one hundred fifty thousand, their net worth's one hundred fifty thousand, that's five dollars is the equivalent of five million to them. Okay?

And so you can begin to see how rolling the dice on just the actual damages doesn't matter to them. It's like a few cents for an average person.

The judge is going to read to you things to consider in awarding punitive damages:

The defendant's degree of culpability. Well, clearly here they're highly culpable because they sat there and said we know basically what we're doing is wrong but the jury will never see it, so, uh, we're going to do it anyway.

Severity of the harm by the defendant. You got a taste for that this week.

Extent to which plaintiff's own conduct contributed to the harm. Ms. Hood did nothing wrong to make USAA treat her this way.

Duration of the conduct, defendant's awareness, and any concealment by the defendant. We heard about concealment.

Existence of past similar conduct. Profitability of the conduct to the defendant. Defendant's ability to pay.

And the likelihood the amount of damages will deter the defendant or others from like conduct.

Ladies and gentlemen, each of these slides is one thousand one million, which is one-billion dollars. Yeah, they're small. And, yes, that's a lot of money.

A stack of 100-dollar bills totaling one-billion dollars would be almost a mile high, which is taller than the world's tallest building in Dubai. But in 2017, when they had 30-billion net worth, they're calling her a liar over a much more modest amount.

Two billion, three billion, four billion, it's more than the Gross Domestic Product of many countries. USAA would be the 95th largest GDP in the world if it were a country and not a company. Five billion, six billion, seven billion, eight billion; if you could live for 30-billion minutes, you would live until you were fifty-seven thousand years old. Nine billion, ten billion, eleven billion, twelve billion, thirteen billion; if we took one hundred-dollar bills and stacked them one on top of the other, to go to thirty billion, it would be nineteen miles long. We'd have hundred-dollar bills from this courthouse to Ladson. That's a lot of money.

Fourteen billion, fifteen billion, sixteen billion, seventeen billion, eighteen billion, nineteen billion, twenty billion, twenty-one billion, twenty-two billion,

twenty-three billion, twenty-four billion, twenty-five billion, twenty-six billion, twenty-seven billion, twenty-eight billion, twenty-nine billion, thirty billion; if you saved ten thousand dollars every day it would only take you eight thousand two hundred nineteen years, eight thousand two hundred nineteen years, of saving ten thousand dollars a day, to save thirty billion.

Think about profitability of the conduct to this company. Think about the defendant's ability to pay, to give maybe a dollar or two, fine, are they going to stop? No.

In fact, the last time I got a speeding ticket, I think it was in the hundreds.

Likelihood the amount of damages will deter the defendant or others from like conduct. Or others. There were a lot of people in this courtroom this week coming and going. There are still a lot of people; other lawyers, people from other law firms, people from out of town, Mr. Bailiff there in the front.

Aside from Mr. Bailiff - he has to be here - these people are here to see what you do with your verdict. Because it matters.

It matters because in the law there's something called precedent. And every insurance company is going to be watching to determine if, in Charleston County, if a case

like this, where it's in black and white that they took two different positions in two different cases, to protect their money, if it's in black and white - because most of the time it's not - will a Charleston County jury hold them accountable or will they give them a pass.

And so these people in the courtroom all week, in and out, in and out, how's it going, want to know.

Conduct rewarded, ladies and gentlemen, is conduct repeated. And I'm not going to tell you how much in punitive damages you should award in this case. That's a question for you to decide. But what I'm going to tell you is that if give them a one-dollar fine or a two-dollar fine, go slow when you're driving down King Street later because the champagne glasses will be clinking.

I'm going to sit down in just a minute and Mr. Whelan is going to stand up. And I have no idea what he's going to say.

We all know this case is not about the underlying car-wreck case. We know what this case is about. So I want you to listen to his closing argument for just a few things.

No matter what gets thrown on the law, I want you to see if you get an answer to these questions:

Should an insurance company be able to do whatever it wants to keep owed money from its customer? See if he

gives you an answer to that.

Should an insurance company be able to hire two different lawyers to go into two different courtrooms and take two different positions on the same facts, to hold on to money owed to their insured?

And if the answer is yes to either of those questions, ask him to tell you what it should cost them. Should they just get away by paying the policy limit that they had to pay anyway under the contract? Or are we going to tell them that in our community if you do this to our neighbors you're going to pay their actual damages and we're going to punish you to try to deter you, to try to stop you from rolling the dice with our neighbors' lives.

Thank you.

THE COURT: Mr. Whelan.

MR. WHELAN: Thank you, Your Honor.

CLOSING ARGUMENT

MR. WHELAN: Good morning.

So the key question in this case -- or the key questions in this case are what Mr. Willey doesn't want to talk about. He's saying that this case doesn't involve the underlying wreck. That's what he just said.

He's saying that the -- he's saying -- he's talking about everything other than what -- how USAA evaluated the underlying wreck and whether it had a reasonable basis for

the actions it did.

Now, you remember what Mr. Poulin said when he started this case, the very first words he -- out of his mouth; he said this is a case about an insurance company telling a lie. And he says, this is about an insurance company that took positions that they knew weren't true.

And Mr. Willey, over and over and over, says they're lying, they're lying, they lie, they were lying. What lie are we talking about? What lie was ever said?

If we go to the next slide.

I asked Ms. Hood that. I said, ma'am, what lie did USAA tell to you; what are you complaining about? And she said, USAA refused to acknowledge my innocence.

So the question is, what she's talking about, what this case is about, is was there a reasonable basis to contest the claim because there was evidence that her lights were off at the time of the accident. And as a result, a jury, when the claim got to a jury, may determine that she bore some fault.

Now, Mr. Willey keeps talking about delay and money being owed to Mrs. Hood before the lawsuit was ever tried down in Jasper County. The benefits owed under an underinsured motorist's policy are not owed until there is a verdict against the at-fault driver. So that argument is irrelevant.

Now, if we could go to the next slide, please.

I'm sorry. Go one back.

All right. So Mr. Willey is an excellent lawyer. Mr. Smith is an excellent lawyer. Mr. Poulin is an excellent lawyer. But all of the evidence they made, all of the arguments they made to the jury down in Jasper County, resulted in the Jasper County determining, yeah, her lights were off.

MR. WILLEY: Objection, Your Honor. That's not what they determined.

MR. WHELAN: Well, they ---

MR. WILLEY: May we approach?

THE COURT: That's sustained. Thank you.

MR. WHELAN: Okay. The jury found she was 49-percent at fault. All right?

So Mr. Willey doesn't want to talk about that. He doesn't want to talk about USAA's evaluation of her fault.

If we could go to the next slide, please.

All right. So Kathy Moats evaluated the claim. And she determined that the potential comparative fault was 50 percent, which is almost exactly what the Jasper County's jury awarded.

And remember what she said to you. She said that when this evaluation was done she considered all of the evidence and she considered this Woody Poplin report.

And Mr. Willey keeps -- talks about the timeline of the Woody Poplin report and they should have considered the Woody Poplin report. Well, Ms. Moats said she did and that's how she got to 50 percent. And she wasn't saying that Ms. Hood can't recover any benefits under the policy. She was evaluating how a Jasper County jury made -- valued the case. And she got the 50 percent. And the number she got to, $250,000, we now know for the first time this week was the same amount that the plaintiff's attorney valued it at.

Mr. Smith has now told you, and Ms. Hood has now told you, yeah, we would have taken $250,000, when that was not what they told USAA back in 2016.

So if we go -- could go to the next slide, please.

All right. This is the law on bad faith. An insurance company only acts in bad faith when there is no reasonable basis to support its decision. And if there is any reasonable ground for contesting a claim, there's no bad faith. And here there was plenty of reasonable grounds for USAA's actions in evaluating the underlying case.

If we could go to the next slide, please.

All right. These -- we're not going to go over these in detail. But there were three parties to the accident besides Mrs. Hood. They all said that her lights were off. That's a reasonable basis for USAA's decision.

If you could go to the next slide, please.

There were three independent witnesses, independent witnesses. All three said the same thing, in different variations, that Mrs. Hood's headlights were off.

We saw the statements of Kerry Tanrath, we saw the statement of Antoine Johnson. You heard from Mr. Daniel concerning these witnesses.

And Officer Lee, who Mr. Willey mentioned, was a traffic court judge. He called 911. We heard it. He said that Johnson could not have seen her. And Mr. Willey says, well, he couldn't see the -- he couldn't see what kind of vehicle it was, it was a Chrysler and not a Pacifica, and he said that the car flipped.

Well, that's because it was dark and she didn't have her lights on.

If we could go to the next slide, please.

That's Tanrath's statement. He said that they -- she did not have any headlights on.

Go to the next slide, please.

All right. Now, this is the police officer. The police officer iden- -- excuse me, talked to four different witnesses. She concluded that Ms. Hood did not have her headlights on.

And Mr. Willey said, well, how could she see -- on the camera, how could she Ms. Hood's lights? Well, she says

unit two's running lights were not on upon my arrival. Running lights are on the front and they're on the back. So that is -- that explains that.

If you could go to the next slide, please.

All right. Now, what evidence was there on the plaintiff's side that Ms. Hood's lights were on? This is -- so Mr. Willey, his position in this case is that there is only one reasonable conclusion concerning Ms. Hood's headlights, that they were on.

And the only evidence of that is Mr. Kuck's second statement, number one. Number two, Therese Hood said, my automatic lights were always on. And then, number three, Woody Poplin, who concluded her high beams were on.

But remember, Ms. Hood said her automatic lights were on, not her high beams. Remember that there was traffic coming in both directions. This is on Highway 278. And it's at dusk. Mr. Smith characterized it as 6:00 in the afternoon. Well, actually, it was in November at six o'clock and it was a half hour after sunset.

And then Mrs. Hood told you it was a surprise to her when her attorney told her that an expert had determined that her high beams were on. She had no evidence of that before this expert came up with his opinion.

And then you also heard from Jack Daniel and Kathy Moats, concerning the issue with the high beams being on,

when the expert found that the low beams were off, because the high beams and the low beams come on at the same time on this vehicle unless you flash the lights.

So maybe Ms. Hood hit the -- hit the stick and flashed the lights during the collision. Maybe the opinion isn't valid. Regardless, there were facts supporting the lights being on; there were facts supporting the lights being off. And it was reasonable to consider those facts and make a decision based on that.

Could we go to the next slide, please.

All right. This was the plaintiff's first side -- first slide in opening. And you'll recall I had to object and they had to take it down.

And I should say I have had to object a lot in this trial, and it's -- it is part of the process. And when plaintiff's lawyers introduce evidence that the Court rules should not come before you, I have no choice but to object. And the same is true for Mr. Willey and Mr. Poulin. There's been a lot of objecting going on. But that is just litigation.

Now, what does profit mean in this case? USAA is not some company with stockholders profiting off of its actions. It's not some business owner sitting somewhere collecting checks. It is a group of insured's, a big group of insured's.

And, yes, there are a lot of claims out there; and if they need big reserves to be able to pay those claims when big disasters come in.

So what I want to say is Mr. Willey claims that USAA's employees hurt their insured's to make profit to give back to their insured's. And that doesn't make any sense.

You heard Ms. Moats talk about she's evaluated based on customer service. She's evaluated based on customer retention. And she -- I mean, she loves her job. She loves her --- you heard from her. And that theory just doesn't make any sense.

With respect to the profit, the plaintiff got over a million dollars last time. Now, Mr. Smith evaluated this case at $250,000, and he -- Mr. Willey says he rolled the dice and he got the boxcar, right. And at the mediation of the case Mr. Smith had an idea. He was going to file this bad faith lawsuit and get more money; so he sent a request to admit to USAA, which is the basis for this whole case, the fact that there were two different factual positions made it two different court cases.

And when he filed the request to admit that her headlights were on, Jack Daniel, standing in the shoes of Antoine Johnson, had two choices. He could either deny the request to admit, which he did, based on the evidence or - if we could go to the next slide, please -- no, I'm sorry.

This is -- this goes back to the profit. This is Ms. Hood's statement to the Kuck's asking them to give a statement to Kevin Smith.

Next slide, please.

All right. One more.

Oh, I'm sorry; could you go back, Alex.

VIDEO PRODUCTION: This?

MR. WHELAN: No, go back two slides.

There you go.

The only way Jack Daniel could deny the request to admit, would be to ignore and get rid of so the jury down in Jasper County could not hear from any of these witnesses who said that her lights were on.

And if you would go to the next slide, please.

If he admitted the request to admit, he would also have to ignore and the jury would never hear about the problems with the Poplin report, Kuck's changing statements, and the issues with Ms. Hood's testimony.

So there was only one reasonable response for Mr. Daniel, which was to deny the request to admit, standing in the shoes of Mr. Johnson.

Now, Kevin Smith, who decided he was -- he was getting attorney's fees in the suit down in Jasper, and he was going to set this up and get attorney's fees in this case as well. He knew when he sent that request to admit

exactly what was going to happen. And he got on the stand. And before I asked him about the timing of it he said, when he got that request to admit he was so angry and so upset. He knew what was going to happen the whole time. This was a manufactured process that Mr. Smith instituted.

And if we could go to the next slide, please.

So Mr. Smith told you -- all right, let me back up a little bit.

So we've talked a lot about the liability case and the UIM case. All right. This is Mr. Willey's big contention here, that USAA is taking two different positions in two different lawsuits, and this is what it's all about. But the testimony has been consistent that in the liability suit against Ms. Hood, Chris Nickels represented Ms. Hood. Chris Nickels is the mouthpiece for Ms. Hood. And if Ms. Hood says that her lights were on, Chris Nickels, as her mouthpiece, must say her lights are on.

Remember, the number one -- the number one thing a liability insurer has to do is to hire a lawyer to defend the case. And that's what Mr. Nickels did.

Now, on the UIM side, Jack Daniel has a completely different role. His client is not Mrs. Hood. His client is the membership of USAA, the members; and it's their interests that he has to protect. And if you don't have somebody protecting that, protecting that interest, then

you have a Kevin Smith or a Roy Willey with nobody on the other side.

Now, Mr. Smith was not shy about it; he makes his money from insurance companies and his goal in every case is to get as much money from the insurance companies as he can.

And so that is the reason for the statute and the law that says an insurer has the right to stand in the shoes of Johnson and there is no duty to just take whatever -- to admit whatever the insured on the other side says.

There was a reasonable basis for Mr. Daniel to deny the lights were on. It was a reasonable action. There could be no liability for that action.

Now, we really haven't heard anything about the Chris Nickels' side of the story, except for the fact that Mr. Nickels and USAA paid and dismissed two of the suits against Mrs. Hood. And the only reason to pay and dismiss a suit is if there is some liability against Mrs. Hood.

So Mr. Nickels and -- well, Mr. Nickels filed the answer; but USAA still paid. So there were some decisions and some payment based on the fact that she bore liability in the liability suit.

So you don't have a situation where USAA on the liability suit is saying we're not paying anything because her lights were on. No, they're saying we're going to

evaluate this thing as a whole and settle it if we can, just like Ms. Moats told you.

And the same thing is happening on the UIM side. Jack Daniel and Ms. Moats are evaluating the case as a whole and settling the case, if they can. That's reasonable.

Now, you know, I told you that there were objections, there are things that are no longer in dispute. There is no claim for any emotional damages or anxiety or pain and suffering or anything like that in this case, despite all the evidence you heard about that. And you may not consider that in your verdict.

The damages that Ms. Hood is complaining about are costs, $49,000 in costs. And she -- she according to her and Mr. Smith, would have settled the case for $250,000 and they say USAA acted in bad faith so they were not able to. And as a result they had to pay $49,000 to take the case to trial. And they ended up with over a million dollars.

So taking the case to trial cost her 49,000, but she made $750,000 doing it. So she did better than she would have otherwise. So no damages were caused to Ms. Smith -- to Ms. Hood, excuse me, by taking that case to trial.

And, you know, Mr. Willey said that the -- you know, the $49,000 had to come out of the million. There were no medical bills taken out of the million at all.

MR. WILLEY: Objection, Your Honor.

Mischaracterization, inaccurate, not in evidence.

THE COURT: I don't believe that's in evidence. Move on, please.

MR. WHELAN: Now, the -- what -- so I go back to the beginning, which is what did they say we did wrong? You've got the filing of the -- of the lawsuit and the defense of the request to admit by two different lawyers. And there's been no testimony that there's anything wrong with that.

And you have the alleged lie. And we still cannot pinpoint what the lie was.

This is a case in which the plaintiffs are now asking for punitive damages. They are looking for boxcars yet again. To get punitive damages, they would have to show willful, wanton, reckless conduct, which is intentionally invading the rights of a third party.

Defending a suit to protect the membership, when a jury ultimately finds that there was a question of liability of 49 percent, is not reckless, willful, or wanton conduct.

Folks, we do appreciate your time this week. I know it's been a long haul. We would ask that you look through -- it's really the mud and all these other issues, it's coming in from the plaintiff's side. It's not coming in through USAA's.

Ms. Hood has done quite well in the case. And there

was no lie. There was no factual misrepresentation. There was no damages as a result of that. There's been no willful, wanton, or reckless conduct. We would ask that you find for the defendant, USAA.

Thank you.

THE COURT: Thank you, Mr. Whelan.

Mr. Willey, any reply?

MR. WILLEY: Yes.

CLOSING ARGUMENT - REPLY

MR. WILLEY: I made a lot of notes during that. There's a lot of things I could respond to. There's conversation about members, conversation about this document.

But I want to remind you again that what doesn't make a difference doesn't matter. And the question in the case is this: It's not can they take this position or that position. It's can they take this position to protect their money here and then go in another court and take the exact opposite position to protect their money over here. That's the question.

Somebody is owed as a result of the wreck. Somebody is at fault. And in this case the jury determined it was Mr. Johnson.

Which by the way, we talk about this one number on this sheet. But you'll remember when Mr. Poulin was cross-

examining Ms. Moats, on her actual note he went down and asked her to -- what she found about the liability.

And it's right here. So when you go back there, this will be Defendant's Exhibit 7. And hopefully your eyes are better than mine. But it says liability issue, our evaluation is the evidence will support probable liability rests with Johnson.

Based on everything they do, that was their evaluation. That's what this case is about, not doing what your own evaluation shows, not how you got to the evaluation. Because when they evaluated it, they then evaluated it at $250,000 and never paid it. It's not about that. It's about can you take two separate positions, in two different places, to protect your money.

And let's talk for a minute about this whole, oh, we're not some big company, it's all about our members. USAA has almost 13-million members. In this year, their total distribution to members -- and this will be down here for you -- was one-point-five billion dollars. Right down here.

Sounds like a big number, doesn't it? One-point-five billion of that thirty billion is what they distributed to their members. One-point-five billion. Okay? Five percent.

Now, twelve-point-eight million members, do you know

how much that is each? $117.18, or whatever that number is percentage. Way less than one.

And you know what it is? It's the equivalent of somebody with five million dollars giving you one red cent. That's what $117.18 means to USAA. So all this talk about the membership is bunk.

In fact, you heard -- you heard, when Mr. Hood took the stand, you heard when Ms. Hood took the stand, they still pay their premiums. They're still members of USAA. And they are, because they're loyal.

But loyalty, ladies and gentlemen, is not a one-way street. Loyalty is a two-way street. And it's up to you to determine if they were loyal to Ms. Hood.

I'm not going to get all into the license testimony. They're an evaluation. We just read it. The question is not what it was. It's can you take two different positions.

And at the end of the day, when Mr. Whelan comes up and talks about, well, that's just litigation, well, it's not. Because this ain't Vegas. This is a courtroom. And in a courtroom we have an obligation to tell the truth.

When Mr. Smith sent that RTA, gave it at mediation, as he testified, he didn't expect them to come back in black and white with that decision. Because oftentimes that's what an insurance company might do, take the different

positions, and never put it in writing, just use that lawyer speak. But they did in this case.

And they did in this case, and you will have it in the jury room. You will have the answer and the complaint where they denied, in Paragraphs 4 and 7, that her lights were illuminated. In one case saying her lights were on. The complaint says, admit her lights were illuminated. Right?

And then you'll have the RTA, admit that Plaintiff Therese Hood was operating her vehicle with her headlamps illuminated at the time of collision. Denied. Jack Daniel, Madison Suddy, attorneys for USAA General Indemnity Company.

In this case it's in black and white. And the question for you is in Charleston County, when it's in black and white are you going to let them get away with it.

One of the things you have to consider when you're thinking about punitive damages is this: The likelihood the amount of damages will deter the defendant or others from like conduct.

Everybody that has homeowners or renders insurance knows that they don't cover flood damage. Right? There's a separate policy for flood insurance.

And your verdict today will tell the insurance companies that insure the homes and businesses in this

community whether the next time a hurricane comes, that insurance company, be it USAA who has the homeowners insurance on the home and the flood insurance, or any other insurance company, whether they are allowed to come into one courtroom and say, well, the homeowners or renters insurance doesn't apply, it was all water damage; and then go into the other courtroom and say, well, the flood insurance doesn't apply because the water would have never been in the house if it wasn't for the wind, it was a hurricane.

MR. WHELAN: Your Honor, that is ---

MR. WILLEY: That ---

MR. WHELAN: --- so far afield ---

MR. WILLEY: That ---

THE COURT: Thank you.

MR. WHELAN: --- from the, quote, UIM statute ---

THE COURT: Thank you.

MR. WILLEY: That is ---

THE COURT: Move on, please.

MR. WILLEY: --- the question, what will deter the defendants and others like them from the conduct of taking two separate positions in two separate courtrooms just to protect their money.

And you'll remember what Mr. Daniel had to say to that: We know a jury won't like it, but we can do what we

want to do because the jury will never see it.

And here we are. Here are the dice. Your verdict will hand the dice back to them and tell them to keep rolling. Or your verdict will tell them to stop. Stop. The lives in this community are worth more than what's worth less than a penny to you. Stop.

And I hope you will do that.

Thank you.

THE COURT: Okay. Ladies and gentlemen, it's time for me to instruct you on the law. But let me first ask if you need a short break before I give you the instruction.

[Indication from jury member]

Okay, I'm going to let us be at recess for about ten minutes. And when you come back in I'll give you the jury instruction. I just don't want to hold you hostage here for too long without giving you a break.

[Whereupon, the jury exits the courtroom 6/28/19, 12:52 p.m.]

[Whereupon, a recess is taken 6/28/19, 12:52 p.m. to 1:02 p.m.]

THE COURT: If I could ask both attorneys to approach for just a minute.

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

[Whereupon, the jury enters the courtroom at 1:02

p.m.]

THE COURT: Okay. Ladies and gentlemen, I understand I am standing between you and lunch. But it's now my duty to instruct you on the law that applies.

CHARGE OF THE COURT

THE COURT: I remind you that during this trial you and I have certain duties to perform. As the trial judge it's my responsibility to preside over the trial of this case, and I also have the duty to rule on the admissibility of the evidence offered during this trial.

You are to consider only the evidence before you. If there was any testimony ordered stricken from the record during this trial, you must disregard that testimony. You are to consider only the testimony which has been presented from the witness stand and the exhibits which have been made a part of the record in this case, and any stipulations of counsel.

I have the additional duty to charge you the law applicable to this case. It is your duty as jurors to accept and apply the law as I now state it to you.

If you think you have any idea as to what the law is or what the law ought to be and it does not agree with what I tell you the law is, you must forget that idea because you are sworn to accept the law and apply the law exactly as I state it to you.

In every case tried in this court before a jury, the jury becomes the sole and exclusive judges of the facts. A trial judge cannot comment on or make any statement about the facts in a case.

Since you are the sole judges of the fact, do not think by anything I have said during the trial that I have any opinion about the facts in this case. The law does not allow me to have an opinion about the facts.

The burden of proof in this case is by a preponderance of the evidence. And a preponderance of the evidence simply means the greater weight of the evidence. It is evidence which, as a whole, shows that the fact sought to be true is more likely true than not true. And this can be illustrated by imagining a set of scales. When the case begins, the scales are even. After all of the evidence has been presented, if the scales remain even, or if they tip even slightly in favor of the defendant, then the plaintiff has failed to meet the burden of proof and would not be entitled to recover in this case. If on the other hand the scales tip even slightly in favor of the plaintiff, the plaintiff will have met the burden of proof and you should return a verdict for the plaintiff.

The preponderance of the evidence is not determined by the number of witnesses. Instead, it must be determined by the greater weight of all of the evidence.

Now, necessarily, you must determine the credibility of the witnesses who have testified in this case. And credibility simply means believability.

It becomes your duty as jurors to evaluate the evidence and determine which evidence convinces you it is true. In determining the believability of witnesses who have testified, you may believe one witness over several or several witnesses over one. You may believe a part of the testimony of a witness and reject the remaining part -- the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety, or you may reject the testimony of a witness in its entirety. You may consider whether the witness is prejudiced toward either the plaintiff or the defendant, the opportunity for the witness to have seen the matters and things about which the witness may testify, and the way the witness acts on the witness stand or what their demeanor was while on the witness stand.

During the trial of this case we've had testimony by way of deposition of witnesses taken outside of the courtroom. The deposition was taken in the manner prescribed by law, and you will consider the testimony from that deposition just as if the witness were here upon the stand testifying.

You take this deposition testimony in connection with

all other testimony, and you assess the credibility of that witness from anything that is in the record that will aid you in doing so.

You consider that deposition evidence, along with the testimony of the witnesses who have appeared in person, and you determine from all of the evidence in the case whether by witnesses present or by depositions or whether by exhibits in this case, what the truth of this controversy is according to the facts as you find them, and then applying the law as I give it to you.

Now, in our courts no distinction is made between an insurance company and individuals. An insurance company is a person in the eyes of the law. An insurance company is entitled to the same consideration and to the same justice by the same legal standards as an individual.

An insurance company can only act through its agents or employees. Therefore, an insurance company is responsible for any negligent acts or omissions of its agents or employees while they are acting within the scope of their employment which proximately caused damage to another person.

The plaintiff has alleged a cause of action for violation of the implied duty of good faith and fair dealing. So I'm going to talk about that cause of action first.

There is an implied duty of good faith and fair dealing in every insurance policy that neither party will do anything to impair the other's rights to receive benefits under the contract.

Plaintiff claims that defendant breached this duty, and defendant denies that it breached the duty. To prove that defendant breached the duty of good faith and fair dealing, plaintiff must prove by a preponderance of the evidence the following:

First, the existence of a mutually binding contract of insurance between the plaintiff and the defendant. Second, refusal by the insured to pay benefits due under the contract. Third, resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract. And, four, causing damage to the insured.

Under South Carolina law if an insured files a claim against its own underinsured motorist coverage, the insurance company has the right to appear and defend in the name of the underinsured motorist in any action that may affect its liability.

In such an action, by statute the insurance company steps into the shoes of the underinsured motorist and may assume control of the defense and of the -- and may assume control of the defense of the action for its own benefit.

An insurance company acts in bad faith only when there is no reasonable basis to support its decision. If an insurance company has a reasonable ground for contesting a claim, there is no bad faith.

An insurance company has both a right and a duty to investigate claims prior to paying them. It is not bad faith or an unreasonable action for an insurance company to investigate a claim and to gather facts about a claim.

Whether an insurance company is liable for bad faith must be judged by the evidence before the insurance company at the time it denied the claim; or if the insurance company did not specifically deny the claim, by the evidence it had before it at the time suit was filed.

Breach of this duty by an insurer's bad faith refusal to settle the claims of its insured's renders the insurance company liable in tort for all actual and consequential damages that occur as a natural and probable result of the breach. Actual damages are not limited by the amounts set forth in the insurance contract.

The plaintiff has also alleged a cause of action for negligence. The plaintiff claims that the defendant was negligent and should compensate the plaintiff for the damages the plaintiff suffered as a result of the defendant's negligence.

In order to prove that the defendant was negligent,

the plaintiff must prove by a preponderance or greater weight of the evidence four things:

First, the plaintiff must prove by a preponderance or greater weight of the evidence that the defendant owed the plaintiff a duty of care.

Next, the plaintiff must prove by a preponderance or greater weight of the evidence, that the defendant breached that duty by a negligent act or omission.

Negligence means that a person has done something that a reasonable person would not have done or has failed to do something that a reasonable person would have done in the same situation.

The plaintiff must also prove by a preponderance or greater weight of the evidence that she suffered damages as a result of the defendant's breach of duty.

Finally, the plaintiff must prove by a preponderance or greater weight of the evidence that the damages were proximately caused by the defendant's breach of duty.

Proximate cause is something that produces a natural chain of events which in the end brings about the damage. It is the direct cause of the damage.

To prove that the defendant's negligence proximately caused the plaintiff's damage, the plaintiff must first prove causation in fact. This is proven by showing that the damage would not have occurred but for the defendant's

negligence.

The plaintiff must also prove legal cause. Legal cause is proven by showing that the damage was foreseeable. This means that the damage occurred as a natural and probable consequence of the defendant's negligence.

The plaintiff must prove that some damage from the defendant's negligence was foreseeable but does not have to prove that the particular damage that occurred was foreseeable. However, the defendant cannot be held responsible for things -- for things which could not be expected to happen.

Proximate cause does not mean the only cause. The defendant's act can be a proximate cause of the plaintiff's damage if it was at least one of the direct concurring causes of the damage.

When a defendant adopts internal policies or self-imposed rules, and thereafter violates those policies or rules, the jury may consider such violations of evidence of negligence.

If you decide that the plaintiff is entitled to a verdict, your next step would be to decide how much money the defendant should be required to pay.

Actual damages are to compensate the plaintiff for the plaintiff's damages or loss and to put the plaintiff as near as possible in the same position that she was in

before the incident occurred. In other words, actual damages would be the actual losses and expenses which the plaintiff has suffered because of the defendant's negligence.

Emotional damages are not an element of damages in this action.

If you award actual damages, you may also consider an award of punitive damages. In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence, which is evidence that produces in your mind a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. The evidence should not be ambiguous, doubtful, or contradictory.

Punitive damages are intended to punish the defendant for extraordinary and outrageous conduct -- excuse me -- misconduct and to prevent the defendant and others from committing similar acts in the future.

The evidence must establish the defendant's acts were reckless, willful, and wanton, meaning there was a conscious failure to exercise due care or a conscious indifference to the rights and safety of others, or a reckless disregard thereof.

To recover punitive damages, the plaintiff must prove by clear and convincing evidence that the defendant's

actions were willful, wanton, or reckless.

The words recklessness, willfulness, and wantonness, are synonymous. The terms are used to describe a conscious failure to exercise and observe reasonable or due care.

Recklessness is a higher degree of culpability and responsibility. Recklessness signifies a conscious failure to exercise due care. Recklessness is a conscious indifference to the rights of the plaintiff or a reckless disregard of the rights of the plaintiff. Recklessness is an awareness of wrongful conduct and a continuation to act, regardless of consequences.

The test for determining whether a tort may be deemed reckless, willful or wanton is whether it has been committed in such a manner and under such circumstances that a person of ordinary reason or prudence would have been conscious of it as an invasion of the rights of the injured party.

If you find that the defendant’s conduct was willful, wanton, or reckless, you may award the plaintiff punitive damages.

To support an award of punitive damages, the plaintiff must prove by clear and convincing evidence that the conduct complained of included a consciousness of wrongdoing at the time of the conduct.

Clear and convincing evidence is more than just a

preponderance or greater weight of the evidence, which requires only proof which persuades you that a party's claim is more likely true than not true.

On the other hand, clear and convincing is not as high a standard as the burden of proof in criminal cases, which is proof beyond a reasonable doubt.

Convincing means persuading, by proof or argument, causing one to believe in the truth of what is asserted. Clear and convincing proof establishes in your mind not only that the fact is probable, but that it is highly probable.

Before awarding punitive damages you must consider and weigh four elements which may be pertinent to the facts. You must first consider the relationship between any punitive damage award and the harm caused.

Any penalty imposed should take into account the reprehensibility of the conduct, the severity of the harm caused, the defendant's awareness of the conduct's wrongfulness, the duration of the conduct, and any concealment.

Thus any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused, including the actual damage award made by you if any.

Secondly, any penalty imposed should take into account, as a mitigating factor, any other penalty that may

have been imposed or which may be imposed for the conduct involved, including any criminal or civil penalty, or any other punitive damages award, arising out of the same conduct.

You may also consider the profitability of the conduct of the defendant. Next you should consider whether any award of the amount of any punitive damages award may deprive the defendant of any profits derived from the improper conduct, and whether any ill-gotten profits should be properly awarded to the plaintiff.

Finally, any award of punitive damages must be limited to punishment and thus may not affect economic bankruptcy. To this end, the defendant's ability to pay any punitive damage award should be considered. However, the economic bankruptcy factor is not an absolute bar to an award of punitive damages.

Now, ladies and gentlemen, I'm going to send you into the jury room to deliberate, with the exhibits and the verdict form. So I'm going to go over the verdict form with you.

The first question on the verdict form says: Do you find by a preponderance of the evidence that the defendant USAA breached its duty of good faith and fair dealing to Therese Hood?

And the possible responses are yes or no.

Please don't read anything into the order in which these questions appear. One has to be first and one has to be second.

You will next answer: Do you find by a preponderance of the evidence that the defendant USAA individually or through its agent was negligent?

And then your possible responses will be yes or no.

Once you've answered those two questions, if you've found a yes response to either number one or number two, it states if yes to either one or two or both, go to question number three. Number three states: If the answer to number one or two is yes, the amount of actual damages, if any, caused by the defendant's conduct. And if you find actual damages, you will write that amount in here.

Question number four asks: Did the plaintiff prove by clear and convincing evidence that USAA's bad faith was intentional, reckless, willful, wanton, or malicious?

If you answer yes, you will go to the next question. If you answer no, you'll stop deliberating.

If the answer to question number four is yes, then you would state the amount of punitive damages to be awarded against USAA.

And then, Ms. Sabbato, you will sign on behalf of the entire jury panel.

All 12 of you must agree on the verdict. Your verdict

cannot be based on sympathy, passion, prejudice, emotion, or any other consideration not in evidence in this case.

Ms. Sabbato, again, when the jury agrees on the verdict, you will sign your name as the foreperson on the line underneath the verdict and then knock on the jury room door and inform the bailiff that you have reached a verdict. At that time we will receive you back into the courtroom.

I'm now going to release you to go to the jury room. Please don't begin your deliberations until we actually bring you the verdict form and the exhibits. Thank you.

[Whereupon, the jury exits the courtroom 6/28/19, 1:20 p.m.]

THE COURT: Okay. Any exceptions, additions, etc., before we allow the jury to begin deliberating?

MR. WILLEY: Your Honor, I renew all of my exceptions in the prior hearing and just note that the line read with respect to emotional distress not being an element was not in my copy. And I thought that we had agreed not to say that. I don't know that there is a way to cure it now but.

THE COURT: No, I specifically in the course of our charge conference I specifically said I was going to add that in. That was part of our discussion about whether we should instruct the jury that I have made certain rulings of law on the facts. And I said, no, I was not going to do

that but I was going to include that sentence on emotional damages.

MR. WILLEY: Very well.

THE COURT: But you are right, it is not in your copy.

MR. WILLEY: Okay.

THE COURT: I just hand wrote it in.

MR. WILLEY: Got it.

MR. WHALEY: And, Your Honor, I would renew my objections at the charge conference including the objection concerning the -- or rather request to have it noted that the lawyer in a liability insurance case is the -- the insured is the agent of the lawyer in a liability case.

And I think you -- I believe that you denied that and said it was the client.

THE COURT: Well, did I say I was going to charge it?

MR. WHALEY: You didn't.

THE COURT: Okay. Okay. Thank you. If you all will just -- if I can get you to come and make sure we have got all of the exhibits together.

(WHEREUPON, review exhibits with counselors. Verdict and exhibits delivered to jury by the clerk, 6/28/19, 1:25 p.m. Break awaiting jury.)

(WHEREUPON, resume 6/28/19, 2:01 p.m.)

THE COURT: Okay. We have a question from the jury. It says: May the jury have the list of considerations in

the plaintiff's closing arguments? May we also have a copy of the charge of the law?

MR. WILLEY: They are asking, Your Honor, for -- may you read the first question -- will you read the first question?

THE COURT: May the jury have the list of considerations in the plaintiff's closing argument? May we also have a copy of the charge of the law?

I don't know that it would be appropriate for me to give them a list of considerations from your closing argument.

MR. WHALEY: I would agree with that.

THE COURT: Do y'all have any objection to me giving them a copy, a written copy of the jury charges?

MR. WILLEY: Yes.

THE COURT: Okay.

Mr. Whaley?

MR. WHALEY: I would be in favor of them getting the charges.

THE COURT: Well, Mr. Willey, what would you propose?

MR. WILLEY: I would just I would propose that we tell them no, that you charged them on the law, and that they are to go based upon that charge.

I know that it is some judge's preference to send the charge back initially. And I think that is a different

scenario. Because here they are asking for two pieces of information. And I believe by providing them one and not the other the court is making a comment on the weight that they should give one over the other.

And really what the considerations were were from the charge of the law. But I would just -- I would just ask that we say no to both of those. I don't think at this point it is proper.

MR. WHALEY: It is in your discretion, Your Honor. And it is probably a good practice -- helpful to the jury anyway, but particularly where they request.

THE COURT: Yeah, I mean I know judges have differ -- differing views about whether to give them the charge or not give them the charge. I don't have any problem with giving them the charge. We are giving them so much information.

MR. WILLEY: If we did that, Your Honor, I would ask that they -- they can rehear argument and testimony as well, and I would just ask that in lieu of giving them the written we allow them to come out and rehear that part of my closing.

MR. WHALEY: That would be improper, Judge.

THE COURT: Yeah, I am not going to have re- -- allow them to rehear the closing. But I am going to clean up my jury charges and provide them with a copy of the jury

charges.

MR. WHALEY: Okay.

THE COURT: But I need to clean it up because some of it -- you noticed some was in a bigger font. Some was not. And I don't think that would be appropriate. So I am going to put them in a standard font and give them a copy.

MR. WHALEY: Okay.

THE COURT: All right. We are adjourned again.

(WHEREUPON, Court's Exhibit Number 12, jury note, marked for identification.}

(WHEREUPON, recess 6/28/19, 2:02 p.m.)

(WHEREUPON, resume 6/28/19, 3:40 p.m.)

THE COURT: We do have a question from the jury. It states may we know the exact amount of court costs for the first trial, the plaintiff's court costs.

If you guys want to take a look at it.

(WHEREUPON, jury note reviewed by Mr. Willey.)

THE COURT: Mr. Whaley, you are welcome to look at it if you want to look at it.

MR. WHALEY: Okay. I was just writing it down.

(WHEREUPON, jury note reviewed by counsel.)

THE COURT: So I would propose that we bring them in here and tell them -- I think the figure was $49,100 -- you have to remind me of the exact figure. But let me hear your thoughts.

MR. WILLEY: My thought would be for Your Honor -- us to agree what the figure is. Which we have up there (pointing). And just write it and send it back. I don't think we need to bring them in here for that.

THE COURT: That is fine with me if you all are okay with that.

MR. WHALEY: I think that is fine.

THE COURT: Okay.

MR. WILLEY: It should be on the court's exhibit.

THE COURT: Okay. The figure I am showing on here is $49,052.20.

MR. WHALEY: Are you going to write it on that?

THE COURT: I can. Sure. And the figure I am showing on here is $49,052.20.

MR. WHALEY: Well, Your Honor, I guess the -- okay, I think that is right. I think that is fine.

(WHEREUPON, Court’s Exhibit Number 13, jury note, with Court’s answer, marked for identification.)

THE COURT: All right. Thank you.

(WHEREUPON, jury note and answer return by clerk to jurors at 6/28/19, 3:43 p.m.)

(WHEREUPON, resume 6/28/19, 4:02 p.m.)

THE COURT: We have a question from the jury. It says: Can verdict one and four be mutually exclusive?

That is the question.

(WHEREUPON, pause for counselors and Court to retrieve copy of the verdict form.)

(WHEREUPON, bench conference as follows:)

MR. WILLEY: The answer is no.

THE COURT: What I would propose is to bring them back in and just go through the verdict form with them exactly like I did the first time, just to walk them through the verdict form.

MR. WILLEY: I mean I think what they are asking, can verdict one and four be mutually exclusive, is if they don't find bad faith can they still find punitives.

I am okay with walking them back through it if that is what Your Honor thinks is best.

MR. WHALEY: Yeah, I think they -- I think they should be instructed that they need to consider each question and answer each question on its own merits without reference to the other questions. Well, take them one at a time.

MR. WILLEY: And I think just give us the verdict instruction.

I mean I think the answer is no. I am also fine with you ---

THE COURT: I guess I am having -- I am having a hard time conceptualizing the verdict in one and four and mutually exclusive. I am just not entirely certain I understand what they are asking.

This would be -- with what you think they are asking do these have to be consistent?

MR. WILLEY: Right. I think what they are asking is if we find negligence can we still find punitive damages -- if we find only negligence can we still find punitive damages.

MR. WHALEY: I mean that is pretty clear -- I'm sorry, I didn't mean to ---

THE COURT: No, that's fine.

MR. WHALEY: --- turn that (document) away from you.

MR. WILLEY: I would -- well, I would also be fine with Your Honor doing it back there or, you know, to try to get more information about what they are asking and then answer their questions directly.

MR. WHALEY: Well, I ----

THE COURT: I just -- I would hate to go back there ---

MR. WILLEY: Okay.

THE COURT: --- and then they say something -- something crazy.

MR. WILLEY: I understand.

THE COURT: So that is what I would propose is just to bring them in and just walk them through the verdict form one more time.

MR. WILLEY: Right.

THE COURT: Does that make sense?
MR. WILLEY: Right -- and this says -- this is the important part I think, if yes to either one or two or both, go to three. And then after three you just -- well, we should have said if you found actual damages then go to four.
THE COURT: Yeah, I guess I could just add if you find no actual damages you go no further.
MR. WILLEY: I ---
THE COURT: Because if they find zero in actual damages then they are not going to punitives.
MR. WILLEY: I don't -- I don't know that I love that wording though.
THE COURT: I can only go to question number four if you found ---
MR. WILLEY: If you find actual damages you go to question number four, ---
THE COURT: Okay.
MR. WILLEY: --- otherwise stop your deliberations.
THE COURT: Okay.
MR. WILLEY: Right?
MR. WHALEY: Can I see this?
(WHEREUPON, form supplied to counsel.)
THE COURT: And I can -- I mean if you want to hold on to it and make me a copy ---

MR. WHALEY: Let me ask you this question. Maybe we can just write that as a answer on the sheet and say if you need further clarification let us know.

But if that is their real question I don't know we need to walk through the whole thing. It is just if you find actual damages go to the Question 4, otherwise stop your deliberations.

THE COURT: Do you think that will answer the question?

MR. WILLEY: I think it will. Because if you find actual damages you go to four. Otherwise you don't. And then we can -- and then you can put on there if you have further questions let us know.

MR. WHALEY: Yeah, I don't -- I don't -- I don't agree with that.

THE COURT: Well, because they are only going to actual damages if they are found yes to one or two.

MR. WILLEY: So what -- okay, then we could say if you ---

THE COURT: No, I am agreeing with you.

MR. WILLEY: If you put -- yeah ---

MR. POULIN: Because if they put a no on two they can't ---

MR. WILLEY: Right. Right, they would stop.

MR. POULIN: If they put a no on one and two they

would have to stop anyway.

MR. WHALEY: Well, four is did the plaintiff prove by clear and convincing evidence that USAA's bad faith was intentionally reckless, willful, wanton, ---

MR. WILLEY: That is their question.

MR. WHALEY: --- malicious.

MR. WILLEY: And they can find punitives for negligence. So the answer to the question is no.

MR. WHALEY: But this ---

MR. WILLEY: And I think we do need a curative instruction on that. That if they find the negligence was intentional, reckless, willful, wanton, or malicious they should find punitive damages.

That is what they are asking. Because we put bad faith in that question. And that is all of our faults I guess for not realizing it.

MR. WHALEY: I mean I don't think we should monkey with it.

THE COURT: Well, because we have already said if you -- if you find yes for either of these then you go to the next section.

MR. WILLEY: Right.

MR. WHALEY: Which is actual damages.

(WHEREUPON, comment by law clerk, inaudible.)

MR. WHALEY: Right, but they don't have to find the

answer to one is yes. They could find negligence that was reckless, willful and wanton and award punitive damages. But because we put in there the word ---

THE COURT: Well, why don't we do this: Let's bring them in. We will go through the verdict form and I will say if you -- if your answer to either one or two -- if you answer yes to either one or two, you will go -- you will continue to question three. If you find -- if you award actual damages on either bad faith or negligence then you will continue to question four.

MR. WILLEY: And I think we need further clarification that if the plaintiff proves by clear and convincing evidence that USAA's bad faith or negligence was intentional, reckless, willful, wanton, or malicious you would answer yes.

THE COURT: I mean I think that's a proper statement.

MR. WILLEY: And I should have caught that.

MR. WHALEY: Your Honor, I think -- I think that the answer to the question is yes that mutually exclusive, you don't -- you answer number one and then you go to number two and then you go to number three and then you go to number four.

Again, I mean this is what we agreed to submit to the jury so.

MR. WILLEY: Right, by now they have had a question

which makes it clear that there is an error of law on the verdict form which can be cured with a curative instruction. That is how we should proceed. We shouldn't continue with an improper verdict form. It can be cured very easily by the judge just telling them.

THE COURT: I mean if they were to use -- to do exactly what we told them to do on here there wouldn't -- but I understand ---

MR. WILLEY: Right.

THE COURT: --- where there might be some confusion.

So let's bring the jury in. I am going to give them -- I am going to walk through the verdict form with them again and just I am going to give them that caveat that if you can answer yes to either one or two then go to number three. If you find that an award of actual damages proper under either cause of action then you will go to question number four. Did you find the plaintiff proved by clear and convincing evidence that USAA'S bad faith or negligence was intentional, reckless, willful, wanton ---

MR. WILLEY: Right, just adding or negligence, yeah.

THE COURT: Basically going to tell them that these questions apply to either cause of action.

MR. WILLEY: Right.

MR. WHALEY: Okay, well, for the record I would like it to be just read as it is written. But I understand,

Your Honor. Thank you.
(WHEREUPON, Court's Exhibit Number 14, jury note, marked for identification.)
THE COURT: If you will bring the jury in. Thank you.
(WHEREUPON, break 6/28/19, 4:11 p.m.)
(WHEREUPON, resume and jury entering 4/12/19 4:12 p.m.)
MR. WHALEY: Your Honor, may I?
THE COURT: You can both approach.
Mr. Willey.
(WHEREUPON, bench conference 6/28/19 at 4:12 p.m., as follows:)
MR. WHALEY: Also another issue Mr. Willey has proposed they do is that --- I'm sorry, that they have to award ---
THE BAILIFF: All jurors are present.
MR. WHALEY: --- they have to award punitive damages, which I don't think they do. And I object to that.
MR. WILLEY: Okay. That is not what it is doing.
THE COURT: That is not what this is saying.
MR. WHELAN: Well, that is what -- well, but there is no right to punitive damages.
MR. WILLEY: There is ---
MR. WHALEY: Okay. But I wanted to note my objection.
(WHEREUPON, end of bench conference.)
THE COURT: Okay. Ladies and gentlemen, I am just

going to go over the verdict form with you one more time. I hope this will answer your question.

Number one on the verdict form is asking you do you find by a preponderance of the evidence that the defendant breached its duty of good faith and fair dealing to Therese Hood. And of course you are going to answer that either yes or no.

Number two pertains to the second cause of action for negligence. And it states do you find by a preponderance of the evidence that the defendant USAA individually or through its agent was negligent. To which you will answer yes or no.

If you answered yes to either of these things, either number one or two, then you will proceed to number three which is the question about actual damages. So if the answer to number one or two is yes, the amount of actual damages, if any, caused by the defendant's conduct.

If you find actual damages then you will continue to question number four, did the plaintiff prove by clear and convincing evidence that USAA's bad faith on either of the bad faith cause of action or the negligence cause of action was intentional, reckless, willful, wanton, or malicious.

If the answer is yes you will continue to question five. If the answer is no you will stop and deliberate no further.

Does that answer your question?
(WHEREUPON, jury foreperson nods in the affirmative.)
THE COURT: Thank you. Then I am going to ask you to continue with your deliberations.
(WHEREUPON, jury exits 6/28/19, 4:15 p.m.)
THE COURT: Is there anything for the record?
MR. WILLEY: No, Your Honor.
MR. WHALEY: Your Honor, I do want to say that I did request that -- so the jury's question was: Are questions number one and four mutually exclusive? I feel like the simplest answer to that was yes.
And as far as number four I just want to -- I just want to state for the record that negligence was inserted into the verdict form that -- excuse me, negligence was inserted into question one -- excuse me, negligence was inserted into question four in that instruction when it originally was not in the verdict form that was sent to the jury so.
THE COURT: Well, the duty is the same for either the negligence cause of action or the bad faith cause of action.
MR. WHALEY: Well, we don't -- we contend that the -- there is no negligence, that the only duty arising from the contract of insurance is the bad faith duty.
THE COURT: I understand.

MR. WILLEY: And, Your Honor, we are in agreement with the court's ruling. And just so we are clear, my position on the question was that the answer would be no and in lieu of that Your Honor decided to bring in the jury, go through the verdict form again, and give them a curative instruction to fix an issue of law on the verdict form which we believe was appropriate and the best remedy under the circumstances.

THE COURT: Okay. Thank you.

(WHEREUPON, recess 6/28/19, 4:57 p.m.)

(WHEREUPON, resume for verdict, 6/28/19, 5:46 p.m.)

THE CLERK: All jurors are present.

THE COURT: Okay. And I understand that you have reached a verdict.

THE FOREPERSON: Yes.

THE COURT: Okay. If you would hand the verdict form to the bailiff for me, please.

(WHEREUPON, complied.)

THE COURT: Okay. The verdict form states as to question number one: Do you find by a preponderance of the evidence that the defendant USAA breached its duty of good faith and fair dealing to Therese Hood? The answer is no.

Number two: Do you find by a preponderance of the evidence that the defendant USAA individually or through its agents was negligent? The answer is yes.

As to number three: If the answer to number one or two is yes the amount of actual damages, if any, caused by the defendant's conduct? And the answer is $49,052.20.

Number four: Did the plaintiff prove by clear and convincing evidence that USAA's bad faith was intentional, reckless, willful, wanton, or malicious? The answer is yes.

As to question number five: If the answer to question four is yes state the amount of punitive damages to be awarded against USAA. And the answer is $250,000.

So let me ask, ladies and gentlemen of the jury, is this your verdict? And if I can just get you to raise your hand to indicate that this is your verdict.

(WHEREUPON, all jurors complied by raising hands.)

THE COURT: Thank you.

Anything further from either the plaintiff or the defendant before I release the jury?

MR. WHALEY: Not from the defendant, Your Honor.

MR. WILLEY: May I approach?

THE COURT: Sure.

(WHEREUPON, bench conference 6/28/19, 5:46 p.m.)

THE COURT: Okay. Ladies and gentlemen, Thank you. You have been most diligent, punctual, attentive. I know that this has at times been a long week. Very well. We are very very appreciative of your service this week. I am

not going to take up anymore of your time. You are free to go. Thank you again.

(WHEREUPON, jury exits 6/28/19, 5:48 p.m.)

THE COURT: Anything further we need to address before we adjourn?

MR. WHALEY: Your Honor, we will have post-trial motions. Can we have ten days under Rule 50 and 59 to file those?

THE COURT: Certainly.

MR. WHALEY: Thank you.

THE COURT: All right. Thank you. We are adjourned.

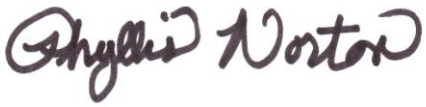
(WHEREUPON, trial adjourned, 6/28/19, 5:49 p.m.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.*)*

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, for the trial week of June 24, 2019.

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



PHYLLIS NORTON, CVR

Date: February 5, 2020

Certified Transcript Provided For: Anastopoulo Law Firm
Certification Reference #020520 Original

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

----------x

THERESA HOOD,

Plaintiff,

vs.

USAA,

Defendant.

----------x

Transcript of Record
2018-CP-10-666

September 26, 2019

Hearing on Post-Trial Motions

B E F O R E:

The Honorable Kristi Curtis, Presiding Judge

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

Roy T. Willey, Esq.
Attorney for the Plaintiff

Robert Whelan, Esq.
Attorney for the Defendant

Transcribed by Bobbi Fisher, RPR, CET, for DCRP,

Digital Courtroom Recorder Project

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E X H I B I T S

(None.)

P R O C E E D I N G S

(Whereupon, the following proceedings started at 10:42 a.m.)

THE COURT: Thank y'all so much for coming to Sumter, saving me a trip to Charleston. I appreciate you doing that.

Mr. Whelan, I'm going to hear from you first, sir, and then I'll be glad to hear from you, Mr. Willey, in response.

MR. WHELAN: Thank you, Your Honor. And thank you for agreeing to hold this hearing on the post-trial motions. The defendant filed four post-trial motions and briefs supporting them, and I would like to rely on those briefs and certainly don't want to waive any of those arguments. But this morning, I would like to focus on three points, if I may.

The first being, the portion of the JNOV related to the conduct of USAA alleged being authorized by state statute and the law of South Carolina, and associated with that, the negligence cause of action on which the jury returned a verdict not being proper under these facts.

The second point I'd like to discuss is the evidentiary issue with respect to the exclusion of Ms. Hood's trial testimony in the underlying trial.

And the third point I'd like to discuss is the issue of punitive damages.

So starting with the first point, I want to start with the plaintiff's theory of the case, this disparate position theory that went to the jury. And the theory was that,

because Ms. Hood, through counsel hired by USAA, Chris Nichols, took the position that her rights were on in one case; that USAA should not have taken the position they were off in the other case. In other words, that USAA should not have contested liability. When they talk about the disparate position, that's what it comes down to, boiled down that USAA should not have contested liability in the underlying suit. It all boils down to that.

But the state statute, 38-77-160, gives USAA the right to contest liability. It gives USAA the right to stand in the shoes of the underinsured motorist. And Broome vs. Watts said that the Supreme Court said that that statute -- the right provided by that statute is not for the insured, it's for the insurers', italicized, own benefit, unitalicized emphasis, by the Supreme Court.

And in Williams vs. Selective, the Supreme Court said -- and I think this is important -- the intent of 38-77-160 is to protect an insurance carrier's right to contest its liability for underinsured benefits. Again, the legislature's intent was to protect our right to contest liability for underinsured benefits.

And in this case, if an insurer cannot contest liability under the facts of this case, it's difficult to imagine very many when they could contest liability, and that is because of the evidence in this case, the five eyewitnesss, the police

report said Ms. Hood was at fault. You had Ms. Hood ultimately agreeing that her lights were off or may have been off at the trial. And in the underlying trial, you had the jury come within 2 percent of giving Ms. Hood a goose egg. It was 49 percent at fault. And I think we all know that's so close that if the jury room was five degrees hotter or five degrees colder or it was a little brighter outside or the bailiff had brought back Jimmy John's into that deliberation room, it could have been 51 percent or 47 percent or 55 percent.

Regardless, the facts were very close. It was a case of contested liability. USAA had a right to contest this liability, and the jury took away that right in this case. The verdict is at odds with the law of South Carolina with Section 160 with Williams vs. Selective and the right of jurisprudence.

With respect to the cause of action that the verdict came back on, which is negligence, this case arises from a contract of insurance. The Court ruled that USAA did not breach that contract. Arising from the contract is the implied duty of good faith and fair dealing. The jury ruled that USAA did not breach that duty.

And so it's the plaintiff's position that there is some other duty outside of that that must have been violated, and there is no law to support that. We found three cases that

look to this issue, when an insurer was sued for bad faith, breach of contract and negligence, and all three dismissed negligence as a matter of law because the appropriate cause of action is bad faith. That was Judge Duffie, Judge Houck, and Judge Harwell. Judge Duffie in the Moranto (ph) decision said that no law had been cited, and he was aware of no law that would support a cause of action for negligence against the insurer. Judge Houck said the same thing in the Cramer decision two years ago in 2017, and Judge Harwell said the same thing this year in the Skinner opinion, 2019.

And it makes sense because South Carolina law is that there is generally no duty of care between two parties to a contract. There is an exception when there is a special relationship between the parties, and what our case law has said is they recognize there is a special relationship. That relationship arises from a duty of good faith and fair dealing. That's the special relationship. And, accordingly, the duty in tort is to comply with the duty of good faith and fair dealing, which applies to all actions of the insurer under the contract. And so there is no separate cause of action for negligence and USAA is entitled to judgment as a matter of law on that.

Again, the jury found USAA did not breach that duty. I think that the plaintiff did a -- tried a very good case, and I think that the jury was confused by the legislative scheme

that was essentially tried to them. I think that the plaintiff put the legislature's system of how we defend UIM insurance carriers on trial, and I think that was confusing to the jury and I think that explains the verdict.

That takes me to the second point I'd like to address, Your Honor, which is the evidence of Ms. Hood's trial testimony, because there was a lot of evidence presented in the underlying trial that was difficult to follow for the jury, with the different cases and the answer in the Cook case and the complaint in the Cook case and the request to admit in the Johnson case. And I, frankly, think they had a hard time following that and understanding the law of underinsured motorist coverage.

But this would have been very easy for them to understand; that the allegedly unreasonable position taken by USAA that she was suing over, the plaintiff and her attorneys took the very same position in the underlying trial. The basis of her case against USAA -- the position that was the basis of her case was the same position that they ultimately took. Stated differently, the plaintiff alleged she was damaged by USAA taking a factual position that her and her attorneys later took. And I cannot think of anything more probative than that. I can't think of any evidence that was presented in the trial. I can't think of any evidence that we could get that would be more probative than the fact that they

took the position they said was bad faith, when we took the same position.

And if that wasn't relevant or if it was over -- you know, outweighed by 404, then the plaintiff opened the door. And they didn't crack the door, they didn't leave the door ajar. They took the revolving door from downstairs and put it in the courtroom and let it spin because the whole theory of their case, the disparate positions, the fact that they kept saying USAA called Ms. Hood a liar; that they kept talking about the true facts, all of that should have opened the door to her trial testimony.

Mr. Poulin said in opening statement and Mr. Willey said and Mr. Smith said that these were two different lawyers going into two different courtrooms and taking completely opposite positions when we should have been able to tell the jury who was taking two different positions was Ms. Hood and her lawyers. Ms. Hood took different positions in the same case. Her lawyers took different positions in the same case, and it was unfair that the jury did not get to hear that.

We continually heard that Ms. Hood and her attorneys say that USAA called her a liar and called her credibility into question. And, of course, USAA never called her a liar. They were talking about USAA taking the position that her lights was off, that that was calling her a liar. And the jury should have heard that Ms. Hood took the same position; that

she presented the exact same evidence saying that, you know, if these people say my lights were off, I'm not going to dispute that. They should have been able to hear that.

And Mr. Willey interrogated Ms. Moats and Ms. Howard about the true facts. There's one set of true facts, implying, of course, that when Ms. Hood said her lights were on, those were the true facts and USAA should have not contested liability based on that. But the jury should have heard that Ms. Hood ultimately said, "Yeah, maybe my lights were off," and the, quote, true facts weren't so true after all.

With respect to 403, Nestler v. Fields, from earlier this year, January 30th, 2019, said that unless trials are to be conducted on scenarios or on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative, probative force dragged in by the heels for the sake of its prejudicial effect. And, again, the probative force of that evidence was very, very great.

The last point I'd like to touch on, Judge, is the award of punitive damages. A reasonable jury could not find, by clear and convincing evidence, that USAA's conduct was reckless, willful, or wanton. Again, USAA was complying with state statute, complying with state law in contesting its

liability.

The jury found that USAA did not act in bad faith, had a reasonable ground for its actions, hence the award on bad faith. USAA's conduct was supported by the underlying jury, who, again, found, again, 2 percent away, that Ms. Hood was a proximate cause of her fault. It was supported by the plaintiff and her attorneys, who admitted in the underlying trial that her lights were off or could have been off. And if it is willful and wanton and reckless to contest liability in a case with these facts where there's just so much evidence that her lights were off, it is difficult to imagine when it would not be.

Additionally, we think that the punitive damages should be stricken or reduced because they're unconstitutional. Under the Gore guide posts, there are three guide posts that the Court looks at. The first is the degree of reprehensibility. The second is the disparity between the actual or potential harm and the amount of punitives, and the third is the disparity between the damages and the civil penalties in comparable cases.

The most important of these factors is the degree of reprehensibility. And the Supreme Court has said that is the most important factor, is how reprehensible was the conduct. And there's five factors under Gore and Campbell vs. State Farm that a Court looks at to determine whether the conduct

was sufficiently reprehensible to justify punitive damages.

Factor No. 1: Was the harm physical as opposed to economic? Here, there was no physical harm. It was economic harm. So Factor No. 1 is in USAA's favor.

Factor No. 2: Was the tortious conduct evidence -- did the tortious conduct evidence an indifference to or a reckless disregard for the health or safety of others? No mention or discussion or theory concerning the health or safety of others. Factor No. 2 is in USAA's favor.

Factor No. 3: Was the -- did the target of the conduct have financial vulnerability? And there was no evidence concerning Ms. Hood's financial vulnerability, but we heard that she and her husband are retired. We heard that she has a vacation condo that she was driving to when this accident occurred. So there's no evidence that she was financially vulnerable. In fact, the opposite is true.

Factor No. 4: Did the conduct involve repeated actions or an isolated incident? There's no allegation that -- no evidence, no suggestion that this act occurred before or was anything other than an isolated incident.

And then Factor No. 5: Was the harm the result of intentional malice, trickery, or deceit? And there was no evidence of that. Again, these are people going through the tort system, complying with the scheme that the legislature has set up.

So we don't think any of the factors for reprehensibility apply. Certainly, the vast weight is in USAA's favor. In State Farm vs. Campbell, the United States Supreme Court said the existence of any one of these factors -- the five factors -- weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award, and the absence of all of them renders any award suspect.

It goes on to say that it should be presumed that plaintiff has been made whole for his injuries by compensatory damages. So punitive damages should only be awarded if the defendant's culpability, after paying compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. And that's State Farm vs. Campbell.

So reprehensibility does not apply here. With respect to the disparity between actual or potential harm suffered and the amount of punitive damages, here, there was no actual harm suffered by Ms. Hood because her testimony was she wanted $250,000 in the underlying case but she received over a million. So -- and I think she actually testified that she was not financially harmed by this. In fact, she did better because the case went to trial. So that factor is in USAA's favor.

And finally, these are the Gore guideposts. The third Gore guidepost, after reprehensibility and harm, is the

disparity between the punitive damages and civil penalties in comparable cases. And I think the one thing that Mr. Willey and I agreed in the underlying case was that this was a unique case. There is no law in this state or any other state that looks at the factual scenario that were tried before Your Honor.

So all three of the Gore guideposts indicate that the award of punitive damages in this case was unconstitutional. Additionally, this Court has the authority and the duty under South Carolina 15-32-520 to determine whether the award was the result of the passion or prejudice of the jury, and I do think, when you look at these factors and you look at the actual conduct that was alleged in the case and you look at the award -- the finding that there was no bad faith -- and you compare that with the finding of punitive damages, that those punitive damages had to be inspired by passion or prejudice and the discussion of flooding and the pictures of flooding and the discussion of net worth and billions of dollars, other things to arouse prejudice against insurance companies.

Your Honor, obviously, there are other points addressed in our motion. I'd be happy to discuss any of those or answer any questions you have, but those were the three main topics I wanted to address with Your Honor.

THE COURT: Thank you.

MR. WHELAN: Thank you.

THE COURT: Mr. Willey?

MR. WILLEY: Your Honor, may it please the Court. Roy Willey. I represent the plaintiff on an underlying case. And first of all, I would like to thank Your Honor and Mr. Whelan; I think that the trial of this case was a clean trial under the circumstances. It wasn't -- did bring forth an issue to the jury that we do not typically see jury trials on in South Carolina, and so I appreciate your patience and attention and reading of the law in this case and Mr. Whelan's professionalism.

I would like to rely on the briefs and arguments that I made in the underlying case. I believe that we argued all of these issues before Your Honor both prior to trial and during trial, and so I would rely on those arguments, but I will respond briefly.

The issue of the underinsured motorist statute, 38-77-160, does give a right for the carrier to defend and step into those shoes. But, in so doing, it does not give the carrier carte blanche to defend in away that an ordinary litigant would not be permitted to. And that is what this case brought before the Court. There were essentially two cases arising out of the same wreck where USAA, as the insurance carrier, was involved. The first was this case where they were involved defending on the UIM basis, which was

their million dollars in underinsured coverage payable to Ms. Hood, and then there's the other case, which is actually still pending in Jasper County common pleas which is where they were defending Ms. Hood from a suit bought by the Cooks on the basis of her liability insurance coverage, which would also make them owe a million dollars should it be paid because there's two claimants, Mr. and Mrs. Cook, in that case.

So, in this case, what we ultimately sent to the jury was whether or not an underinsured carrier can take disparate position and whether or not, in so doing, it's fulfilling the duty to the insureds under that contract. And, of course, the jury in this case found that they cannot do that and that it is neglect if they do so.

And so I think that, given the -- and we could go into the statutory law in some of the cases in more detail, but just very basically, when you look at it from what is the purpose -- what is the purpose of the civil justice system, it is to find the truth. And if litigants are permitted to take two disparate positions in two different cases in order to evade the truth of what happened in one situation, that is a breakdown of the civil justice system. And, of course, litigants -- ordinary litigants are not allowed to do that. You are judicially estopped from taking disparate positions in two cases arising out of the same incident.

And so that is what this case really brought to the fore.

So I think, on that basis, in terms of judgment notwithstanding the verdict, again, I would rely on all of my briefs and arguments prior, but I don't think there's any merit to that here.

Second, with respect to the exclusion of or -- yeah, the exclusion of Ms. Hood's testimony in the underlying trial, I would remind the Court that this was their argument. Their argument was that everything that occurred after the filing of the bad faith lawsuit should not be permitted into evidence. And they relied on various cases for that position. Of course we took the position that we could always amend. But in the end, that did not occur, and we went forward basically and tried the case under their wish, which was everything that happened prior to the filing of the bad faith -- quote, bad faith negligence lawsuit, which was the subject of this trial.

And so I don't think that, despite Mr. Whelan's analogy this morning about the revolving door, that any doors were opened. We address this issue in the underlying case. And, again, it was their position that nothing after the filing of that case could come in, and the Court ultimately agreed with them.

And, again, that's on the basis of what the insured knew at the time. That's how the Court got there in the underlying case. Essentially, Your Honor said this case is based on what the insured knew at the time, not what happened later, and

that's how this case is going to be tried and that's how it was tried.

Third, with respect to the punitive damages, I'll start at the end of that argument. The idea that this jury was impassioned, I think, is not supported by the verdict and not supported by Mr. Whelan's argument. He mentioned that there was testimony about the net worth of USAA being in the billions of dollars. We spent a good deal of time talking about billions of dollars in the closing of the case and, ultimately, the jury came back with a punitive damage award on their own accord, which is well within the confines of South Carolina law and is basically a five-time multiplier of the actual damage award. And, of course, that's not what I hoped for. I realize Mr. Whelan had hoped for less than that, but I don't think that we can credibly say that the jury was inflamed or somehow influenced by passion in coming back with that award, given the way that the case was tried.

With respect to the award of punitive damages in the first instance, there's been a lot of conversation that the jury found a reasonable basis for the action, and that's just not true. The jury found that USAA was negligent, and negligence is the act or omission that a reasonable insurance company, in this case, would or would not have taken in that same circumstance. And so the jury found that their actions were not reasonable or else they would not have found

negligence.

In order to get there, Mr. Whelan relies on a compound element of the good faith and fair dealing bad faith definition, but the other part of that is bad faith or unreasonable action. And so, in this case, I think the jury simply found unreasonable action and wasn't willing to assign the label of bad faith, whatever abstract notion they had of that term based upon the judge's instruction.

And so with respect to the guideposts, I think the guideposts in this case are -- the verdict is within those guideposts. How reprehensible was the conduct? And I would take the position that, in a civil society, this is among, frankly, the most reprehensible of conduct. I mean, taking disparate positions which a litigant knows to be false in one instance or the other in two separate cases, simply to try to evade the truth and protect their money is at the very core of the civil justice system. It's why we have it, it's what the jury found they did in this case.

With respect to the harm, there was testimony from Ms. Hood, of course, about the harm that she suffered in having to be called a liar over and over and over again.

Reckless disregard for the health of others, there was testimony about emotional distress. Ultimately, Your Honor ruled that that could not be an element of damages in this case, but that testimony existed.

Financial vulnerability, there was testimony about the amount of medical bills, I believe, and at least the extent of damages from the underlying case, and trickery, you know, this is the ultimate trickery, so to speak.

And so I don't think that USAA gets any benefit from those guideposts or other elements with respect to punitive damages. I think, frankly, that this was kind of a classic punitive damages award, which was well within the confines of what our Supreme Court and the United States Supreme Court had upheld as reasonable, given the actual damages, particularly, I would say, against an insurance company.

And so that's the response that I had with respect to the three points raised this morning. With respect to anything else in the motions, I would rely on prior arguments and briefing, and I'd be glad to respond to anything else or take any questions that Your Honor has for me.

THE COURT: Well, let me ask you this -- and I think that you have answered what your position is with respect to -- the jury came back and said USAA did not breach its duty of good faith and fair dealing and did find negligence. So my first question was what duty did they breach to support the negligence cause of action, which I think you have just answered by saying it's either bad faith or unreasonable action. Is that your response?

MR. WILLEY: Right, that's the reading of the jury charge

that Your Honor gave to the jury. That's directly from the charge. And so I think that that is the crux of the case, and if you would refer back to my closing, that's how I address essentially that bad faith is a heightened, more abstract term, and negligence is just simply unreasonable action. And under the duty, it says "or." And so that is really the crux where you could find one and not the other, given the way that the verdict form, which was, I believe, agreed upon and was laid out in this case.

And so to the extent that there's some dispute that you couldn't find one or the other, I think that should have been raised prior to submitting the verdict form to the jury.

THE COURT: Well, that was -- that really is my next question is, do you see this as an inconsistent verdict where the jury found USAA did not breach its duty of good faith and fair dealing but then found that the plaintiff proved by clear and convincing evidence that USAA's bad faith was intentional, reckless, willful, wanton, or malicious? So they're finding no bad faith and then finding that the bad faith was willful.

MR. WILLEY: Well, I think there's two pieces of that. So under the duty of good faith and fair dealing, it talks about acted in bad faith or unreasonable action. It's not a joint test, the way that it reads. And so I think, in that instance, it's not an inconsistent verdict, given the way that the phraseology occurs in the jury charge.

Now, I'm not here to say the jury totally understood that, but I'm saying that, when you read the jury charges, I do not think that's an inconsistent verdict. And, in fact, on the discussion -- and I don't recall if this was on the record or not -- of the verdict form, that was essentially the discussion that the Court had with us when deciding to include both, which was ultimately, I believe, agreed to by the parties.

THE COURT: And then I guess my last question is -- I don't know if it's really a question, but if the insurer cannot take factually disparate positions -- I mean, in this particular instance, given the differing testimony, the conflicting testimony at the trial about her lights -- I mean, it was a hotly contested issue -- couldn't somebody argue that the unreasonable position to take really was that her lights were on? Given all this other testimony and the fact that she admitted to the lights -- I don't know that she admitted; she conceded that her lights may not have been on -- that, really, the unreasonable position would be, in defending her against the Cooks, to say that, yes, her lights were on.

MR. WILLEY: Well, I think that, ultimately, that is the way that -- Mr. Whelan, essentially, wanted to have it both ways, which is nothing that USAA did after the filing of the bad faith suit could be taken into account in this case, but everything that Ms. Hood did or that her counsel did could be

taken into account. And ultimately, the Court ruled that nothing, after the filing of the bad faith suit, could come into evidence.

And so the question is what did USAA know at the time that it made the decision at the mediation? And the evidence in this case was that they had not one but two expert reports, which indicated that the lights were on.

Now, later there -- you know, what happened at the actual underlying trial in order to essentially absorb that impact by the plaintiff did not come into evidence in this case and was, in fact, requested to be admitted by Mr. Whelan. I mean, he asked that only what happened before the filing of the bad faith suit come into evidence.

And so the question is what did they know at the time, and all they knew at the time is what their experts had told them, which were that the lights were on. That was the report. They had another expert who came in and said, yes, Mr. Poplin's lamp filament analysis test was done correctly. There was no testimony otherwise or to the contrary at that point in time. And, in fact, you're recall that, in this case, they had valuated the case at 250,000 at that time and then only offered 200, despite the fact that nothing else had come to light during that period of time.

So they could not have known what was going to happen at trial, unless USAA has some crystal ball that they haven't

told us about in discovery of this case, which I don't think.

THE COURT: Thank you.

MR. WHELAN: I will say, with respect to that, that that's just not an accurate representation of the facts; that the expert report he's talking about said that her -- he found her high beams were on. And at the time, there was a police report that said she was at fault and that her lights were off. There was all these witnesses who said her lights were off.

The only thing that had not happened yet at that time is that Ms. Hood was still contending that her lights were on. So that's the only thing that changed at trial, was Ms. Hood, and her attorneys -- Mr. Willey said "made a strategic decision," but for whatever reason said, "Okay. Well, maybe my lights were off."

Now, Mr. Willey keeps saying that it was USAA's position that everything that happened after the filing of the bad faith suit was irrelevant, and that's not true and that's not what we argued. What Howard vs. State Farm says is that what happens after the -- that the insurer's conduct after the filing of the bad faith suit is irrelevant to determine reasonableness. But that doesn't mean that information cannot be relevant for other reasons.

For example, the verdict, they got into evidence -- the amount of the verdict, they got into evidence. It was them

who filed a motion in limine, not us, to keep Ms. Hood's testimony out. And we opposed that motion. And Your Honor originally ruled sort of -- had difficultly with that motion -- and I don't mean that --

THE COURT: Oh, no, I completely changed my ruling. You're absolutely right.

MR. WHELAN: So, anyway, it's not correct that it was USAA's position to keep that out. That's not true at all. And Your Honor asked Mr. Willey an important question: What duty did they breach? And his answer was: Bad faith, unreasonable action. And that's not a duty. Unreasonable action isn't a duty.

The duty of good faith and fear dealing is the duty that South Carolina has said arises from the contract of insurance. That's the only one. And it is true that Nichols and his progeny has said that you can show that. You can prove that cause of action through showing unreasonable conduct. And, you know, there's a whole body of law on bad faith. But what it hasn't done is said there is a separate caution of action for negligence, there's a separate duty that supports a cause of action for negligence. That's a question for the Court.

And, again, as I have said, the three cases that we have cited, I'm happy to hand them up to you -- have looked at this and said there is no separate duty under those facts, recognized under South Carolina law.

And Mr. Willey talked about -- he said that the question that went to the jury was whether or not a carrier can take disparate positions. That's a question of law that should be answered by the Court. And he referenced judicial estoppel. Yeah, judicial estoppel exists to keep a party from taking two inconsistent positions, and if it applied in this case, they could have used it but they didn't do it because it doesn't apply in this case, because Mr. Nichols represented Ms. Hood, not USAA. And Ms. Hood is the one who gave deposition testimony. Ms. Hood is the one who answers interrogatories, who answers the complaint all through Mr. Nichols.

And so when he keeps saying what he said below and he says now, USAA took different positions, no. Ms. Hood took that position. She had to do it through Mr. Nichols.

And when Your Honor said was it -- you know, wouldn't it be more unreasonable to say that her lights were on, again, Ms. Hood is the one who we're saying that. Ms. Hood is the one who is testifying in depositions. Chris Nichols cannot. If she says her lights were on, he cannot say her lights were off. Right? I mean, he is her agent.

So I just wanted to address those points, Your Honor.

THE COURT: Thank you.

MR. WHELAN: Thank you.

THE COURT: Mr. Willey, I'll give you one last opportunity, if there's anything else you want to tell me.

MR. WILLEY: No, I would just -- what I would say with respect to the Howard case is that the conduct of the parties to show reasonableness or unreasonableness after the filing was the fact that it was argued, and the Howard case was a very -- there was no dispute about the conduct of the other party.

And so, essentially, what they're saying here is that something Ms. Hood did later made it reasonable for us on the front end to take these disparate positions, and of course that just can't be the case. It's based on what they knew at the time.

And so that was -- the entire argument we had in the underlying case, that's what was argued to the jury, and ultimately, the jury found that, you know, it was not reasonable. And so that's all I would say with respect to that.

THE COURT: All right. Thank you-all so much. Again, I appreciate you coming to Sumter. You have given me some very interesting issues to look at. I will try to get you-all a final ruling on these before I go to Reno for two weeks in October for the judicial college. So I'll try to get you a ruling certainly before I leave town.

MR. WILLEY: Your Honor, I did have some motions as well.

THE COURT: And I'm glad -- if you want to -- I mean, you have got your filings, but I'm glad to hear from you.

MR. WILLEY: Well, I would just briefly say, I think on the additer (ph) motion, I'll rest on the brief on that. I think that, in Mr. Whelan's response to my motions, I wanted to make one thing clear, and I think that the best way to think about it is this: The first question is with respect to the statutory fees under 38-59-40, which would be added to the judgment. And if Your Honor reads 38-59-40, which is liability for attorney's fees where an insurer has refused to pay a claim -- which, by the way, comes under the claims practices title -- that section is clear that if there is a finding on the suit of the contract that the refusal to pay was made without reasonable cause or in bad faith -- there it is again: Without reasonable cause or in bad faith -- the insurer, plan, or corporation is liable in the addition to any sum otherwise recoverable, all reasonable attorney's fees for prosecution of the case.

And so, in this instance, what we would ask for is the contingency of fee which, in this case for us, is more than the third but the statute limits it to a third, and so we would ask for that under the statute. I think it's clearly applicable in this case. The jury has already made that finding.

And so pursuant to the statute, that amount would be added to the judgment. And I would give you three cases that look at that statute, which I notice this morning I don't have

a copy of, but the cite is 310 S.C. 400, which is the Benton case, 332 S.C. 176, and 349 S.C. 394. And those three cases look at the statute specifically with respect to statutory attorney's fees both on a negligence bad faith basis and on a declaratory judgment action.

And I read Mr. Whelan's response to essentially say, "Well, unless it's a declaratory judgment action or a breach of contract action, you can't get the fees." And so those are cases that show you can get it both ways. It's where there's unreasonable action and the refusal to pay, which, in this case, the jury found occurred.

With respect to the Rule 54, this statute deals with costs all the way back to the filing of the bad faith case. And so these are enumerated under Rule 54. You can see what they are. We have submitted with either this or the other the affidavit saying what total court costs are. If Your Honor wants a more delineated list, I'm happy to give it to you, but I think we're entitled to 54 and 68 costs, which I'll talk about in a moment, and so that is the full amount there.

But 54 goes all the way back to the filing of the case and does deal with those six specific categories. Rule 68, which is the offer of judgment rule, deals with costs and interests since the filing and service of that offer. And so there's no dispute in this case that the offer was filed and served. Mr. Whelan has a dispute in his motion about whether

it was served, you know, two weeks after it was filed or something like that, but all that that would do is make the computation of the interest different. And so to the extent the Court needs more information on that, I'm happy to provide it. But I do not have anything in my file indicating that his dates are incorrect, and so I would notate that for the Court.

But what Rule 68 permits, of course, is administrative filing or other court costs. And Mr. Whelan attempts, I think in his response, to conflate 54 and 68, but 68 is more broad in including other court costs. And with respect to that, I would point Your Honor, of course, "other court costs" are not defined in this specific statute, but where they're not defined in one statute, we can look at where the legislature used them in others.

And in 24-27-100 and 24-27-110, the legislature clearly makes the distinction between filing fees and court costs. In fact, this is an inmate litigation statute, but here, they talk about 24-27-100 is filing fees; 24-27-110 is court costs, which is, obviously, a more broad definition. You can also find it in federal statutes with respect to labor and employment in -- let's see -- 29 U.S.C. 216(b), Section 1913 deals with court costs. And of course you can look up just a general definition. But it's our position, under that statute, that we don't just get filing fees. We also get other court costs, which include deposition, trial

preparation, and necessary costs in order to bring the case to trial.

And I think that, if you read those two statutes in conjunction, it's clear why. It's clear that the legislature intended with respect to Rule 54 that, yeah, a defendant may not know at that point that they owe this money. They may need to do some investigation, and so you're only entitled to a very limited number of costs, but with respect to the offer of judgment, which typically come later in the litigation, at that point, the defendant is required to do more than just read the complaint. They're given a period of time in order to investigate, and then additional costs are incurred. And, in fact, in this case, the offer of judgment came much after the filing of the initial lawsuit, and so more information had been obtained at that point.

So that is all I will say with respect to those unless Your Honor has any questions.

THE COURT: Thank you.

Mr. Whelan?

MR. WHELAN: Yeah, Thank you, Your Honor. With respect to Rule 54, Mr. Willey has submitted an affidavit saying that it's discussing, quote, itemized costs, but there are no itemized costs. He simply says that his, quote, expenses are $8,000.

Rule 54 specifies certain taxable costs. I'm sure

CERTIFICATE OF TRANSCRIBER

CASE/NO.: Therese Hood v. USAA

2018-CP-10-6666

DATE OF PROCEEDING: September 26, 2019

I, Bobbi J. Fisher, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

Bobbi fisher

_____

Bobbi J. Fisher, RPR, CET

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Prepared: March 11, 2020

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
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COUNTY OF CHARLESTON	)	DOCKET NO. 2018-CP-10-0666
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THERESE HOOD	)	
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
UNITED SERVICES AUTOMOBILE	)	
ASSOCIATION GIC, et al	}	
	)	
Defendant	)	
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June 20, 2018
Charleston, South Carolina

B E F O R E:

THE HONORABLE JENNIFER B. MCCOY, JUDGE

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PROCEEDINGS

THE COURT: The next matter is Therese Hood versus United Services Automobile Association, GIC. Good afternoon. Are all the parties present wishing to be heard today in this matter?

MR. WHELAN: They are, Your Honor.

THE COURT: All right. It looks like we have three motions; a motion to compel, a motion for summary judgment, I have a plaintiff's motion; it's hard to tell or decipher from here.

MR. WILLEY: It's just two motions, Your Honor.

THE COURT: Just those two?

MR. WILLEY: The two you stated.

MR. WHELAN: There are I think two motions to compel. The first one was a motion to compel a third party compliance with a subpoena.

THE COURT: Okay.

MR. WHELAN: I think that one has been resolved.

THE COURT: Okay.

MR. WHELAN: And so the next one is the defendant's motion for summary judgment and then the plaintiff's have a motion to compel.

THE COURT: Okay. I'm happy to hear those in any order. I've got various documents that have been filed in association with these motions.

MR. WHELAN: The motion for summary judgment was filed first and it probably makes sense to hear that ---

THE COURT: --- I think so, yes ---

MR. WHELAN: --- first if that's okay.

THE COURT: Okay.

MR. WHELAN: Your Honor, Robbie Whelan for USAA. There is I think one thing that Mr. Willey and I will agree on today and that is this is an unusual case with an unusual legal theory.

THE COURT: Okay.

MR. WHELAN: And I'd like to talk about the theory and the facts. I drew up -- may I hand something up, Your Honor?

THE COURT: Of course.

MR. WHELAN: Okay. I drew up a chart.

[Whereupon, Mr. Whelan provides documents to the court]

THE COURT: Thank you.

MR. WHELAN: And what this shows Judge is ---

THE COURT: --- do you want me to mark this as a court's exhibit or?

MR. WHELAN: That would be great.

THE COURT: I'll do that momentarily. Give me one moment. It will be court's 1 -- actually plaintiff's 1 -- no defendant's 1.

[Whereupon, defendant's exhibit number 1 is marked by the court reporter]

THE COURT: All right, defendant's 1.

[Whereupon, defendant's exhibit number 1 is entered into evidence by the court]

MR. WHELAN: Thank you, Judge. So this is a bad faith suit and this is an underlying suit that is at the bottom of this triangle. That is a suit by Ms. Hood against Mr. Johnson and then a counterclaim from Mr. Johnson back against Ms. Hood. And then there is a separate suit by the Cooks against both the Hoods and the Johnsons, okay.

THE COURT: All right.

MR. WHELAN: And I'll get into the facts and I think this will make more sense. This case involves positions taken by defense counsel. And I just wanted to illustrate that Ms. Hood was defended by Chris Nickels. Ms. Hood is a USAA insured. And so USAA hired Mr. Nichels from Clawson and Staubes to defend Ms. Hood from the Cooks suit and also from Mr. Johnson's counterclaim.

And then in the case of Hood v Johnson I think Geico was Johnson's liability insurer and they hired Toland Sams to represent Mr. Johnson. Ultimately Geico tendered their limits and so Jack Daniel stepped in for the UIM carrier, who is USAA. So let me back up to the facts of

the case. So the plaintiff in our bad faith suit is Therese Hood. Therese Hood was driving down 278 at dusk and her lights were either on or they were off and that's at the center of this dispute. As she is driving down the road Mr. Johnson pulls out of a driveway and hits her. So that's the first collision. She crosses the street and then hits the Cooks and that's the second collision.

So there are two sets of suits. The Cooks sue Hood and Johnson saying that one or both of them are at fault. There is a suit by Mr. Cook and there is a suit by Mrs. Cook and those cases are pending right now in Jasper County and subject to trial any day. As I already mentioned Ms. Hood has liability insurance with USAA and they represented Chris Nickels to defend Ms. Hood.

In that suit there is a question of were her lights on or off. A bunch of eyewitnesses say they were off. Mr. Nichels hires an expert witness who opines that they were on. And that expert witness position is essential to the plaintiff's bad faith suit.

Now in the other suit Ms. Hood sues Mr. Johnson and Johnson counterclaims back against Ms. Hood. Then again the central issue is were her lights on or were they off. Mr. Johnson says your lights were off. That's the position taken by Toland Sams for Geico. During the Hood

v Johnson trial -- or not the trial but during the case Geico tenders its limits, gets a covenant not to execute and so at that point USAA's counsel steps into the shoes of Mr. Johnson and defends the case; and that's Jack Daniel.

Now when that happened after Mr. Daniel took over the defense for Mr. Johnson Hoods lawyers, the plaintiff's lawyers, sent a request to admit to Mr. Daniel and it said admit that her lights were on. And in that request to admit and the expert witness opinion procured by Chris Nickels are the two exhibits to this bad faith case. It's what this bad faith case is based on.

And it's the plaintiff's position that Jack Daniel because he was hired by USAA had to admit that the lights on despite the fact that all these eyewitnesses said they were off. And they claim that Mr. Daniel had to admit that they were on simply because USAA was paying Mr. Daniel and because USAA was also paying Chris Nickels to defend Ms. Hood.

So that is the legal theory. There are several different causes of action that are asserted in the complaint. But this much is based, Your Honor, on a matter of law. There is no cause of action that would require or could be based on Mr. Daniel defending the UIM

carrier to the best of his ability. This is controlled by statute. South Carolina Code 38-77-160 controls underinsured motorist coverage. And it says the insurer has the right, the right, to appear and defend in the name of the underinsured motorist. And obviously there is going to be a conflict between the plaintiff and the underinsured motorist carrier. The legislature recognized that and it said, this is in the statute, it says the underinsured motorist insurer may assume control of the defense of action for its own benefit.

So USAA and Jack Daniel when they step into the shoes of Mr. Johnson are defending USAA. They are not defending Ms. Hood. And the plaintiff's position that they have to look out for Ms. Hood's interest or they have to adjust their evidence depending on what Ms. Hood claims is just inconsistent with the statute.

I won't go through them but we cited a few briefs -- excuse me, a few cases in the brief we submitted on Friday, Brew v Watts [phonetic] and there are few others. But they talk about the fact that the statute gives the insurer the right to defend itself. It steps into the shoes of the tortfeasor.

The plaintiff's position is it steps into the shoes of the plaintiff. And I just can't see how Jack Daniel or me or any defense lawyer could step into the shoes of

the tortfeasor and simultaneously look out for the interest of the plaintiff, which is what they are claiming. The complaint as I mentioned has six causes of action. The first is bad faith. Again, we think none of them can survive because of 38-77-160. But beyond that bad faith cannot lie if an insurer has a reasonable basis for the action it undertakes. Here there was a reasonable basis provided by 38-77-160.

I should mention that that Hood v Johnson case went to trial in Jasper County. In the trial there was substantial evidence that Ms. Hood's lights were off. The plaintiff, Mrs. Hood, elected not to call an expert to say that her lights were on and the jury attributed 49 percent of fault to Ms. Hood. There was a 2.5 million dollar verdict reduced by 49 percent. USAA's UIM limits were a million dollars and they tendered this plus interest to the plaintiff.

With respect to breach of contract Lawson v Porter talks about the fact that an insurer has a right to defend a case under 38-77-160. In fact Lawson v Porter says the right to recover UIM benefits does not even arise until a judgment against the underlying tortfeasor. They had sued for barratry and barratry could not apply under these facts that its barratry to defendant a UIM suit and it would render the statute meaningless.

Additionally barratry applies to someone who interferes in a suit between two unrelated parties. That is not the case here. Ms. Hood cannot claim you made me sue you and that is barratry.

The fifth cause of action is outrage. And outrage requires -- I could quote you the language; you know the language. But it requires absolutely abhorrent behavior that is atrocious to a civilized society or something like that. And this is just run of the mill insurance defense. So there is no facts that would support a cause of action for outrage.

And then their last cause of action is negligence per se. This is a little bit of a different cause of action. They claim that USAA's insurance adjusters weren't licensed. They did not have evidence to support that. They filed an opposition to a motion for summary judgment and said well two of the adjusters we talked to may not have been licensed with the South Carolina Department of Insurance.

So I submitted an affidavit in response to that on Friday that said yes, they were licensed. In any event the statute they cite does not give rise to a private cause of action. Thank you, Your Honor.

THE COURT: All right. Thank you so much. Mr. Willey, if you don't mind stating your name for the

record and the party you represent.

MR. WILLEY: Your Honor, Roy Willey, and I represent Therese Hood. And I disagree with just about everything Mr. Whelan said. But I'm going to start with the motion itself because the motion was filed on the basis of USAA not having a duty to the plaintiff. And under the Nichols case and all the progeny UIM carrier like any other insurance carrier has a duty to act in good faith and fair dealing toward its insured. Our allegations in this case are that USAA did not do that for multiple reasons.

Taking disparate positions as to headlights and different cases to protect their own bottom line at the expense and humiliation of Ms. Hood is one of those ways, but it is not the only way. Dragging out a claim is another way that that can give rise. And Mr. Whelan said something interesting which is there has to be a reasonable basis. Well, reasonable basis is a question of fact for a jury to determine whether or not the insurer in this instance acted as a reasonable insurer would.

And in this situation we would obviously argue that they did not. But that's the basis of the motion. Anything else raised today I don't have fair notice of and so it can't come before the court other than the duty

argument and he claims that there are no damages. But as Your Honor knows and we cited it in our memorandum in the Nichols case the plaintiff is entitled to recover consequential damages in a bad faith action against an insurer. Ms. Hood in this case has alleged that she suffered damages including humiliation, going through the litigation process; expenses that she should not have had to endure and those would be recoverable in the case if the jury found that USAA did not act as a reasonable insurer should.

But in this case I'm not even sure we get there because as Your Honor noted I have filed a motion to compel. And let me give you a little procedural history on this case before even Mr. Whelan became involved. And that is that I was associated late in the underlying matter to try the underlying case in Jasper County which we did and got a verdict of two and half million dollars reduced by 49 percent.

And at that time an appeal was filed by USAA and post trial motions and all the rest all of which was taken away. I'm sure if the appeal actually got filed and I'd have to check that. But in any event we filed a bad faith action after that point. And Mr. Whelan became involved and we had a conversation about the case. He said I think your case is crap. I said I think my case

is good. And he said well, let me talk to USAA and see if we can agree on mediation before we go through the full litigation of the bad faith claim, and I said that would be fine. We were able to get a mediation set and we agreed and had a gentleman's agreement not to conduct depositions and further discovery during that period of time despite the fact that I had served discovery in August of 2017. We did not file the motion to compel.

One day I'm sitting in my office with mediation on the horizon and I get a motion for summary judgment in March of this year just before we were to have the mediation that we had agreed upon in this case. I called Robbie and I believe Robbie said you know my client asked me to file it and I had to get the motion filed. And I said I understand but you know we have this outstanding discovery and we haven't done any discovery in the case pursuant to our agreement. And as a result I don't think the motion is proper.

So my motion to compel August 2017 we served discovery September. They filed a motion to stay pending transfer of the underlying cases. An order to transfer venue to Charleston from Jasper was signed in September, but the case was not actually transferred until February the 9th. Before that, even before the case was transferred we had had an agreement to go into an early

mediation without discovery. Despite that March the 12th about a month after the case was transferred the motion for summary judgment was filed and then immediately thereafter I filed this motion to compel discovery responses. The case law is quite clear and we cited it in our ---

THE COURT: --- I don't want to stop you but it's a little bit confusing because you're referring to the case and I think you're referring to two separate cases. So just so I'm clear when you say we were on the horizon for mediation was it for the underlying case ---

MR. WILLEY: --- this case ---

THE COURT: --- or this bad faith case ---

MR. WILLEY: --- this case.

THE COURT: Okay.

MR. WILLEY: So the verdict in the underlying case was rendered prior to this bad faith case law suit being filed.

THE COURT: Okay. Thank you.

MR. WILLEY: We filed this just before the verdict.

THE COURT: Okay.

MR. WILLEY: But we're talking about this case.

THE COURT: Okay.

MR. WILLEY: So this timeline in August we served discovery in this case which we have filed in Jasper

County which is where we allege the bad faith took place since that's where the trial was pending. Judge Mullen in September -- well, a motion was filed to transfer the venue in September. She signed it September 19th saying no, you need to go to Charleston which we had kind of agreed on. It's kind of complicated how we got there but anyway. But it was not transferred, this case, until February of 2018.

THE COURT: Okay.

MR. WILLEY: I still had no discovery responses obviously while we were pending transfer. We had mediation on the horizon, which I can't remember exactly ---

THE COURT: --- has it been mediated?

MR. WILLEY: --- it has been mediated.

THE COURT: Okay.

MR. WILLEY: The early mediation we did with Marvin Infinger. We were not able to reach an agreement mainly because this motion was pending, which is kind of ironic. But in any event March the 12th they filed this motion and immediately thereafter I filed my motion to compel and said basically hey, we had an agreement and we're supposed to not do anything until we mediate. But if this is the route you want to go and litigate I've got to get the discovery responses. Obviously, I need to know

everything USAA knew and when because that all goes into reasonable basis for the positions that they took in the case. So it boils down to this. Does an underinsured motorist carrier have a duty to its insured? Yes, of course it does; the law is clear. Is it possible based on the pleadings in this case that USAA breached that duty to Ms. Hood by dragging on litigation that did not need to drag on by taking disparate positions in different courts to protect their pocketbook.

And the thing that wasn't mentioned in this particular argument is that the checks were actually written by USAA so this is not a litigant situation, it is an insurer situation; they hired the expert, the expert that rendered the opinion. But none of that matters none of that matters because we don't have discovery so it's moot.

But even if we did the basis of the motion on duty is clear. They have a duty; we've alleged they breached it. There are some facts just in the argument that Mr. Whelan made to support that but further discovery is required in order to give us a full and fair opportunity to respond and to complete discovery. And the Beira [phonetic] case is right on point, the Cunningham case. There is a whole litany of cases as Your Honor knows. And so that's our basis. We have fully briefed it in

terms of each of the causes of action. The fact is that Your Honor doesn't need to read, and I hope you didn't spend time reading the full trial transcript because that is not really relevant to what we are arguing today because the bad faith goes deeper than that and it's beyond that and we need the discovery in order to be able to litigate this case properly. I think it's pretty clear but I would be happy to answer any questions the court has.

THE COURT: Okay. What do you say about, address briefly if you don't mind his argument as to the statute 38, the underinsured motorists statute 38-77-160, and the underinsured duty with respect to the -- under -- insurer's duty with respect to the insured.

MR. WILLEY: He is -- his statement, and in fact we cited that statute in our memo. The insurer does have a right to defend the case but they do not have a right to defend the case in bad faith or in an otherwise negligent manner. The Nichols case, Nichols v State Farm 279 S.C. 336 speaks directly to that.

And it says if an insured can demonstrate bad faith or unreasonable action by an insurer in processing a claim under their mutually binding insurance contract she can recover damages in a court action. That's exactly what we allege here; that they were unreasonable and

committed bad faith in processing and litigating the claim for a variety of reasons. As a result Ms. Hood was damaged. So while they have a right to defend they do not have carte blanche to take disparate positions to commit fraud on the court, to take you know inconsistent positions to protect their money at the expense of their insured. They have a duty to act in good faith and in fair dealing as to their dealings with their insured even when they are defending an action from that insured.

And we've cited the UIM cases that clearly provide the law in terms of allowing an action against an underinsured carrier or a first party -- it's called a first party bad faith action. There is a whole section on it in the insurance book. It wouldn't exist if it didn't, if it wasn't possible.

And we've brought these cases many times. I've never -- I don't recall ever having defended the argument that a UIM carrier has no duty and they can do what they want pursuant to the statute. It's just not consistent with the case law.

THE COURT: All right.

MR. WHELAN: Thank you, Your Honor. Just to clarify we're not taking the position that an insurer does not have a duty. That is not what we say. Our motion says that the duty sought to be imposed by the

plaintiff is not recognized under South Carolina contract, negligence or bad faith law. The plaintiff has an obligation is response to our motion to not rest on the pleadings but to provide facts that support for their theory. They have filed a 12 or 14 page memorandum in opposition. I think there is about 300 pages of exhibits that are attached to that.

And the only thing they allege is that or the only facts they have is what Mr. Willey just called inconsistent positions, disparate positions and fraud on the court he said. And that goes to this request to admit and Mr. Daniel maintaining that Ms. Hood's lights were off.

Both parties, Your Honor, have attached the trial transcript as exhibits to the motion. I have pulled out just a very few pages of excerpts. May I approach and hand up these excerpts?

THE COURT: Yes.

[Whereupon, Mr. Whelan provides documents to the court]

THE COURT: Do you want these marked?

MR. WHELAN: It's not necessary; they're in the record.

THE COURT: Okay.

MR. WHELAN: Thank you. So Your Honor, these are

witnesses in this trial. The plaintiff called I'm not sure how many witnesses and the defense called one. And I pulled these pages because they concern whether her lights were off or on. And again the plaintiff claims that the fraud on the court was claiming that the lights were off.

The very first page is an excerpt for the plaintiff's witness Mr. Lee. He says that the headlights were not on. The second page is an excerpt of Officer Welch [phonetic] called by the plaintiff. And there are two pages here 246 and 247. Officer Welch [phonetic] said the headlights were not on. And that's when she arrived. She didn't see the wreck but when she arrived afterwards her dashboard camera showed the lights were off.

The next page 285 the plaintiff's witness Mr. Cook: Question: Now Mr. Cook in this case your testimony is no headlights, right? Answer: Yes, sir. The next page is Mr. Johnson at page 304: I didn't see no headlights. The next is Ms. Hood herself at page 496.

And here plaintiff's counsel says: Now Ms. Hood we've heard from a lot of people this week, people saying no headlights but running lights, Ms. Hood that is the testimony and we have heard that over and over again are you going to disagree with that. And her answer was:

No, I'm not. Then the next page is page 556. This was the defense's single witness. This is Carey Tanraft [phonetic]. And Carey Tanraft [phonetic] said that he did not see headlights and he told the officers that because it was important and it was dark outside.

And then I saved the best for last, Your Honor, and that's page 553. This is plaintiff counsel Kevin Smith who tried the case with Mr. Willey. I quote from Mr. Smith, quote: If this witness is going to testify that Ms. Hood did not have her headlights on we'd stipulate to that; period end quote. So they're claiming it was bad faith for USAA to say Ms. Hood's headlights were off. We went into trial and when I read the transcript I was shocked to see they stipulated her headlights were off.

With respect to the discovery the discovery was served in August of 2017. At that time both of the lawsuits on my diagram were pending. The Cook case had not gone to trial yet. So we filed a motion to stay discovery pending the resolution of the Hood lawsuit and both Cook lawsuits. I'm not sure why that motion was not scheduled today but it is pending.

And the point here is that if the plaintiffs are allowed to proceed under this theory, if they are filing a suit concerning actions taken in two underlying suits then we need to wait until those suits conclude to

conduct discovery. I don't see how you can do discovery on these suits while they are pending. The Hood suit has concluded. The Cook suit has not although I understand it should be set for trial soon. And then the other point on discovery is and I'm going to quote from the plaintiff's brief at page 5 where they are citing the Ginneken [phonetic] case but there are many cases that say the same thing.

A party that claims summary judgment is premature because she has not been provided a full and fair opportunity of discovery must advance a good reason why time was insufficient under the facts of this of this case -- that doesn't apply -- but they must advance why further discovery would uncover additional relevant evidence and create a genuine issue of fact, of material fact.

And in this case the plaintiffs have not said I need to learn this or I need to learn that. They have -- the only thing they have said in response to our motion is a disparate position. Mr. Willey made reference to USAA dragging out a claim. There has been no evidence of that provided to Your Honor. In fact the case was just litigated and there is no evidence that it was dragged out, and therefore summary judgment is appropriate on each of the plaintiff's causes of action.

MR. WILLEY: Your Honor, if I may briefly?

THE COURT: Sure.

MR. WILLEY: The elements for a bad faith negligent insurance action is what we should call it or the existence of a contract of insurance between the parties, which we have, refusal by the insurer to pay benefits due under the contract, which we have, resulting from the insurer's bad faith or unreasonable action, which is a jury question, causing damage to the insured, which we have.

This transcript doesn't mean anything because the facts that we need to uncover in discovery are what USAA knew, when they knew it, what their claims file showed, what they decisions in not paying the case or paying the claim were based upon, why they chose to drag out the litigation. And I can go through each of these and tell you why they aren't relevant. I mean Mr. Lee for example admits he didn't see her car at the time of the wreck. This is talking about minutes before the wreck for example ---

THE COURT: --- I realize these are out of context ---

MR. WILLEY: --- but the ---

THE COURT: --- let me ask you something real quick and I don't mean to interrupt tell me is this under a

scheduling order right now at all this current case?

MR. WILLEY: No. The current case ---

THE COURT: --- there is no pending scheduling order ---

MR. WILLEY: --- I don't think it is and part of the reason on the unreasonable time ---

THE COURT: --- it's not that old ---

MR. WILLEY: --- I had forgotten he's correct that they did file a motion to stay discovery, which I had forgotten about that which initially got our conversation going. But there is the unreasonable time. I mean there is a motion to stay discovery pending and I was thinking a motion to compel discovery is pending and so we've had zero opportunity to do anything.

And the question in the case what did USAA know about the claim, when did they know it, what did their agents do in response to it. I need all of that information. I need the claims file. I now have the file from one of the lawyers. I need the full and complete file from the lawyers.

I need to take depositions of the adjusters and what they knew because frankly what came out at trial doesn't mean a hill of beans if they didn't have that in their file as knowledge before. And I can tell you that what's in their file is they paid an expert to go out and do a

landfill of an analysis test who said her lights were off. So whether or not they had anything to contradict that prior we need to know. That's what ---

THE COURT: --- I'm not going to grant them a motion for summary judgment today. I think it is premature given what has not happened in the case. I know it's really not that old of a case necessarily relatively. You're not under a current scheduling order.

I'm going to dismiss it without prejudice. In other words you can bring it back at a later time after some more discovery has been conducted, okay. And I don't know -- do y'all need -- I don't think a formal order really is going to be required. Do the parties consent to a form order just simply stating that the motion is denied without prejudice to...

MR. WHELAN: That's fine, Your Honor ---

THE COURT: --- or with leave I could say without prejudice and leave to renew at a later time during ---

MR. WILLEY: --- that's fine. And the other motion before Your Honor is my motion to compel ---

THE COURT: --- right. And I mean giving my reasoning for the denial of summary judgment is that nothing is there -- we can go forward with it if you want to.

MR. WILLEY: I just need an order compelling them

to respond. I don't have any responses.

THE COURT: Well, apparently there is a pending motion to stay discovery. So I don't know; it's not showing up on this roster ---

MR. WILLEY: --- and I believe ---

THE COURT: --- was it filed in Jasper ---

MR. WILLEY: --- it was filed in Jasper ---

THE COURT: --- and not transferred is probably what happened.

MR. WHELAN: Your Honor, I think that is going to take care of itself when this Cook case resolves. And I don't know but you may know better than I but I think it's going to be relatively soon.

MR. WILLEY: I don't need anything right now for the Cook case. I need the claims file in this case so that I can start identifying an expert as I work through the claims file in this case.

I'm fine if he wants to put on a privilege log everything about the Cooks case and say it will be provided once that case wraps up I'm fine with that. But as to this case which is resolved they've already written a check and all that. We need this claims file and the files related to this case.

THE COURT: Well, I'll just state that it's -- defendant will have 30 days to respond as he would. Now

you're on notice that we're moving forward. So now you have 30 days to respond to the plaintiff's discovery requests.

MR. WHELAN: Okay. And Your Honor, there are 90 some discovery requests including subparts. Obviously I'm going to have objections to some of those. You're not ruling on ---

THE COURT: --- I'm not ruling on individual pieces at this point in time. I mean I understand you have sufficient reasoning for not responding to date. I don't think opposing counsel, I mean you understand ---

MR. WILLEY: --- oh, of course I want sanctions.

THE COURT: I'm not going to do that today. So anyway I'll state that the motion to compel is granted and I'm not issuing any fees or costs or anything like that against you; just 30 days to respond as you would during the course of normal discovery proceedings.

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

THE COURT: And of course I encourage y'all to keep up the communication. Any extensions you grant between yourselves are fine.

MR. WHELAN: We will. Thank you, Judge.

THE COURT: Thank you.

********END OF TRANSCRIPT OF RECORD********

C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Charleston County, South Carolina on the 20th day of June, 2018.

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

July 9, 2018

Joyce C. Rueger, CVR-M
Court Reporter

The Numbers

Being financially strong enables USAA to better serve our members every day. In 2017, USAA carefully managed its financial resources to fulfill our commitments, whether that involved helping thousands of members recover from devastating storms, paying claims or investing in technologies and expertise to keep member transactions convenient and safe.

Despite an extraordinary hurricane season that included three Category 4 storms and wildfires that devastated parts of California, USAA strengthened its financial foundation. USAA achieved solid earnings, increased net worth and was able to return more than $1.5 billion to members in the form of distributions, dividends, bank rebates and rewards. In addition, all three major credit rating agencies continue to give USAA very strong ratings for financial strength.

USAA's financial strength allowed us to pay out nearly

$15 BILLION

in total claims—

while still returning more than

$1.5 BILLION

to you in distributions, dividends, bank rebates and rewards—

and standing strong at over

$30 BILLION

in Net Worth.

Management's Responsibility For Financial Reporting

The management of USAA is responsible for the integrity and objectivity of the financial information presented in this annual report. Due to the volume of financial information contained in the audited consolidated financial statements, including the accompanying footnotes, we have chosen not to include the full audited consolidated financial statements in this Report to Members.

The financial statements that appear in this document have been selected from the audited consolidated financial statements to give basic and necessary financial information about USAA. Certain prior-year amounts were reclassified to conform to the current-year presentation. The selected financial information was prepared by USAA in accordance with Generally Accepted Accounting Principles (GAAP), except for key statutory data, which was prepared in accordance with Statutory Accounting Principles (SAP). Management believes the financial information contained in the audited consolidated financial statements fairly presents USAA's financial position, results of operations, and cash flows. A copy of the complete audited consolidated financial statements of USAA, including Ernst & Young LLP's unqualified independent auditor's report thereon, is available upon request to USAA headquarters in San Antonio.

USAA's internal controls are designed to reasonably ensure that USAA's assets are safeguarded from unauthorized use or disposition and that USAA's transactions are authorized, executed and recorded properly. In addition, USAA has a professional staff of internal auditors who monitor these controls on an independent basis. The Finance and Audit Committee of USAA's Board of Directors engaged Ernst & Young LLP as independent auditors to audit USAA's financial statements and express an opinion thereon. Ernst & Young LLP's audit included consideration of USAA's internal controls over financial reporting as a basis for designing audit procedures that support their financial statement audit opinion, but not for the purpose of expressing an opinion on the effectiveness of USAA's internal controls over financial reporting. The Finance and Audit Committee of USAA's Board of Directors consists of members who are not officers or employees of USAA. This committee meets periodically with management, internal auditors and Ernst & Young LLP to ensure that management fulfills its responsibility for accounting controls and preparation of the consolidated financial statements and related data.

Stuart Parker
Chief Executive Officer

Laura Bishop
Chief Financial Officer

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Consolidated Statements of Comprehensive Income

USAA reported $2.4 billion in net income, up 36 percent from 2016. This was in a year we faced another record catastrophe season and paid out more than $2 billion to thousands of members who relied on USAA to recover from multiple natural disasters. In addition, non-catastrophe losses increased as a result of normal growth in the number of auto policies, industry-wide trends in rising costs for auto parts and repairs and an increase in the number of homeowner claims.

Even with these higher losses, USAA operations remain solid, as reflected by increasing premium growth and healthy member retention. Our diverse business model—including banking, life insurance, and investment management operations—all helped contribute positively to USAA's net income. The strong stock and commercial real-estate markets, along with improved bond yields—a result of higher interest rates—helped propel USAA's investment income to $3.2 billion.

Normal growth in our business, as well as continued investments in the future, led to increased expenses. These investments included tools and resources to enhance the member experience and to achieve the highest service levels as well as capabilities to ensure member information is secure from cyberattacks. We are also building the tools, processes and expertise required to make sure USAA remains fully compliant in an increasingly complex regulatory landscape.

Thanks to USAA's conservative financial management, we kept overall expense ratios low. Our Property and Casualty Company achieved an operating expense ratio approximately 17 percent better than the industry.

Years ended Dec. 31 (dollars in millions)	2015	2016	**2017**
REVENUES			
Insurance premiums, net	$ 16,786	$ 18,287	**$ 20,093**
Investment returns:			
Interest and dividends earned, net	1,937	2,147	**2,433**
Gains (losses) on investments, net	(100)	295	**793**
Total investment return	1,837	2,442	**3,226**
Gains on sale of loans, net	368	650	**542**
Fees, sales and loan income, net	4,365	4,651	**5,093**
Real estate operations	382	499	**428**
Other income (e.g., miscellaneous product services and fees)	623	602	**634**
Total revenues	24,361	27,131	**30,016**
LOSSES, BENEFITS AND EXPENSES			
Net losses, benefits and settlement expenses	14,559	17,177	**18,371**
Deferred policy acquisition costs	555	594	**641**
Real estate expenses	190	221	**136**
Interest expense	218	208	**193**
Dividends to policyholders	179	118	**142**
Other operating expenses (e.g., personnel, IT costs, loan losses, premium taxes)	5,972	6,576	**7,309**
Total losses, benefits and expenses	21,673	24,894	**26,792**
Pretax income	2,688	2,237	**3,224**
Income tax expense	422	458	**802**
NET INCOME	$ 2,266	$ 1,779	**$ 2,422**
Other comprehensive income (loss), net of tax	(224)	94	**139**
TOTAL COMPREHENSIVE INCOME	$ 2,042	$ 1,873	**$ 2,561**

Consolidated Balance Sheets

Net worth is one of the best measures of USAA's financial strength and stability and helps ensure our ability to meet the commitments we make to our members. In 2017, net worth increased 6 percent to over $30 billion, primarily from our solid net income.

Assets grew over 5 percent to $155 billion. This increase was driven in part by an almost 11 percent growth in investments that benefited from strong equity market appreciation and cash inflows from member deposits, as well as continued product growth.

Years ended Dec. 31 (dollars in millions)	2015	2016	**2017**
ASSETS			
Cash and cash equivalents	$ 10,378	$ 12,456	**$ 12,288**
Investments	66,008	71,892	**79,512**
Loans, net	46,505	47,664	**47,342**
Premiums due from policyholders	3,156	3,504	**3,999**
Property, equipment and software, net	1,691	1,874	**1,971**
Securities lending collateral	171	200	**63**
Other assets (e.g., accounts receivable, pension plans)	9,166	9,700	**10,216**
TOTAL ASSETS	$ 137,075	$ 147,290	**$ 155,391**
LIABILITIES			
Insurance reserves	$ 21,082	$ 23,001	**$ 25,054**
Life insurance - funds on deposit	18,208	19,070	**19,658**
Bank deposits	62,549	68,130	**70,882**
Borrowings	2,127	2,470	**2,834**
Securities lending payable	171	200	**63**
Other liabilities (e.g., accounts payable, benefit plan obligations)	5,164	5.579	**6,292**
TOTAL LIABILITIES	$ 109,301	$ 118,450	**$ 124,783**
NET WORTH			
Total net worth	27,774	28,840	**30,608**
TOTAL LIABILITIES AND NET WORTH	$ 137,075	$ 147,290	**$ 155,391**

Member Distributions

When USAA succeeds, we like to share that success with our members. One of the features of our membership—and a key way to reward the loyalty of our members—is returning money to our members in the form of distributions, dividends, bank rebates and rewards.

In 2017, USAA returned more than $1.5 billion to our members, an 8 percent increase over 2016. In the past 20 years, we've returned no less than 20 percent of profits to members through distributions and policyholder dividends.

Years ended Dec. 31 (dollars in millions)	2015	2016	**2017**
Subscriber's Account distributions	$ 468	$ 246	**$ 299**
Senior Bonus distributions*	259	277	**283**
Subscriber's Account terminations	181	197	**210**
Automobile policyholder dividends	134	72	**97**
Total property and casualty distributions	1,042	792	**889**
Life insurance policyholder dividends	45	46	**45**
Bank rebates and rewards	579	602	**622**
TOTAL DISTRIBUTIONS TO MEMBERS**	$ 1,666	$ 1,440	**$ 1,556**

Past dividends or distributions are not a guarantee or promise of future dividends or distributions.
*Senior Bonus distributions represent additional Subscriber's Account distributions for eligible members of the association with more than 40 years of membership.
**Includes amounts returned to members, associates and other customers.

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PLAINTIFF'S
EXHIBIT
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PLAINTIFF'S EXHIBIT 3 1776

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Ex 3

Case Costs Therese Hood

Date	Provider	Description	Amount
12/22/14	IOD, Inc.	MUSC records	$ 54.00
12/29/14	HealthPort	Memorial Univ records	$ 85.52
12/29/14	MMRA	Hilton Head records	$ 61.87
12/30/14	Central EMS	records	$ 45.97
12/30/14	UniHealth Post Acute Care	records	$ 108.50
01/15/15	Mullen Investigations	professional services	$ 250.00
01/27/15	Shoreline	record/bill	$ 25.00
02/18/15	RecordQuest	Savannah Cardiology bill	$ 31.46
03/06/15	Tobin Bone and Joint Surgery	records	$ 29.00
03/13/15	Jasper County Clerk of Court	filing fee	$ 150.00
04/07/15	Mullen Investigations	process service fee	$ 290.00
04/07/15	Apollo MD Business Services, LLC	itemized bill	$ 15.00
05/22/15	SC Dept of Insurance	service fee	$ 10.00
05/26/15	RecordQuest	Lowcountry Ortho recs	$ 47.66
06/01/15	RecordQuest	Charleston ENT	$ 40.16
06/02/15	Bactes	Chatham Ortho Assoc	$ 30.71
06/05/15	Mullen Investigations	professional services	$ 50.00
06/18/15	HealthPort	Neuro Institute of Sav.	$ 37.62
11/13/15	IOD, Inc.	MUSC updates	$ 40.34
01/25/16	IOD, Inc.	MUSC updates	$ 43.15
02/05/16	Clark & Associates	Def depo transcript	$ 357.65
05/09/16	A.William Roberts, Jr. & Assoc.	client & officer depo	$ 616.05
06/01/16	Sprint	subpoena docs	$ 80.00
06/02/16	Russell Investigations	skip trace for phone #s	$ 140.00
06/10/16	Palmetto Anesthesia of Charleston	billing	$ 18.25
06/13/16	Clemson Sports Medicine & Rehab	records/billing	$ 17.60
06/16/16	Coastal Focus	focus group facility	$ 250.00
07/06/16	IOD, Inc.	MUSC - EMS report	$ 27.51
07/12/16	IOD, Inc.	MUSC report	$ 2.81
08/04/16	RecordQuest	Lowcountry updates	$ 38.78
09/12/16	Jasper County Clerk of Court	motion fee - CSO	$ 25.00
11/11/16	RecordQuest	Lowcountry updates	$ 35.01
01/04/17	Haynesworth, Sinkler, and Boyd	mediation	$ 1,165.75
01/09/17	Engineering Experts, Inc.	professional services	$ 882.86
01/20/17	Dixon Hughes Goodman	retainer	$ 2,500.00
01/23/17	Dr. Habib Rizk	conference	$ 500.00
02/08/17	Engineering Experts, Inc.	material preparation	$ 49.00
02/28/17	Jasper County Clerk of Courts	motion fee - online	$ 31.74
03/02/17	Poplin Engineering	professional services	$ 464.00
03/07/17	Engineering Experts, Inc.	professional services	$ 4,540.58
03/21/17	A.William Roberts, Jr. & Assoc.	videos for Kucks depo	$ 850.50
03/21/17	Clark & Associates	transcript of Rizk depo	$ 207.95
03/23/17	Clark & Associates	Rizk video depo DVD	$ 1,013.20
04/04/17	Clark & Associates	Poplin depo transcript	$ 692.45

04/07/17	Engineering Experts, Inc.	professional services	$	1,665.00
04/10/17	AT&T Subpoena Compliance	subpoena docs	$	55.00
04/12/17	Clark & Associates	Hanlon depo copy	$	438.00
04/18/17	IOD, Inc.	MUSC updates	$	34.94
05/02/17	Clark & Associates	Dr. Jaskwhich transcript	$	247.50
05/04/17	Focus Group	Focus Group Participants	$	910.00
05/08/17	Engineering Experts, Inc.	deposition	$	2,221.00
05/09/17	Clark & Associates	Richardson depo copy	$	390.25
05/10/17	Lowcountry Ortho	Dr. J conf on 4/12	$	385.00
05/12/17	Schenker and Associates	powerpoint	$	275.00
05/12/17	Applied Building Sciences	expert retainer	$	1,500.00
06/27/17	Pratt Memorial Library	focus group facility	$	37.50
07/06/17	Pratt Memorial Library	focus group facility	$	37.50
07/14/17	Focus Group	Focus Group Participants	$	900.00
08/01/17	Pratt Memorial Library	focus group facility	$	75.00
08/07/17	RecordQuest	Lowcountry Ortho recs	$	31.61
08/09/17	Quality Inn & Suites	KBS hotel for trial	$	429.58
08/11/17	Focus Group	focus group participants	$	960.00
08/16/17	Applied Building Sciences	professional services	$	1,483.00
08/18/17	Trident Anesthesia Group, LLC	palmetto anesthesia bill	$	15.65
08/28/17	Mullen Investigations	service of process	$	1,330.00
08/28/17	Russell Investigations	service of process	$	1,061.50
09/08/17	Clark & Associates	Borsendowski transcript	$	261.30
09/08/17	Engineering Experts, Inc.	professional services	$	60.00
09/14/17	Amanda Stearns	trial supplies	$	211.31
09/15/17	AWR & Associates	Jaskwhich depo	$	722.58
09/15/17	Clark & Associates	Cary Tanrath depo	$	98.80
09/20/17	Applied Building Sciences	trial testimony	$	3,639.67
09/22/17	Office Depot	trial exhibits	$	309.56
10/03/17	AWR & Associates	Tami Melnick transcript	$	588.55
10/05/17	Lustig Consulting, LLC	LCP	$	9,153.50
10/05/17	Mona Manley	Hood trial transcript	$	2,112.50
10/09/17	Engineering Experts, Inc.	professional services	$	1,110.00
11/03/17	AWR & Associates	Tami Melnick transcript	$	348.75
		Total Costs	$	49,052.20

2018-CP-10-00666

Therese Hood

V.

United Services

1 of 1 BOXES

PLAINTIFF'S EXHIBIT 3

PLAINTIFF'S EXHIBIT

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2018-CP-10-00666

Therese Hood

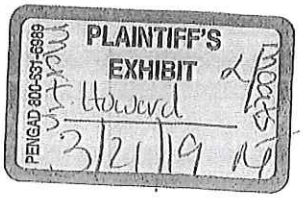
V.

United Services

1 of 1 BOXES

View History - Underinsured Motorists - THERESE HOOD - DRI IV

Date and Time	Updated By	Description	Status	Assigned To	Reserve	Message	Lawsuit	Lien	Deductible Waived
03/17/2017 08:19 AM CT	G1934	Coverage selected	Open	4291 05	$250,000		Yes	Yes	
03/17/2017 07:58 AM CT	42569	Coverage selected	Open	4253 01	$250,000		Yes	Yes	
01/15/2017 10:09 PM CT	42569	Coverage selected	Open	4253 01	$250,000		Yes	Yes	
11/15/2016 07:45 AM CT	42569	Coverage selected	Open	4253 01	$250,000		Yes	Yes	
10/17/2016 12:47 PM CT	33661	Coverage selected	Open	4253 01	$250,000		Yes	Yes	
10/17/2016 11:03 AM CT	42569	Coverage selected	Open	4253 01	$250,000		Yes	Yes	
09/15/2016 05:23 PM CT	42569	Coverage selected	Open	4253 01	$250,000		Yes		
08/24/2016 10:10 AM CT	33661	Coverage selected	Open	4253 01	$250,000		Yes		
08/08/2016 10:40 AM CT	42569	Coverage selected	Open	4253 01	$100,000		Yes		
06/06/2016 08:10 AM CT	42569	Coverage selected	Open	4253 01	$100,000		Yes		
04/03/2016 09:14 PM CT	42569	Coverage selected	Open	4253 01	$100,000		Yes		
02/01/2016 08:11 AM CT	42569	Coverage selected	Open	4253 01	$100,000		Yes		
11/25/2015 11:24 AM CT	42569	Coverage selected	Open	4253 01	$100,000		Yes		
09/23/2015 07:51 AM CT	42569	Coverage selected	Open	4253 01	$100,000		Yes		
07/23/2015 09:34 AM CT	42569	Coverage selected	Open	4253 01	$100,000		Yes		
07/01/2015 05:35 AM CT	System	Coverage selected	Open	4253 01	$100,000		Yes		
06/22/2015 03:06 PM CT	27316	Coverage selected	Open	4231 21	$100,000		Yes		
06/22/2015 01:10 PM CT	M0085	Coverage selected	Open	7984 13	$100,000		Yes		
06/22/2015 06:54 AM CT	46902	Coverage selected	Open	7984 13	$100,000				
05/21/2015 12:53 PM CT	46902	Coverage selected	Open	7984 13	$100,000				



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POPLIN ENGINEERING

ENGINEERING ANALYSIS OF ACCIDENTS

Vehicle Accident: Kuck v. Hood, et al.

Date of Accident: 11/07/14

W Poplin File Number: PT047

Engineer

Woodrow M. Poplin, M.S.E., P.E.

W Poplin Engineering LLC
PO Box 210
Wadmalaw Island, SC 29487

(843) 559-8801
(800) 567-5868
wpoplin.com

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POPLIN ENGINEERING
ENGINEERING ANALYSIS OF ACCIDENTS

August 12, 2016

REPORT TO: Mr. Chris Nichols
Clawson and Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492

FROM: Woodrow M. Poplin, M.S.E., P.E.
W Poplin Engineering LLC

REFERENCE: Vehicle Accident: Kuck v. Hood, et al.
Date of Accident: 11/07/14
W Poplin File Number: PT047

INTRODUCTION

In follow up to your request, a vehicle inspection has been conducted on a 2011 Chevrolet Equinox sport utility vehicle that was involved in a three vehicle accident on US Highway 278 in Beaufort County, South Carolina. The accident occurred at approximately 5:59 p.m. on November 7, 2014. It is understood that there has been some dispute regarding whether or not the Chevrolet Equinox was being operated with its headlamps illuminated at the time of the accident. The objective of this investigation has been to examine the 2011 Chevrolet Equinox with the primary purpose of determining what the physical evidence indicates regarding the status of the headlamps at the time of collision.

The vehicle in question is identified as a four-door bluish gray 2011 Chevrolet Equinox LT sport utility vehicle. The 2011 Chevrolet Equinox was inspected on July 18, 2016 at the facilities of Co-Parts in Savannah, Georgia. Representative photographs of the Chevrolet Equinox as it appeared at that time are presented in Figs 1 – 6. The entire sequence of

photographs taken during the inspection are presented in electronic format on the computer disk attached as part of this report. The Chevrolet Equinox is further identified as follows:

VIN number:	2CNFLPE54B6418470
Model Year:	2011
Make:	Chevrolet
Model:	Equinox
Trim Level:	LT
Body Type:	4 Door Wagon
Engine:	V6, 3.0L; FFV; VVT
Fuel:	Gasoline/E85
Drive Line:	Front wheel drive
Brake System:	Hydraulic
Restraint System:	Dual Air Bag; Active belts-Manual; Front Seat Side (1^{st} row); Roof Side (All seating rows)
Assembly Plant:	Ingersoll, Ontario, Canada

As can be seen in the photographs, the Chevrolet Equinox has minor collision damage in the passenger side and it has been extensively damaged in the front. The collision damage is offset toward the driver side. The driver side lighting assemblies were involved in the collision contact and are broken and crushed. Because of the offset collision, the area surrounding the passenger side lighting was not directly involved in the collision contact. However, the lamp assembly had separated from its mounting position and was not present on the front of the vehicle. An intact lighting assembly was found in the passenger compartment (Fig. 7). Identification markings on the lighting assembly identified it as a passenger side lighting assembly for a General Motors vehicle. The Chevrolet brand is part of the General Motors Corporation. The shape of the lighting assembly matches the pattern of the 2011 Chevrolet Equinox. It does not match the pattern of the other General Motors vehicle in the accident, a 2007 Chevrolet Tahoe. Data from the web searches to confirm the lighting assembly patterns is attached in Appendix I.

The passenger side lighting assembly contained three intact individual lamps. These are identified as a) a single filament high beam lamp, b) a single filament low beam lamp and c) a twin filament lamp in which the larger filament is utilized as a turn signal and the smaller filament as a marker (park) lamp. The marker lamp filament can be energized without the headlamps, but is always energized whenever the headlamps are also energized.

Whenever a lamp is illuminated, the tungsten filament is heated and becomes relatively malleable under the inertial forces of a collision. As it is manufactured, the individual lamp filament consist of a uniformly coiled tungsten wire. If the lamp is not illuminated, the inertial forces necessary to significantly deform a cold filament are not typically encountered outside areas of direct contact. Significant filament deformation was found in the passenger side high beam headlamp shown in Figs. 8 – 9 and in the passenger marker lamp filament shown in Figs. 10 - 11. It is therefore concluded that both of these filaments were illuminated at the time of the collision. The passenger side turn signal filament (Fig. 11) and the passenger side low beam headlamp filament (Fig. 12 - 13) exhibit no deformation indicating that they were not illuminated at the time of the collision.

On the driver side, as a result of the collision damage all of the lighting was missing except for the one broken headlamp shown in Figs. 14 - 16. The base for the high beam and low beam lamps is different so that they are not interchangeable. The pattern of the base and the wiring indicate that the broken lamp on the driver side is the high beam lamp. The outer glass envelope is broken away and one of the filament support posts has been torn from the base. The filament is intact. It has significant axial deformation to the coils and is discolored from oxidation that occurred when the glass envelope was broken and the heated filament was exposed to the oxygen in the atmosphere. It is therefore concluded that the condition of the high beam filament on the driver side also indicates that it was illuminated at the time of the collision.

The 2011 Chevrolet Equinox is equipped with an airbag control module that records some of the operating parameters of the vehicle in the seconds prior to the collision. As part of the inspection of the vehicle, data was electronically downloaded from the airbag control module. This data suggests that the 2011 Chevrolet Equinox was traveling at an indicated speed of approximately 62 miles an hour as it approached collision. The data recovered from the Chevrolet Equinox airbag control module is attached as Appendix II.

Also as part of this investigation, the timing of sunset and civil twilight was checked with the US Naval Observatory website for the latitude and longitude of the accident as provided in the South Carolina traffic collision report. Sunset is reported at 5:28 p.m. and the end of civil twilight at 5:53 p.m. South Carolina requires that vehicles operate with illuminated headlamps beginning 30 minutes after sunset, a time of 5:58 p.m. on the day of the accident.

In summary, inspection of the 2011 Chevrolet Equinox forward lighting provided conclusive evidence that the high beam headlamps on both sides of the vehicle were illuminated at the time of the collision.

Woodrow M. Poplin, P.E.

Transcript from recorded interview with 04 - William Kuck Claim # 0381534410101056

Data from original recording

IART=04 - William Kuck
ICMT=Interview by .
ICOP=11/12/2014 4:16:16 PM
IGNR=GEICO Claim File Recorded Interview
IKEY=0381534410101056
IMED=Digital voice
INAM= at computer M2143106
IPRD=Recorder
ISBJ=0381534410101056 04 - William Kuck
ISFT=Pauses - None
ISRF=Recorded from Phone

Transcription text

THIS IS SALITA COOPER INTERVIEWING BY TELEPHONE FROM 478 621 1693 ON NOVEMBER 12TH, 2014 AT 4:16 P.M.

Q. WOULD YOU PLEASE STATE YOUR FULL NAME
A. WILLIAM L. KUCK K U C K

Q. AND DO YOU UNDERSTAND THIS INTERVIEW IS BEING RECORDED
A. YES MA'AM

Q. IS THIS RECORDING BEING MADE WITH YOUR PERMISSION
A. YES MA'AM

Q. AND DO I HAVE YOUR PERMISSION TO SHARE THIS INTERVIEW WITH OTHER GEICO ADJUSTERS
A. UH YES MA'AM

Q. AND FOR SECURITY PURPOSE CAN YOU VERIFY YOUR DATE OF BIRTH
A. AUGUST 29TH, 1952

Q. AND ARE YOU SINGLE OR MARRIED

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Q. WHAT COLOR IS THIS TAHOE
A. IT'S A DARK BLUE GREEN LOOKING

Q. OKAY AND YOU SAID YOU HAD ONE PASSENGER
A. YES MA'AM MY WIFE

Q. AND DO YOU REMEMBER THE OTHER CAR IN THIS ACCIDENT
A. NO MA'AM ALL I SEEN WAS HEADLIGHTS COMING AT ME

Q. IN YOUR OWN WORDS CAN YOU TELL US AS FAR AS YOU CAN REMEMBER WHAT HAPPENED
A. WE WAS GOING DOWN THE TWO LANE HIGHWAY AND WHICH ... WE WAS GOING DOWN THE TWO LANE HIGHWAY AND ALL I SAW WAS TWO HEADLIGHTS WAS COMING AT US AND THAT'S WHEN WE HIT AND THAT'S ABOUT IT

Q. OKAY AND
A. IN MY LANE

Q. AND THE ...
A. ONCOMING ...

Q. ACCIDENT OCCURRED IN ... IN YOUR WERE YOU IN THE LEFT OR THE RIGHT LANE
A. LEFT

Q. (SHORT PAUSE) ...
A. BUT IT WOULDN'T NOTHING I COULD DO CAUSE SHE CAME SO FAST AT US I MEAN THERE WOULDN'T A THING I COULD DO

Q. OKAY SO WAS THIS ALMOST LIKE A HEAD ON COLLISION
A. IT WAS HEAD ON

Q. OKAY DO YOU KNOW WHAT CAUSED THIS OR DID THE OTHER PARTY SEE YOU
A. ONLY THING I CAN TELL YOU CAUSE IS SHE WAS IN THE WRONG LANE JUST HIT US HEAD ON I MEAN THAT'S ALL I KNOW I DID NOT TALK WITH ANYBODY COPS UH ANYBODY DRIVING VEHICLES OR ANYTHING CAUSE THEY TOOK US ON TO THE HOSPITAL

Q. OKAY UHM DO YOU KNOW IF ANOTHER CAR WAS INVOLVED
A. ONLY THING I HEARD SOMEBODY SAY IT'S THREE VEHICLES

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Q. AND YOU HAD YOUR SEATBELT ON
A. YES MA'AM

Q. AND WHAT DID THEY DO AT HILTON HEAD REGIONAL HOSPITAL
A. TOOK ALL KIND OF X-RAYS AND EVERYTHING THEY COULD TAKE AND KIND OF WIPED UP ALL THE BRUISES AND CUTS ___ AND RELEASED US ___ AT THAT TIME IT SEEMED MY FOOT WAS NOT THEY DIDN'T SEE A BREAK BUT THEN THE NEXT DAY I WENT TO THE HOSPITAL HERE IN COLUMBIA AND THEY SHOWED THREE BREAKS IN MY FOOT AND I'VE BEEN BACK AND FORTH TO THE DOCTOR EVER SINCE THE WRECK AND THE HOSPITAL FOR PAIN AND TRYING TO FIGURE OUT ALL WHAT TO DO

Q. AND DO YOU HAVE ANY PLANS FOR FOLLOW UP TREATMENTS OR
A. OH YEAH

Q. (INAUDIBLE)
A. YEAH I GOT TO GO BACK MONDAY AND ___ TAKE MORE X-RAYS AND THEY LOOKING ___ SOME BOLTS OR SCREWS IN MY FOOT

Q. DO YOU KNOW WHAT HAVE THEY GIVEN YOU A DIAGNOSIS OR ARE THEY SAYING WHAT THE SITUATION IS
A. WELL I GOT A BROKE FOOT I GOT A CRACKED BONE IN ... IN MY CHEST AND I GOT PULLED MUSCLES AND EVERYTHING IN MY NECK MY LOWER RIGHT BACK AND MY RIGHT SHOULDER AND RIGHT ARM I CAN'T HARDLY PICK IT UP AND I GOT SOME REAL BAD BURNS AND BRUISES ON MY RIGHT HAND AND LEFT

Q. AND ARE YOU CURRENTLY EMPLOYED
A. UH RIGHT NOW I'M OUT OF WORK I MEAN FROM THE WRECK

Q. OKAY
A. I CAN'T WORK

Q. ALRIGHT AND IT'S DUE TO THE ACCIDENT
A. YES MA'AM

Q. SO YOU'VE BEEN OUT OF WORK SINCE THE DATE OF THE ACCIDENT
A. YES MA'AM

Q. AND WHAT TYPE OF WORK DO YOU DO OR WHERE DO YOU WORK
A. I WORK AT A RESTAURANT I WAS A MANAGER OF A RESTAURANT

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OKAY AND THIS IS SALITA COOPER-WYNN AND I'M NOW DISCONNECTING

A. **OKAY**

THE RECORDING

A. **OKAY COOPER WHAT WYNN ...**

SCW/mlm

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LITIGATION DEFENSE BUDGET

Date:	**October 21, 2015**
Insured:	**USAA as UIM Carrier**
Case:	**Therese Hood v. Antoine Johnson**
Claim #:	**11043223-7**
ALIS #:	**2015-13866**
Responsible Partner:	**Jackson H. Daniel, III**

INITIAL PLEADINGS:

Review the file, correspondence and associated documents
Review the existing pleadings filed
Evaluation of potential dispositive motions
Removal of action

Total = 6 Projected Costs = $870

WRITTEN DISCOVERY:

Initial meeting(s) with client and opposing counsel
Interrogatories
Requests for Production
Response to Interrogatories and Requests for Production
Supplemental Discovery Request and Responses (if applicable)
Subpoenaed documentation (if applicable)

Total = 10 – 15 Projected Costs = $1,450 - $2,175

DEPOSITIONS:

Plaintiff

Defendant Antoine Johnson

William Legare Kuck

1 – 2 eyewitnesses

Plaintiff's treating physicians

Defendant's treating physicians

Plaintiff's Expert (if necessary)

Additional witnesses as deemed necessary

Total = 5-7 depositions,
4 ½ hrs each, including preparation Projected Costs = $2,900 - $3,262

DOCUMENT MANAGEMENT:

Total = 10 – 14 Projected Costs = $1,450 - $4,060

EXPERT COSTS:

Projected Costs = None projected at this time

MOTION PRACTICE:

Total = 2 – 4 Projected Costs = $290 - $580

ADR:

If applicable, 6-10 hours for preparation for and attending ADR session.

Projected Cost = $870 - $1,450

PRETRIAL:

Prepare Trial and Trial Materials
Prepare Witnesses

Total = 12 - 26 Projected Costs = $1,740 - $3,770

TRIAL:

Approximately 1 – 1.5 days of trial

Total = 14 - 26 Projected Costs = $2,030 - $3,770

MISCELLANEOUS:

Total = 10-18 Projected Costs = $1,450 - $2,610

TOTAL cost of defense estimate = $13,050 - $22,547

October 21, 2015
DATE

ID 150CK Murdaugh

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)
)
William Kuck,)
Plaintiff(s))
)
vs.)
)
Therese Hood and Antoine Johnson.)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET
2016-CP-27-0124

2016 MAR 23 AM 10:3
JASPER COUNTY, S.C.

Submitted By: R. Alexander Murdaugh
Address: P.O. Box 457
Hampton, SC 29924

SC Bar #: 6996
Telephone #: (803) 914-2007
Fax #: (803) 914-2014
Other:
E-mail: amurdaugh@pmped.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

☒ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/ Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199) _____

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-NI-_____-_____

- ☐ Notice/ File Med Mal (230)
- ☐ Other (299) _____

Torts – Personal Injury
- ☐ Conversion (310)
- ☒ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399) _____

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499) _____

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599) _____

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture---Consent Order (850)
- ☐ Other (899) _____

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799) _____

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999) _____

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699) _____
- ☐ Sexual Predator (510)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)

PLAINTIFF'S EXHIBIT 11 12/26/19 MV
PENGAD 800-631-6989

Submitting Party Signature: _____ **Date:** 3/9/2016

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

1793

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

1794

STATE OF SOUTH CAROLINA	)	IN THE MAGISTRATE COURT
	)	
COUNTY OF JASPER	)	C/A NO.: 2016-CP-27-084
	)	
William Kuck,	)	
	)	
Plaintiff,	)	
	)	**SUMMONS**
-vs-	)	**(Jury Trial Demanded)**
	)	
Therese Hood and Antoine Johnson.	)	
	)	
Defendant.	)	

2016 MAR 29 AM 10:33
CLERK OF COURT
JASPER COUNTY SC

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscribed at their office, 101 Mulberry Street East, Hampton, South Carolina within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in this Complaint.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: _____

R. Alexander Murdaugh
Post Office Box 457
Hampton, SC 29924
(803) 943-2111

~and~

Shane M. Burroughs
Justin T. Bamberg
LANIER & BURROUGHS, LLC
Post Office Drawer 2789
Orangeburg, SC 29116
(803) 268-9800

ATTORNEYS FOR PLAINTIFF

Hampton, South Carolina
March 9, 2016

POSTED BY DATE MAR 29 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO.: 2016-CP-27-[illegible]
COUNTY OF JASPER	)	
	)	
William Kuck,	)	
	)	
Plaintiff,	)	
	)	**COMPLAINT**
vs.	)	**(Jury Trial Demanded)**
	)	
Therese Hood and Antoine Johnson,	)	
	)	
Defendants.	)	
	)	

2016 FEB 29 P 12:35
JASPER COUNTY SC

Now comes the Plaintiff complaining of the Defendants herein who would allege and state as follows:

PARTIES

1. That the Plaintiff William Kuck (hereinafter "Plaintiff") is a resident of the County of Orangeburg, State of South Carolina.

2. That upon information and belief, Defendant Therese Hood (hereinafter "Defendant Hood") is, and was at all relevant times herein, a citizen and resident of Berkley County, South Carolina.

3. That upon information and belief, Defendant Antoine Johnson (hereinafter "Defendant Johnson") is, and was at all relevant times herein, a citizen and resident of Jasper County, South Carolina.

FACUTAL ALLEGATIONS

4. That on or about November 7, 2014, Plaintiff was operating his vehicle traveling west on U.S. Highway-278 in Beaufort County, State of South Carolina and stopped at a traffic light; Defendant Johnson was traveling in a easterly direction and attempted to cross U.S. Highway-278 and was struck by Defendant Hood who was operating her vehicle with no head lamps illuminated; Defendant Hood proceeded to drive through a median and strike the Plaintiff's vehicle causing a head-on collision.

POSTED MAR 29 2016

FOR A FIRST CAUSE OF ACTION
AS TO DEFENDANT THRESE HOOD

5. That each and every allegation of Paragraphs 1 through 4 above is hereby realleged and reiterated as if fully set out herein.

6. That as a result of Defendant Hood's negligence, recklessness, carelessness, willfulness, wantonness, and gross negligence in the operation of their vehicles, the Plaintiff received serious injuries causing the Plaintiff to be under the care of a doctor, to incur medical expenses, to experience severe excruciating pain, that the Plaintiff has suffered serious injuries which have and will in the future cause him to endure great physical pain, suffering, mental anguish, emotional distress, and ultimately cause the Plaintiff to incur future medical bills.

7. That Defendant Hood was negligent, careless, reckless, grossly negligent, willful and wanton at the time and place above mentioned in the following particulars, to wit:

a) In operating her vehicle in an unlawful and reckless manner;

b) In driving too fast for conditions;

c) In failing to properly illuminate her headlamps/lights on the vehicle in which she was operating; as required by §S.C. Code Ann. 56-5-4450.

d) In failing to maintain a proper lookout;

e) In failing to apply her brakes, if she had any;

f) In failing to keep proper control of her vehicle;

g) In failing to take evasive action to avoid the collision;

h) In operating her vehicle in utter disregard for the safety of others on the highway;

i) In failing to obey the traffic laws;

j) In failing to exercise the degree of care that a reasonably prudent person would have exercised under the same or similar circumstances; and

k) In such other and further particulars that the evidence in trial may show;

8. All of which combined and concurred as a direct and proximate cause of the injuries and damages sustained by Plaintiff herein, said acts being in violation of the statutes and laws of the State of South Carolina.

9. That as a direct and proximate cause of the aforementioned negligence, of Defendant Hood, the Plaintiff was injured in the following particulars; he was caused to suffer personal injuries, he has been forced to incur doctor and medical bills, he has been forced much mental anguish and physical pain, he has been caused to lose enjoyment of life and that his injuries are serious in nature and pursuant to Section 19-1-150 of the Code of Laws of the State of South Carolina, he will continue to incur damages into the future all to the Plaintiff's damages in an amount to be determined by the trier of fact.

FOR A FIRST CAUSE OF ACTION
AS TO DEFENDANT ANTOINE JOHNSON

10. That each and every allegation of Paragraphs 1 through 9 above is hereby realleged and reiterated as if fully set out herein.

11. That as a result of Defendant Johnson's negligence, recklessness, carelessness, willfulness, wantonness, and gross negligence in the operation of his vehicle, the Plaintiff received serious and permanent injuries causing the Plaintiff to be under the care of a doctor, to incur medical expenses, to experience severe excruciating pain, that the Plaintiff has suffered serious and permanent injuries which have and will in the future cause him to endure great physical pain, suffering, mental anguish, emotional distress, and ultimately cause the Plaintiff to incur future medical bills and lead to his loss wages.

12. That Defendant Johnson was negligent, careless, reckless, grossly negligent, willful and wanton at the time and place above mentioned in the following particulars, to wit:

a) In failing to maintain a proper lookout;

b) In failing to apply his brakes, if he had any;

c) In failing to keep proper control of his vehicle;

d) In failing to obey the traffic laws;

e) In operating his vehicle in utter disregard for the safety of others on the highway;

f) In failing to take evasive action to avoid colliding with Defendant Hood;

g) In failing to exercise the degree of care that a reasonably prudent person would have exercised under the same or similar circumstances; and

h) In such other and further particulars that the evidence in trial may show;

13. All of which combined and concurred as a direct and proximate cause of the injuries and damages sustained by Plaintiff herein, said acts being in violation of the statutes and laws of the State of South Carolina.

14. That as a direct and proximate cause of the aforementioned negligence, of Defendant Johnson, the Plaintiff was injured in the following particulars; he was caused to suffer personal injuries, he has been forced to incur doctor and medical bills, he has been forced much mental anguish and physical pain, he has been caused to lose enjoyment of life and that his injuries are permanent in nature and pursuant to Section 19-1-150 of the Code of Laws of the State of South Carolina, he will continue to incur damages into the future all to the Plaintiff's damages in an amount to be determined by the trier of fact.

WHEREFORE, the Plaintiff prays for judgment against Defendant Therese Hood and Defendant Antoine Johnson for actual damages and for punitive damages as may be determined by the trier of fact, the cost of this action and for such other and further relief as this Court may deem just and proper.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: _____

R. Alexander Murdaugh
Post Office Box 457
Hampton, SC 29924
(803) 943-2111

~and~

Shane M. Burroughs
Justin T. Bamberg
LANIER & BURROUGHS, LLC
Post Office Drawer 2789
Orangeburg, SC 29116
(803) 268-9800

ATTORNEYS FOR PLAINTIFF

Hampton, South Carolina
March 9, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF JASPER	)	CASE NO.: 2015-CP-27-00119
	)	
THERESE HOOD,	)	
	)	
Plaintiff,	)	**UIM CARRIER'S RESPONSES TO PLAINTIFF'S FIRST REQUEST FOR ADMISSION**
	)	
v.	)	
	)	
ANTOINE JOHNSON,	)	
	)	
Defendant.	)	

TO: KEVIN B. SMITH, ESQUIRE, ATTORNEY FOR PLAINTIFF

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, UIM Carrier USAA General Indemnity Company on behalf of Defendant, reserving the right to amend and/or supplement, hereby responds to Plaintiff's First Request for Admission to Defendant's UIM Carrier, as follows:

1. Admit that Plaintiff, Therese Hood, was operating her vehicle with her headlamps illuminated at the time of the collision.

RESPONSE: Denied.

Respectfully submitted,

CARLOCK COPELAND & STAIR, LLP

By: _____

JACKSON H. DANIEL, III
State Bar No.:70308

MADISON B. SUTTIE
State Bar No.: 101385

40 Calhoun Street, Suite 400
Charleston, SC 29401-3531
843-727-0307

Attorneys for USAA General Indemnity Company appearing pursuant to S.C. Code §38-77-160 on behalf of Defendant

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

William Kuck,

Plaintiff,

vs.

Therese Hood and Antoine Johnson,

Defendants.

IN THE COURT OF COMMON PLEASE
FOR THE FOURTEENTH JUDICIAL
CIRCUIT

CASE NO.: 2016-CP-27-0124

ANSWER OF DEFENDANT THERESE HOOD
(Jury Trial Demanded)

TO: R. ALEXANDER MURDAUGH, ATTORNEY FOR PLAINTIFF MARY ELIZABETH KUCK

The Defendant, Therese Hood, answering the Complaint of the Plaintiff, above named, and responding to the allegations as follows:

1. Each and every allegation of the Complaint which is not specifically admitted, qualified or explained is denied and strict proof is demanded thereof.

2. Upon information and belief, Defendant Therese Hood admits the allegations contained in Paragraph 1 of the Complaint.

3. Defendant Therese Hood admits the allegations contained in Paragraph 2 of the Complaint.

4. Upon information and belief, Defendant Therese Hood admits the allegations contained in Paragraph 3 of the Complaint.

5. Defendant Therese Hood admits so much of the allegations of Paragraph 4 of the Complaint as alleges that the accident occurred on November 7, 2014 on U.S. Highway 278 in Beaufort County, State of South Carolina. As to the remaining allegations of Paragraph 4, Defendant Therese Hood denies same and demands strict proof thereof.

6. A response is not required for Paragraph 5 of the Complaint. However, in the event that a response is required, Defendant Therese Hood denies the allegations contained in Paragraph 5 of the Complaint and demands strict proof thereof.

7. Defendant Therese Hood denies the allegations contained in Paragraph 6 of the Complaint and demands strict proof thereof.

8. Defendant Therese Hood denies the allegations contained in Paragraph 7 of the Complaint and demands strict proof thereof.

9. Defendant Therese Hood denies the allegations contained in Paragraph 8 of the Complaint and demands strict proof thereof.

10. Defendant Therese Hood denies the allegations contained in Paragraph 9 of the Complaint and demands strict proof thereof.

11. A response is not required for Paragraph 10 of the Complaint. However, in the event that a response is required, Defendant Therese Hood denies the allegations contained in Paragraph 5 of the Complaint and demands strict proof thereof.

12. Defendant Therese Hood admits so much of the allegations of Paragraph 11 of the Complaint as alleges that Defendant Antoine Johnson failed to yield and keep a proper lookout. Defendant Therese Hood lacks sufficient information upon which to admit or deny the remaining allegations of Paragraph 11 of the Complaint and, therefore, denies same and demands strict proof thereof.

13. Defendant Therese Hood admits so much of the allegations of Paragraph 12 of the Complaint as alleges that Defendant Antoine Johnson failed to yield and keep a proper lookout. Defendant Therese Hood lacks sufficient information upon which to admit or deny the remaining allegations of Paragraph 12 of the Complaint and, therefore, denies same and demands strict proof thereof.

14. Defendant Therese Hood denies the allegations of Paragraph 12 of the Complaint and denies strict proof thereof.

15. Defendant Therese Hood lacks sufficient information upon which to admit or deny the allegations of Paragraph 14 of the Complaint and, therefore, denies same and demands strict proof thereof.

FOR A FIRST DEFENSE
(Reservation and Non-Waiver)

16. The allegations contained in the preceding paragraphs are incorporated herein as if fully repeated verbatim.

17. Defendant has not had an opportunity to conduct a thorough investigation or to engage in sufficient discovery regarding the circumstances of the Plaintiff's allegations. Accordingly, Defendant reserves the right to amend this Answer to assert additional defenses as may arise during the discovery process.

FOR A SECOND DEFENSE
(Intervening & Superseding Negligence)

18. The allegations contained in the preceding paragraphs are incorporated herein as if fully repeated verbatim.

19. That if the Defendant was negligent, which is specifically denied, the injuries and damages sustained by the Plaintiff, if any, were due to and caused by and were the direct and proximate result of the intervening and superseding negligence, carelessness, recklessness, willfulness and wantonness of others. This defense is asserted as a complete and total defense to all claims.

FOR A THIRD DEFENSE
(Bifurcated Jury Trial)

20. The allegations contained in the preceding paragraphs are incorporated herein as if fully repeated verbatim.

21. To the extent punitive damages are claimed, the Defendant demands a bifurcated jury trial pursuant to S.C. Code Ann. §15-32-520 and that said damages, if any, are limited to three times the amount of compensatory damages, or the sum of $500,000.00, whichever is greater, if any.

FOR A FOURTH DEFENSE
(Negligence of Third Party)

22. The allegations contained in the preceding paragraphs are incorporated herein as if fully repeated verbatim.

23. Plaintiff's alleged injuries were directly and proximately caused by a party other than this Defendant, who cannot be held liable for the negligence of others.

WHEREFORE, having fully answered the Complaint of the Plaintiff, the Defendant Therese Hood prays for a trial by jury and that the Plaintiff's Complaint be dismissed, together with the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper.

CLAWSON and STAUBES, LLC

Christopher W. Nickels
Bar No.: 68601
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
Phone: (843) 577-2026
Fax: (843) 722-2867
Email: cnickels@clawsonandstaubes.com
Attorney for Defendant Therese Hood

Charleston, South Carolina

May _____, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF JASPER	)	CASE NO.: 2015-CP-27-119
THERESE HOOD,	)	
Plaintiff,	)	
vs.	)	**NOTICE OF APPEARANCE AND CONDITIONAL ANSWER OF UIM CARRIER TO PLAINTIFF'S COMPLAINT**
ANTOINE JOHNSON,	)	
Defendant.	)	

2015 JUL -7 AM 9:12

PLEASE TAKE NOTICE that the undersigned attorney hereby appears on behalf of USAA General Indemnity Company, in the above-entitled action and gives notice that upon settlement between the liability insurer for Defendant Antoine Johnson and Plaintiff, the underinsured motorist carrier may appear in the name of the Defendant, and provide a defense. The underinsured motorist carrier requests that copies of all pleadings and discovery in this action by all parties be served upon the undersigned at the address given below. The underinsured motorist carrier specifically demands a trial by a jury, pursuant to Rule 38 of the South Carolina Rules of Civil Procedure. The undersigned further states that he and his law firm at the time do not represent the Defendant and are not currently undertaking said representation, but are specifically reserving the option to assume control of the defense pursuant to the underinsured motorist statute should the carrier(s) choose to exercise that option.

This appearance is made pursuant to S.C. Code §38-77-160. To the extent that a responsive pleading is required on behalf of the Defendant, the undersigned denies each and every allegation of the Complaint, asserts those affirmative defenses set forth in Rule 8 of the South Carolina Rules of Civil Procedure, contests service and personal jurisdiction, and raises

PLAINTIFF'S EXHIBIT 1 6/27/19 PENGAD 800-631-6989

POSTED BY DATE 7/8/15

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those defenses set forth in Rule 12 of the South Carolina Rules of Civil Procedure, all to the extent they are applicable.

The undersigned reserves the right to file a full answer at such time it assumes the defense of this case or thereafter.

In filing this notice, USAA General Indemnity Company makes no representations or admissions as to the existence, applicability, or amount of any insurance coverage.

This 2nd day of July, 2015.

Respectfully submitted,

CARLOCK COPELAND & STAIR, LLP

By: Jackson H. Daniel III
JACKSON H. DANIEL, III
State Bar No.:70308
MADISON B. SUTTIE
State Bar No.: 101385

Attorneys for USAA General Indemnity Company appearing pursuant to S.C. Code §38-77-160 on behalf of the Defendant

40 Calhoun Street, Suite 400
Charleston, South Carolina 29401-3531
843-727-0307

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	FOURTEENTH JUDICIAL CIRCUIT
THERESE HOOD,	)	Case No. 2017-CP-27-00073
Plaintiff,	)	
vs.	)	**DEFENDANT'S ANSWERS TO PLAINTIFF'S FIRST AND SUPPLEMENTAL INTERROGATORIES**
UNITED SERVICES AUTOMOBILE ASSOCIATION,	)	
Defendant.	)	

Pursuant to SCRCP 33, United Services Automobile Association ("USAA") answers the Plaintiff's Interrogatories, as follows:

STANDARD INTERROGATORIES

1. Give the names, addresses, and telephone numbers of persons who may be witnesses concerning the facts of this action or who have knowledge of relevant facts concerning this incident, indicate whether or not written or recorded statements have been taken from these witnesses, and indicate who has possession of such statements.

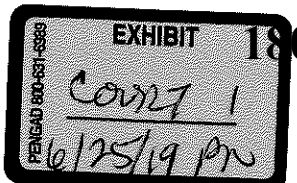
ANSWER:

(a) Therese Hood. The Plaintiff may have knowledge concerning her claims and damages in this lawsuit.

(b) The following employees of USAA had responsibility for the Plaintiff's UIM claim: Kathy Moats, claims litigation manager; Ronald Vestal, director, litigation operations; Diane Martin, auto examiner.

(c) The Defendant reserves the right to rely on witnesses identified by the Plaintiff discovery responses.

A statement of Ms. Hood is located at Hood_USAA_0088 through 0094.



2. For each person listed in response to Interrogatory No. 1, set forth either a summary sufficient to inform Plaintiff of the important facts known to or observed by such witnesses or, if applicable, provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: Please see the Answer to Interrogatory No. 1.

3. Set forth a list of photographs, plats, sketches, or other prepared documents in possession of Defendant or its attorney that relate to the claim(s) or defense(s) in this case.

ANSWER: Photographs of the vehicles and/or the scene may be located in the claim file. Upon information and belief, no plats or sketches have been prepared. USAA objects to "other prepared documents" as vague and overbroad. Further answering, USAA objects to this interrogatory to the extent that it seeks information protected by the attorney-client privilege or work product doctrine.

4. Set forth the names and addresses of all insurance companies which have liability insurance coverage or property damage coverage relating to this cause of action, and set forth the number or numbers of the policies involved, and the amount or amounts of liability coverage provided in each policy.

ANSWER: Not applicable.

5. List the names, addresses, and telephone numbers of any individual whom you propose to use as an expert witness at the trial of this action, and for each state in detail his/her qualifications to testify, the substance of his/her opinions, and the basis for his/her opinions.

ANSWER: USAA has not identified an expert at this time but reserves the right to do so.

1808

6. If Defendant is improperly identified, give the proper identification and state whether Defendant's attorney will accept service of an amended pleading reflecting the correct information.

ANSWER: **Not applicable.**

FIRST SUPPLEMENTAL INTERROGATORIES

1. List any and all individuals that were/are responsible for the automobile insurance claims made regarding the November 7, 2014, collision. Please include specifically the local agent, any supervisors (from any branch offices, regional offices, and national offices), claim reviewers, claim adjusters, claim investigators, claim experts, and any other individual otherwise involved in reviewing, adjusting, or investigating any claim regarding the November 7, 2014, collision.

ANSWER: **USAA objects to the extent that this interrogatory seeks information beyond the Plaintiff's claim for UIM benefits. Otherwise, please see the Answer to Interrogatory No. 1, above. This was a three-car accident involving four occupants, which led to multiple claims for bodily injury coverage, underinsured motorists coverage and property damage. USAA objects to producing information on other claims as they are not relevant to the Plaintiff's suit, and contain confidential, privileged and otherwise protected information of third-parties.**

2. List the name of any experts or witnesses spoken to by the investigators, adjusters, or claim reviewers during the processing and valuation of any claims related to the November 7, 2014, collision, and indicate whether any written or recorded statements have been taken and who is in possession of such statements.

ANSWER: **Interrogatory No. 2 is vague. However, as USAA understands this interrogatory, no expert witnesses were spoken to by USAA's adjusters or claim reviewers for the purposes of processing or valuing the Plaintiff's claim for UIM benefits. Additionally, USAA refers to the objections stated in Interrogatory No. 1.**

3. List the name, current mailing address, and phone number(s) of each person or entity to which any insurance adjuster, claim representative, supervisor, or other employee of Defendant has spoken or written while investigating any claim arising from the November 7, 2014, collision, and indicate whether such consultation was recorded or reduced to writing, and indicate who is in possession of the writing or recording.

ANSWER: **Communications concerning the Plaintiff's claim for UIM benefits would be reflected in the log notes being produced. USAA objects to this request with respect to claims beyond the Plaintiff's claim for UIM benefits. This was a three-car accident involving four occupants, which led to multiple claims for bodily injury coverage, underinsured motorists coverage and property damage. USAA objects to producing information on other claims as they are not relevant to the Plaintiff's suit, and contain confidential, privileged and otherwise protected information of third-parties. Additionally, USAA refers to the objections stated in Interrogatory No. 1. USAA also objects to the extent this interrogatory seeks information protected by the attorney-client privilege or work-product doctrine.**

4. Please describe, in detail, Defendant's routine process for handling claims when timely submitted by Defendant's insureds.

ANSWER: **USAA handles claims on an individual basis based on the merit of those claims. Further answering, USAA objects to request number 4 as it is overbroad,**

vague, and not reasonably calculated to lead to the discovery of admissible evidence. Additionally, this request seeks proprietary, confidential information.

5. Please describe in full any departures from routine practices in the handling of any and all claims arising from the November 7, 2014, collision, and the justifications, if any, for such departures from established processing routines.

ANSWER: **Please see the Answer to Interrogatory No. 4, above. Additionally, USAA refers to the objections stated in Interrogatory No. 1.**

6. State what facts were known to all claims adjusters, investigators, and experts involved any claims arising from the November 7, 2014, collision, and set forth the circumstances under which any determinations were made by these individuals in the course of their respective involvement in said claims.

ANSWER: **USAA objects to the extent that this interrogatory seeks information beyond the Plaintiff's claim for UIM benefits. Otherwise, please see the Answer to Interrogatory No. 1, above. This was a three-car accident involving four occupants, which led to multiple claims for bodily injury coverage, underinsured motorists coverage and property damage. USAA objects to producing information on other claims as they are not relevant to the Plaintiff's suit, and contain confidential, privileged and otherwise protected information of third-parties. Further answering and without waiving this objection, please see the claim file for the Plaintiff's UIM claim.**

7. To what extent are employees of Defendant rewarded for the inexpensive disbursement of claims, measured by total payouts or payouts as a percentage of reserves, or other similar system? Describe any bonus systems that reward employees for such conduct.

ANSWER: **USAA objects to this interrogatory as vague, overbroad, and not reasonably calculated to lead to the discovery of admissible evidence. Further answering and without waiving these objections, USAA's claims adjusters are not awarded bonuses or otherwise compensated based on a measurement of total payouts, payouts as a percentage of reserves, or other similar system.**

8. Have the claims practices of Defendant ever been evaluated by the insurance commissioner of any state for fraudulent or bad faith practices in the past? If so please include the disposition of those investigations, the circumstances that led to those investigations, including the location and date(s) of each investigation.

ANSWER: **USAA objects to this interrogatory as it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. It could not lead to the discovery of admissible evidence in this matter and is the epitome of a fishing expedition. Additionally it is not limited to the issue in this case, and is unlimited in time and geographical scope.**

9. List the title and case name of any other bad faith or fraud claims made against Defendant or its subsidiaries, whether pending or previously adjudicated. Please include the party names, the date of trial, the disposition of the case, and the case number for each claim.

ANSWER: **Please see the Answer to Interrogatory No. 8, above.**

10. What is the amount of the reserve set on Plaintiff's claim?

ANSWER: **Objection, reserve information is irrelevant to this case. Further answering, please see the claim file being produced with respect to the Plaintiff's UIM claim.**

11. List specifically the reasons for the denial of Plaintiff's claim. Include in detail the process that is used and what factors led to the denial.

ANSWER: **The Plaintiff's claim was not denied.**

12. Describe the process by which Defendant determines the amount of reserves for each claim and, in particular, describe the process that was used to determine any reserve for Plaintiff's claim.

ANSWER: **This interrogatory is not reasonably calculated to lead to the discovery of admissible evidence, particularly as this case does not concern reserves, and it is overbroad and vague. Additionally, it seeks proprietary, confidential information, and information protected by the attorney-client privilege and the work product doctrine.**

13. If an electronic program is used in calculating the reserve amount, provide the name of the program, the company that designed the program, and the process that is used by that program in determining the reserve amount. Include specifically what variables are entered into the program, the formula used by the program, and the type of result produced (whether it is a single value, a range or has any qualitative descriptors).

ANSWER: **Please see the answer to interrogatory number 12, above.**

14. Describe in detail the data retention plan for claims that are in dispute. Your answer should describe the general policy and specifically what measure have been implemented to maintain the integrity of Plaintiff's claim file.

ANSWER: **USAA objects to this interrogatory as it is vague and overbroad. Further answering and without waiving these objections, claim files in litigation are maintained for seven years following final resolution of the litigation.**

15. How often does the Defendant have meetings regarding limiting its exposure by reducing the payouts on insurance claims? Please give the schedule of such meetings from a time three years prior to the claim until the present.

ANSWER: **This interrogatory is overbroad, vague, and not reasonably calculated to lead to the discovery of admissible evidence. Additionally it is not limited to the facts of this case, to its jurisdiction, or to the type of claim in dispute. It may also seeks confidential information. Further answering, and without waiving these objections, USAA does not seek to "limit[] its exposure by reducing the payouts on insurance claims" but seeks to pay what is owed under the contract of insurance.**

16. For each person identified as an employee, independent contractor, expert, investigator, or person otherwise involved in this claim state:

a. The date on which the person became involved in this claim;

b. The reason why the person became involved in this claim;

c. If they are no longer involved, the date on which they ceased involvement and the reason for the cessation of their involvement;

d. If applicable, any reprimands, warnings, demotion, citations, or other disciplinary action taken with respect to the person based upon their action or inaction with respect to this claim.

ANSWER: **This interrogatory is overbroad, vague, and unduly burdensome. It also may seek information protected by the attorney-client privilege. Further answering and without waiving these objections, the individuals identified in Interrogatory No. 1 had involvement in this claim as reflected in the log notes.**

17. What does Defendant contend to be the standard of care necessary to satisfy the duty of good faith and fair dealing with regard to the adjustment, prosecution, and/or defense of

liability and underinsured motorist claims arising from incidents that occur in the State of South Carolina and insured policies issued in South Carolina?

ANSWER: **Objection, this interrogatory calls for a pure legal conclusion. Further answering and without waiving this objection, the standard of care with respect to underinsured motorist claims is a matter of law for the court. Additionally, standards of care applicable to liability or other insurance claims are not relevant to this dispute. There is no bad faith as a matter of law if an insurer has a reasonable ground for contesting a claim. See *Henry v. Geico*, 2017 WL 3328229 (D.S.C. 2017); *Snyder v. State Farm*, 586 F.Supp.2d 453 (D.S.C. 2008).**

18. State all actions taken by Defendant to ensure that the standard of car referred to in Interrogatory No. 17 was followed with respect to the claim.

ANSWER: **Objection, this interrogatory is vague, overly broad, and not reasonably calculated to lead to the discovery of admissible evidence. Further answering, none of USAA's actions violated the duty of good faith and fair dealing. It is the plaintiff's burden to prove violation of the duty, and it is unfair and improper to request USAA to list every action it performed in good faith.**

19. As to each expert witness listed in response to Standard Interrogatory No. 5 above, please state:

a. A complete statement of all opinions the witness will express and the basis and reasons for those opinions;

b. The data and other information considered by the witness in forming those opinions;

c. A description of any exhibits the witness or counsel intends to introduce to summarize or support those opinions (to be provided in response to Plaintiff's Requests for Production);

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d. The witness's qualifications, including a list of all publications authored in the previous ten years;

e. A list of all other cases in which, during the previous five years, the witness has testified as an expert at trial or by deposition; and

f. A statement of the compensation to be paid for the study and testimony in connection with this case.

ANSWER: **USAA has not identified an expert witness at this time, but reserves the right to do so.**

20. For each affirmative defense that is raised in your Answer, please state with particularity each and every fact or basis in law upon which you allege to have "good grounds," as defined in Rule 11, SCRCP, to assert such a defense. A full and complete response should include, for each defense:

a. Identify all witnesses that support this contention;

b. Identify all writings that support this contention;

c. Identify all court cases upon which you base this contention; and

d. Identify all statutes that you rely on to support this contention.

ANSWER: **The statutes cited in the Plaintiff's Complaint including South Carolina Codes Section 38-59-20 and 38-57-10 do not give rise to a private cause of action under South Carolina law. See *Snyder v. State Farm*, 586 F.Supp.2d 453 (D.S.C. 2008); *Masterclean, Inc. v. Star Ins. Co.*, 556 S.E.2d 371 (S.C. 2001). Additionally, under S.C. Code § 38-77-160, the insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability. The intent of the statute is the protect the carrier's right to contest its liability for underinsured benefits. *Williams v. Selective Ins. Co.*, 466 S.E.2d 402 (S.C. 1994). Recovery in a suit against an underinsured**

motorist is a condition precedent to contractual liability for insurance benefits. ***Lawson v. Porter*****, 180 S.E.2d 643 (S.C. 1971). The conduct of USAA in acting pursuant to 38-77-160 was not so extreme and outrageous as to exceed all possible bounds of decency, etc., under** ***Argoe v. Three Rivers Behavioral Center*****, 697 S.E.2d 551 (S.C. 2010). Additionally, venue was improper as held by Judge Mullen.**

21. For all photographs relating to this case which are in the possession of the Defendant or the Defendant's counsel, please provide:

a. A brief description of the content of the photograph;

b. The date the photograph was taken;

c. The name, address and employer of the person who took the photograph.

ANSWER: **USAA objects to this interrogatory as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.**

22. Has Defendant ever been involved in any other legal action arising out of claims of bad faith, either as a defendant or as a Plaintiff? If so, please state:

a. The date and place each such action was filed, giving the name of the other party or parties involved, the number of such actions, and the names of the attorneys representing all parties;

b. A description of the nature of each action; and

c. The result of each action.

ANSWER: **This interrogatory is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. It also may seek information that is confidential. Again, this is a fishing expedition that is not connected the unique facts asserted in this case, and is unlimited in time or geographic scope.**

23. Has Defendant or anyone acting on Defendant's behalf obtained any statement in any form from any potential witness or party in this case that concerns the events described in Plaintiff's Complaint? If so, please state from whom those statements were taken and who has possession of those statements.

ANSWER: **Statements of Ms. Hood, Mr. Johnson, and Carey Tanrath are in the UIM claim file. Additional statements may have been obtained by counsel retained by the Defendant, and any such statements would be in counsel's possession.**

24. State Defendant's net worth.

ANSWER: **Objection. This interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.**

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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(843) 853-5200

Counsel for USAA

Charleston, South Carolina

July 20, 2018

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CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, counsel for USAA, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: **DEFENDANT'S ANSWERS TO PLAINTIFF'S FIRST AND SUPPLEMENTAL INTERROGATORIES**

Counsel Served:

Roy T. Willey, IV, Esquire
Eric M. Poulin, Esquire
ANASTOPOULO LAW FIRM, LLC
62 Columbus Street
Charleston, SC 29403

Counsel for Plaintiff

Administrative Assistant

July 20, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	FOURTEENTH JUDICIAL CIRCUIT
THERESE HOOD,	)	Case No. 2017-CP-27-00073
Plaintiff,	)	
vs.	)	**DEFENDANT'S SUPPLEMENTAL ANSWERS TO PLAINTIFF'S STANDARD INTERROGATORIES**
UNITED SERVICES AUTOMOBILE ASSOCIATION,	)	
Defendant.	)	

Pursuant to SCRCP 33, United Services Automobile Association ("USAA") answers the Plaintiff's Interrogatories, as follows:

STANDARD INTERROGATORIES

1. Give the names, addresses, and telephone numbers of persons who may be witnesses concerning the facts of this action or who have knowledge of relevant facts concerning this incident, indicate whether or not written or recorded statements have been taken from these witnesses, and indicate who has possession of such statements.

SUPPLEMENTAL ANSWER:

(d) **Jack Daniel. Mr. Daniel has knowledge concerning the underlying litigation.**

[SIGNATURE PAGE TO FOLLOW]

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Counsel for USAA

Charleston, South Carolina

March 7, 2019

1821

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, counsel for USAA, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: **DEFENDANT'S SUPPLEMENTAL ANSWERS TO PLAINTIFF'S STANDARD INTERROGATORIES**

Counsel Served:

Roy T. Willey, IV, Esquire
Eric M. Poulin, Esquire
ANASTOPOULO LAW FIRM, LLC
32 Ann Street
Charleston, SC 29403

Counsel for Plaintiff

Grace Hamill
Administrative Assistant

March 7, 2019

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	FOURTEENTH JUDICIAL CIRCUIT
THERESE HOOD,	)	Case No. 2017-CP-27-00073
Plaintiff,	)	
vs.	)	**DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION**
UNITED SERVICES AUTOMOBILE ASSOCIATION,	)	
Defendant.	)	

Pursuant to SCRCP 34, United Services Automobile Association ("USAA") responds to the Plaintiff's Requests for Production, as follows:

1. All documents identified or referred to in Defendant's answers to Plaintiff's Standard and First Supplemental Interrogatories.

RESPONSE: Any such documents are attached.

2. All photographs, videotapes, maps, plats, drawings, diagrams, measurements, surveys, or other descriptions related in any way to the subject matter of this action, made either before or after the incident that is the subject of this action.

RESPONSE: This request is overbroad and vague. Upon information and belief, no photographs, videotapes, maps, plats, drawings, diagrams, measurements, or surveys relate to the Plaintiff's claims asserted in this bad faith action. The request for "descriptions" is vague, and potentially requests information protected by the work-product doctrine and the attorney-client privilege. Further answering and without waiving this objection, USAA is producing the claim file for the Plaintiff's UIM claim, prior to the filing of this lawsuit.

3. Any and all documents or other tangible items, including books, records, reports, photographs, moving pictures, videotapes, drawings, charts, maps, diagrams, models, or other documentary materials, or tangible objects that Defendant intends to rely upon to support Defendant and/or which Defendant intends to offer into evidence as exhibits or use as demonstrative aids at the trial of this action.

RESPONSE: USAA objects to the identification of documents or other materials that counsel intends to offer into evidence as seeking the mental impressions of counsel and as protected by the work-product doctrine. However, counsel will exchange exhibit lists with Plaintiff's counsel if agreed to or ordered by a pre-trial order.

4. All statements of any witnesses in the possession of Defendant or its attorney, whether written or recorded on a tape recorder or otherwise, that relate to the matters alleged in Plaintiff's Complaint or Defendant's Answer.

RESPONSE: Upon information and belief, no statements have been taken concerning the Plaintiff's bad faith case. Presumably, depositions in the underlying case exist. Additionally, a transcript of the trial in *Hood v. Johnson* is in possession of Plaintiff's counsel. Finally, all statements in the subject claim file are being produced.

5. All memoranda, notes, diagrams, reports, photographs, e-mails, computer data or documents, videotapes, audiotapes, or other materials relating in any way to the matters alleged or referred to in the Complaint, any injuries or damages claimed, and any defenses raised or which could reasonably be raised.

RESPONSE: This Request is overbroad, vague, unduly burdensome, and seeks information protected by the attorney client privilege and work product doctrine.

Additionally, such a Request for Production is improper. Otherwise, this single request would replace the entirety of Rule 34.

6. Produce or permit Plaintiff or his attorney to inspect, photograph, or otherwise copy all photographs, plats, or diagrams Defendant or Defendant's attorney may have which relate to the matter alleged herein.

RESPONSE: Please see the Response to Request No. 2, above.

7. Any documents (as defined in Rule 34(a), SCRCP) and tangible things of whatever nature and description which you intend to introduce into evidence or to use as impeachment or evidence at the trial of this case.

RESPONSE: Please see the Response to Request No. 3, above.

8. The most recent resume or curriculum vitae of any experts that Defendant intends to use at trial or in preparing documents in response to this or other inquiries by Plaintiff.

RESPONSE: No expert has been identified at this time. USAA objects to identifying any expert who is not designated for use at trial or any pre-trial hearing.

9. Copies of any statutes relied upon by Defendant in its Answer, pre-trial motions, and trial.

RESPONSE: The Answer cites Rule 12(b)(6). Additionally, *see* S.C. Code § 38-77-160. The Defendant objects to producing or identifying statutes relied upon in pre-trial motions or at trial, and as those will be evident to Plaintiff's counsel, and Plaintiff's counsel has access to the same statutes.

10. Results from any tests or evaluations ordered by Defendant, or any expert retained by Defendant, that is used to support Defendant's position in this matter.

RESPONSE: Please see Response to Request No. 8, above.

11. Results from any tests or evaluations ordered by Defendant, including expert witnesses retained by Defendant, in the matter of Mary Elizabeth Kuck v. Therese Hood and Antoine Johnson (Case No. 2016-CP-27-0123) in the Court of Common Pleas for the State of South Carolina, County of Jasper.

RESPONSE: The Defendant has not ordered any tests or evaluations. Presumably, the Plaintiff is referring to the expert report obtained by counsel for the Plaintiff. This has already been obtained by the Plaintiff as it is attached to the Complaint, and the Plaintiff has served a subpoena on her counsel.

12. Results from any tests or evaluations ordered by Defendant, including expert witnesses retained by Defendant, in the matter of Therese Hood v. Antoine Johnson (case no. 2015-CP-27-0119) in the Court of Common Pleas for the State of South Carolina, County of Jasper.

RESPONSE: Please see the Response to Request No. 11, above.

13. Receipts of all transactions with experts used by Defendant in this cause of action, including receipts for payment for services rendered by said experts.

RESPONSE: Please see the Response to Request No. 8, above.

14. Receipts of all transactions with experts used by Defendant in the matter of Mary Elizabeth Kuck v. Therese Hood and Antoine Johnson (case no. 2016-CP-27-0123) in the Court of Common Pleas for the State of South Carolina, County of Jasper, and in the matter of Therese Hood v. Antoine Johnson (case no. 2015-CP-27-0119) in the Court of Common Pleas for the State of South Carolina, County of Jasper.

RESPONSE: Please see the Response to Request No. 11, above.

15. A copy of all non-privileged documents relating to any pending criminal or civil matter involving Defendant which include allegations against Defendant of bad-faith in the adjustment, prosecution, or defense of automobile insurance claims.

RESPONSE: This Request is overbroad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, vague, and seeks information protected by the attorney-client privilege and work-product doctrine. It is unlimited in time or scope, and is not tailored to the issues in this case. In any event, it is a classic fishing expedition.

16. A complete copy of any insurance policies, including the declarations page(s), for any policies that may provide coverage to Defendant for the allegations contained in the Complaint.

RESPONSE: Not applicable.

17. Returns to any subpoena or FOIA requests that you have served to date in this action, or any that are served in the future through the trial of this action.

RESPONSE: None.

18. All training manuals related to the process used for the settlement of automobile claims made by or against a USAA insured which were or have been used from January 1, 2013, through the present date.

RESPONSE: USAA objects to this request as overly broad, unduly burdensome, vague, not reasonably calculated to lead to the discovery of admissible evidence and seeking proprietary and confidential information. Notwithstanding these objections, USAA does not have "training manuals" but rather provides online guidance to claims handlers through its "Knowledge Delivery" (KD). USAA will produce, upon entry of a Protective

Order, KD relevant to any claim handling at issue from January 1, 2013 through February 20, 2017. However, upon information and belief, the only settlement negotiations of the UIM claim at issue occurred between Jack Daniel and Roy Willey and/or Kevin Smith, and therefore "the process used for the settlement of automobile claims" is not reasonably calculated to lead to the discovery of admissible evidence.

19. All instructional materials used in education programs related to the negotiation and adjustment of automobile claims made by or against a USAA insured which were or have been used from January 1, 2013, through the present date, including instructional materials related to the training of Defendant's employees in the processing, negotiation, and adjustment of insurance claims, whether on paper or in video, audio, or other electronic form.

RESPONSE: **Please see the response to request number 18.**

20. Minutes and agendas for any meeting related to the limitation of exposure and the lowering of payouts on automobile claims made by or against a USAA insured from January 1, 2013, through the present date.

RESPONSE: **This is another boilerplate Request that has nothing to do with facts of this case. It is overbroad, unduly burdensome, and could potentially request information protected by the attorney-client privilege or work-product doctrine.**

21. A copy of all protocols related to your interaction with re-insurance companies from January 1, 2013, through the present date.

RESPONSE: **This is another example of the Plaintiff issuing a Request for Production that has no connection whatsoever to this case. The request is overbroad, unduly burdensome, vague, and is not reasonably calculated to lead the discovery of admissible evidence, and potentially calls for proprietary and confidential information.**

22. The complete underwriting file, including the policy, application, amendments, and letters between any adjusters, their supervisors, and any re-insurers that were involved in the adjustment process of the claim arising from the November 7, 2014, motor vehicle collision.

RESPONSE: Underwriting is not at issue in this case and this Request is therefore not reasonably calculated to lead to the discovery of admissible evidence.

23. The report(s) of any investigators and experts that were assigned to investigate claims arising from the November 7, 2014, collision, along with any documentation such persons have including photographs, videos, and affidavits.

RESPONSE: Please see the Response to Request No. 11, above.

24. The entire files related to November 7, 2014, collision of any investigators, independent contractors, employees, agents, experts, or anyone that has knowledge of collision. Defendant's response should include any and all notes, memorandum, emails, transcripts of recorded conversations, text messages, or correspondences with any such investigators, independent contractors, employees, agents, experts, or anyone that has knowledge of the November 7, 2014, collision.

RESPONSE: This Request is overbroad, vague, unduly burdensome, and potentially seeks information protected by the attorney client privilege. Further answering and without waiving these objections, please see the Response to Request No. 11, above.

25. Any marketing materials and advertisements concerning the type of coverage that is in dispute in this case. Please include all advertisements in all mediums, including video, pamphlets, or mailings from January 1, 2013, through the present date.

RESPONSE: **This Request is not reasonably calculated to lead to the discovery of admissible evidence. Additionally, it is overbroad, unduly burdensome, and is not limited in time or scope.**

26. All claims files for pending or previously disposed of litigation concerning bad faith or fraudulent claims practices of Defendant.

RESPONSE: **This Request seeks confidential information of policy holders and claimants for claims that have nothing to do with this lawsuit. It is not reasonably calculated to lead to the discovery of admissible evidence. It is overbroad and vague. Additionally, it seeks information protected by the attorney-client privilege and work-product doctrine, and other private and confidential information.**

27. Any and all files related to investigations undertaken against Defendant by any insurance commissioner (nationwide) regarding Defendant's claims practices.

RESPONSE: This Request seeks confidential information of policy holders and claimants for claims that have nothing to do with this lawsuit. It is not reasonably calculated to lead to the discovery of admissible evidence. It is overbroad and vague. It seeks information protected by the attorney-client privilege and work-product doctrine, and other private and confidential information.

28. All notes, log entries, correspondence, internal memoranda, e-mails, and transcripts between any of Defendant's employees or agents that are related to Plaintiff's claim.

RESPONSE: **Please see the Answer to Interrogatory No. 1. Notes, logs entries, correspondence, memoranda, e-mails, and transcripts concerning the Plaintiff's UIM claim are being produced in conjunction with the claim file. USAA objects to the production of**

documents created after the filing of this lawsuit and the production of any privileged or work-product information.

29. All letters from Defendant or its subsidiaries that are addressed to Plaintiff or his attorney.

RESPONSE: Please see the Response to Request No. 28, above.

30. Any and all internal memoranda discussing in any way Plaintiff's claim against Defendant regarding the November 7, 2014, collision.

RESPONSE: Please see the Response to Request No. 28, above.

31. The application made concerning the automobile insurance policy that is the subject of this action.

RESPONSE: Any insurance application is irrelevant to this claim.

32. Any agent training booklets or seminar materials that relate to the instruction of agents, claims adjusters, or salespersons with regard to the investigation of claims, made against a USAA insured.

RESPONSE: This case does not concern an insurance agent or sales person. Additionally, please see the Response to Request No. 18.

33. Any and all guidelines regarding the selection and retention of experts for the purposes of evaluating and investigating a claim made against or by a USAA insured.

RESPONSE: This Request is vague and overbroad. However, as USAA understands this Request, no such guidelines are in place. Experts are retained upon the recommendation of defense counsel.

34. The articles of incorporation of Defendant and its subsidiary, sister, and parent corporations.

RESPONSE: **This Request is overbroad and is not reasonably calculated to lead to the discovery of admissible evidence. This Request is even more far afield with respect to subsidiary, sister, or parent corporations.**

35. Defendant's corporate tax returns, including returns for and any of its subsidiaries, parents, or sister corporations, for the past ten (10) years.

RESPONSE: **This Request is not reasonably calculated to lead to the discovery of admissible evidence. It is overbroad, unduly burdensome, and seeks confidential information.**

36. Copies of all documents related in any way to programs, goals, or incentives employed by Defendant regarding claim cost reduction.

RESPONSE: **Please see the Response to Request No. 35, above.**

37. Copies of all documents related in any way to any programs employed by Defendant regarding the eligibility for, earning or, considerations for, and ward of bonuses to adjusters, claims representatives, supervisors, and other employees who handle supervise, or otherwise perform work on claims.

RESPONSE: **Please see the Answer to Interrogatory No. 7.**

38. Copies of the personnel files related to job performance, evaluation, bonuses, wages, salary data, and disciplinary matters for all adjusters, claims representatives, supervisors, experts, investigators, and other employees or agents of Defendant who handled, supervised, or otherwise performed work related to the November 7, 2014, collision.

RESPONSE: **Objection. This Request is not reasonably calculated to lead to the discovery of admissible evidence. It is overbroad and seeks confidential and proprietary information.**

39. Any hidden claims files that include internal memoranda, minutes of internal meetings or roundtable discussions, or any other internal documents related to the processing, investigation, and adjustment of any claims related to the November 7, 2014, collision.

RESPONSE: No hidden claims files exist.

40. Copies of any complaints filed by or through the insurance commission of any state's insurance commissioner involving allegations of fraud or bad faith against Defendant or any of its subsidiaries or parent companies.

RESPONSE: Please see the Response to Request No. 27, above.

41. A copy of Defendant's corporate bylaws, as well as a copy of the bylaws of any of Defendant's parent, subsidiary, or sister corporations.

RESPONSE: Please see the Response to Request No. 34, above.

42. Any and all contracts between Defendant's parent, subsidiary, or sister corporations that make those corporations liable for claims payouts or any portion of claims payouts.

RESPONSE: Objection. This Request is not reasonably calculated to lead to the discovery of admissible evidence. Additionally, it may seek confidential information. Further answering, the Plaintiff's claim was paid by Defendant USAA.

43. Copies of any reprimands, citations, or other disciplinary material for any and all individuals involved in the processing, assessment, investigation, and/or adjustment of claims arising from the November 7, 2014, collision.

RESPONSE: Please see the Response to Request No. 38, above.

44. Any and all actuarial memoranda filed with the insurance commission of any state or internal actuarial memos used by Defendant in evaluating the profitability of insurance contracts similar to the one at issue in this cause of action.

RESPONSE: This Request overbroad, unduly burdensome, vague, and is not reasonably calculated to lead to the discovery of admissible evidence. Additionally, it seeks proprietary and confidential information.

45. Any and all loss experience ratios for the type of contract at issue in this cause of action from January 1, 2013, through the present date.

RESPONSE: Objection. This Request is overbroad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, vague, and seeks confidential information.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Matthew W. Orville
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Counsel for USAA

Charleston, South Carolina

July 20, 2018

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, counsel for USAA, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: **DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION**

Counsel Served:

Roy T. Willey, IV, Esquire
Eric M. Poulin, Esquire
ANASTOPOULO LAW FIRM, LLC
62 Columbus Street
Charleston, SC 29403

Counsel for Plaintiff

Administrative Assistant

July 20, 2018

IN THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON IN THE
COURT OF COMMON PLEAS FOR THE
NINTH JUDICIAL CIRCUIT

CASE NO: 2018-CP-10-0666

THERESE HOOD,

Plaintiff,

vs.

UNITED SERVICES AUTOMOBILE
ASSOCIATION (USAA),

Defendant.
_____/

DEPOSITION OF:

GAIL MARIE (MISSY) HOWARD

Examination of a Witness, beginning at 1:00 P.M. and concluding at 5:30 P.M. on Thursday, March 21, 2019, taken by the Plaintiff at Nelson, Mullins; 100 N. Tampa Street, Suite 3500; Tampa, Florida, before Roberta Turner, RPR, FPR, CLR, CCR (GA), Certified Court Reporter.

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I N D E X

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THE WITNESS: Yes, I do.

GAIL MARIE (MISSY) HOWARD

called as a witness having been first duly sworn, was examined and deposed as follows:

DIRECT EXAMINATION

BY MR. WILLEY, IV:

Q Okay. So, Ms. Howard, your name is Gail Howard, correct?

A Yes, sir.

Q You go my Missy?

A Yes.

Q Would it be okay if I call you Missy?

A It's perfect.

Q Okay. Have you had your deposition taken before?

A No.

Q First time?

A Yes.

Q Okay. So let me go over some ground rules, okay.

This is not an endurance contest. This is not a, like you see on Suits or something on TV where, you know, I'm trying to beat you up or trick you into saying something. If you need a break at any time just say so, okay. We'll take breaks

whenever you need it, however long you need.

If you don't understand my question, ask me to rephrase it. Because if you do answer it, we're going to assume that you understood it, okay?

A Okay. Yes, sir.

Q And that's the other thing. Obviously, she's taking down everything that we're saying into a written record. So as we go through today, if you will just say yes or no, you can always explain your answer, but just give an audible response, all right?

A Yes.

Q If at any point we do take a break, now that the deposition has started, you're not allowed to discuss your testimony with Mr. Whelan. And if you have any questions about your testimony, you should direct those to me, okay?

A Yes.

Q All right.

MR. WILLEY, IV: Did I miss anything, Rob? Anything else? Did I miss anything?

MR. WHELAN: I don't understand your question.

MR. WILLEY, IV: Okay. All right. So anything I should be aware of since she

hasn't taken her deposition before?

MR. WHELAN: You ask her whatever questions you want to.

MR. WILLEY, IV: Okay. All right. Very good.

BY MR. WILLEY, IV:

Q You understand why we're here today, Ms. Howard?

A Yes.

Q Okay. And you understand generally what this case is about?

A Yes.

THE COURT REPORTER: Since this is a South Carolina case, any stipulations you want to put on the record?

MR. WHELAN: We just follow the South Carolina Rules of Civil Procedure.

MR. WILLEY, IV: Right. We follow South Carolina Rules of Civil Procedure.

I will put on the record that we have agreed that for the depositions this week, we're just going to mark one set of exhibits. So we'll share those when we get to them.

BY MR. WILLEY, IV:

Q What is your understanding of what this case is about?

MR. WHELAN: Object to the form.

You can answer.

Q And let me say that too, before, and you can think about it.

During the course of the deposition, he may make objections to some of the things that I ask. And, basically, it's an objection to the form. And, so what he's saying is he doesn't like the way I asked the question, or he thinks the form of my question is improper.

But you will still go ahead and answer that. He's just preserving that for the record so that when we get later into a court case, that objection shows up on the record for the judge, okay?

A Okay, yes.

Q All right. And, again, I'm not trying to trick you with anything. So if you don't understand my question, you ask me to rephrase it and I will be glad to do so. So let me ask it again.

What do you understand this lawsuit to be

about?

A I'm not sure exactly, a hundred percent sure. I didn't handle that much of the file. And certainly I didn't handle it, really, I didn't handle any of this claim. So there were some issues with coming to a resolution of the underinsured motorist claim, is just what I understand.

Q Okay. And how did you come to that understanding? How do you know what you know about this particular lawsuit?

A Just meeting with USAA attorney.

Q Okay. With Mr. Whelan?

A Yes.

Q Okay. Have you ever been provided any documents or any e-mails about this lawsuit in advance of today?

MR. WHELAN: You talking about outside of meeting with me?

MR. WILLEY, IV: Just been provided with documents.

A That I have in my possession?

Q No. Just at some point prior to today, have you been provided with any documents concerning this lawsuit?

A To look at?

Q To look at, to read, to take home.

A Yes.

Q Okay. And when were you provided with those documents?

A Yesterday and Tuesday.

Q Okay. So Tuesday and Wednesday of this week?

A Yes.

Q All right. How were you provided those documents?

A I was shown those documents.

Q Okay. In an in-person meeting?

A Yes.

Q Okay. Was that meeting with Mr. Whelan?

A Yes.

Q Okay. How long did those meetings last?

A Couple of hours; two hours each day, maybe.

Q During those meetings, did you review anything other than documents?

A No.

Q Have you had the opportunity at any point to review the claims file in the underlying case that's the subject of this lawsuit?

MR. WHELAN: You talking about the U.I.M. file?

MR. WILLEY, IV: Right.

A Have I reviewed the U.I.M. file?

Q Right.

A I only, I've looked or been in it when I initially set it up.

Q Okay. When you met with Mr. Whelan on Tuesday and Wednesday of this week, was anyone else present?

A In the room?

Q Yes.

A No, sir.

Q Okay. Was there anyone on the phone or video conference?

A No, sir.

Q Okay. Have you met with anyone, other than Mr. Whelan about this lawsuit?

A No, sir.

Q Have you ever been involved in a meeting at USAA about this lawsuit?

A Other than with Robbie?

Q Other than with Robbie, right.

A No.

Q Okay. Have you ever been in a meeting

with Robbie where anyone else was present or participating via phone or video conference?

A No.

Q How long have you been at USAA?

A Two years October of -- This past October was twenty years.

Q Okay. All right. Do you agree with the general statement that USAA should not take factual liability positions solely to protect its money?

MR. WHELAN: Object to the form.

A I don't really understand the question.

Q All right. Let me back up, let me back up.

Do you agree that the purpose of civil litigation is a search for the truth of what actually happened?

MR. WHELAN: Object to the form.

A I'm not sure that I'm qualified to answer that. I don't -- I'm not an attorney, so.

Q Okay. You spent twenty years at USAA --

A Uh-huh.

THE COURT REPORTER: Yes?

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

Q I'll try to be better about reminding you. I know in the course of conversation it's not

natural to always have to give an audible response.

-- handling civil litigation claims, right?

A Yes.

Q Okay. And --

A Well --

Q Go ahead.

A Let me rephrase. Let me go back to that.

Q Sure.

A My claims are presuit.

Q Right.

A So I handle presuit --

Q You handle --

A -- claims.

Q You handle presuit claims that are part of the civil process, right?

MR. WHELAN: Object to the form.

Make sure that he finishes his question before you answer.

I object to that question.

Q You handle insurance claims prior to a lawsuit actually being filed, correct?

A Yes, sir.

Q Okay. Have you ever handled or participated in claims after a lawsuit was filed,

in your career?

A Yes. If I can explain the reason.

Q Yeah, of course.

A That would be that there was not going to actually -- Maybe there was a statute running and that they filed just to protect that. And we were just to -- So that was just a technicality, I guess. So, really, and therefore, I was just continuing up my normal negotiations ongoing with that. That would be the only reason.

Q All right. Does USAA provide training? Did you get training about how to handle insurance, automobile insurance claims?

A When I first started working at USAA?

Q Yes.

A Yes, sir, I did.

Q Okay. And have you had subsequent training in the years that followed, or did you just get one dose, and that's it?

A No. We -- Yes. We have additional training, ongoing training.

Q Does part of that training include that in the adjustment of automobile insurance claims, you should try to find out what actually occurred?

A Yes. That's the investigation piece of

it, the claim.

Q And in the investigation piece of a claim at USAA, is the purpose supposed to be to find out the truth about what happened, or is the purpose supposed to be to come up with a theory, a factual theory that helps protect the insurance company's money?

A The purpose of the investigation is to determine the best we can what actually happened with the evidence provided or obtained in that investigation.

Q So would you agree with me that it would be against USAA's policy for an insurance adjuster or a claims' handler to attempt to create or twist the facts in order to create a version other than the truth in their investigation of underwriting?

A Just to clarify what you're asking.

Is it against USAA's practice to create our own, create facts or come up with facts on our own?

Q Right.

A Yes. We don't do that. That's not -- USAA does not do that.

Q Right. So would you agree with me then that it would be against USAA's policy for

individuals at its company to take different factual positions related to the same wreck in order to protect its money?

MR. WHELAN: Objection.

A Well, I wouldn't agree with what you're saying, is that it has -- During our investigation it doesn't have anything to do with protecting USAA's money. We have to look at the facts for each case on a case-by-case basis for what we're provided and what we're given.

And when looking at that, what we can successfully, or what we can prove based on the information provided at that time.

Q Right. And I think we're in agreement. USAA's purpose is to protect its insureds, right?

A Yes.

MR. WHELAN: Object to form.

A Yeah, yes.

Q That's what you're trained at USAA, that your job as a claims handler is to protect the insured?

A That is part of our, that is part of what we mean -- That's part of what we do as an adjuster.

Q Right. And you agree with me that if USAA took two different factual positions related to the same wreck in order to protect its money, that would be against USAA's policy, right?

A I don't agree with that, what you're saying.

Q Okay.

A 'Cause I don't believe that that, the protecting USAA's money, that's not what, that's not what's coming into play. We're looking at each accident and each circumstance as it is and handling each claim.

If you want to give me a more specific case, then I can answer that maybe a little better. But we have to handle each claim on a case-by-case basis, and the facts that we're looking at at that time.

Q All right. And sometimes multiple adjusters at USAA investigate the same wreck, right?

A That can happen, yes.

Q Okay. And in any given wreck there can only be one set of true facts; would you agree with that?

MR. WHELAN: Object to form.

A Obviously, there are only one set of true facts. If you're able to obtain those, the true facts, yes.

Q All right. I mean, in any given car wreck it only happened one way, right? Whether or not you can obtain the facts, it only happened one way?

A That is correct. If you can obtain that information.

Q Right. So it would be impossible then, would you agree with me, for there to be two sets of different facts representing the truth that arise out of the same wreck?

MR. WHELAN: Object to the form.

Q In other words -- Let me try to make it clear.

If I investigate a wreck and I say the person ran a stop sign, and the adjuster next to me investigates the wreck and says the person didn't run the stop sign, one of us is wrong, right?

A Correct. But, again, it's going to be a case-by-case basis, based on what information each person has.

Q I agree, I agree. There is no disagreement here about that.

But either I made a mistake in my

investigation in determining that the individual ran the stop sign, or adjuster-B made a mistake in their investigation in determining that the individual did not run the stop sign, right?

A Not necessarily.

Q All right. Explain.

A Maybe one of the other of the two adjusters had additional information that the other one didn't have.

Q Okay.

A That, you know, led to the one decision versus the other decision.

Q All right. If they both had identical information, would you agree that one of them would have had to have made a mistake in analyzing the information?

A Would I agree that they made a mistake. Not necessarily. But is it a possibility; certainly.

Q What are the different ways, in your mind, that the wrong adjuster, the adjuster whose investigation led to the wrong conclusion could have arrived there, if they didn't make a mistake?

MR. WHELAN: Object to the form.

A Again, I will go to say that, you know, I

handle and have handled a lot of claims, in my experience with, you know, over the twenty years of time. And with each case, everyone is different and everything you have to look at is different. So it makes it hard to make an assumption of what somebody might or might not have done incorrectly, based on given the information that they were given.

Do you have anything specific that you can --

Q No. I'm just trying to figure out from you how you would explain two adjusters having the same set of facts arriving at different factual conclusions without one making a mistake.

MR. WHELAN: Asked and answered.

A Again, there's just so many factors that go into investigating and things that you have to consider and look at.

Q How many claims do you oversee at any given time? Right now how many claims are you handling?

A My current pending right now is approximately a hundred and twenty.

Q Okay. And is that, is that average for you?

A Yes, sir.

Q Okay. Is that average for other claims' handlers of your experience at USAA?

A I would say about in that range, yes, uh-huh.

Q They all auto claims?

A The majority are auto, but I also handle homeowner liability.

Q Okay. How many of those would you say you have of the hundred twenty?

A I would be guessing. Maybe a quarter of that.

Q Okay. And is that pretty typical, you know, usually about three-quarters auto?

A Yes.

Q Do you always handle the liability and auto claims, or do you sometimes handle other coverages?

A Just because I'm not sure exactly which coverages, I'll just let you know what I do handle.

Q Perfect.

A Comp, collision.

Q Sorry. What was the first one?

A Comprehensive.

Q Okay.

A That, you know, sometimes that does come into play; B.I., P.D., U.M.

Our first-party coverage, which we refer to like PIP or med pay. We have those specific department for that.

Q Okay. And you said U.M., which here does that --

A U.I.M.

Q U.I.M.

A U.M. or U.I.M. I handle both those. I apologize.

Q Okay. Sometimes when you go to different states, they look like --

A So that's because --

Q -- three heads.

A Yes.

Q Okay. At USAA, what is the, what is the structure? Who do you report to?

A I have a direct manager.

Q Okay. Who is that person?

A Currently her name is Lisa Mitchell.

Q All right. How long has she been your manager?

A I would say approximately two years, at the most.

Q Okay.

A Maybe not that long.

Q Who was your manager before her?

A Alisa Sumner.

Q Okay. And do you know --

What's your actual title now?

A Examiner.

Q Examiner?

A Uh-huh.

Q I know I was messing that up.

How many examiners does Lisa manage?

A Currently I think she has, I think there are seven of us.

Q Okay. And is that pretty average, the examiner team is generally groups of five, seven, eight, in that range?

A Yes. I think between seven and eight. That's -- Yes, examiner teams.

Q Who does Lisa report to?

A Crystal McDaniel.

Q What's her -- What is Crystal's title?

A Director.

Q All right. And do you know how long she's been director?

A Fifteen plus years --

Q Okay.

A -- she's been director for.

Q What do we call a group of managers and examiners, like that team?

A M.S.T., Member Service Team.

Q Do you know how many Member Service Teams Crystal has responsibility for?

A I do not.

Q Okay. Is Crystal in your office?

A She is.

Q Who does Crystal report to?

A It just changed. His name --

Q Who was the last person, if you know?

A His name is Matt, Matt Smith I believe his name is.

Q Who was before Matt? You said it just changed.

A Carol Witherow, W-I-T-H-E-R-O-W.

Q What is Matt's title?

A Executive director.

Q Is he in your Office?

A No, he's not.

Q Is he in Texas? Do you know?

A No, no. He's not.

Q Okay.

A Maybe Colorado.

Q Okay. How many directors are in the Tampa office?

A Claims' directors?

Q Claims directors.

A I -- injury claims between the two buildings, I'm going to say possibly four to five, but.

Q That's an estimate. We're not going to hold you to it.

Have you ever worked on Member Service Teams under any of those directors?

A No.

Q Okay. So your director, prior to Crystal, left the company or moved on or something?

A Crystal has always been my director for many years.

Q Right.

A And I think when I first got into, promoted to injury, which was a long, long time ago, it wasn't initially her, but --

Q Okay.

A But, again, that was --

Q Pretty quickly thereafter?

A Correct.

Q Okay. Where did you start at the company? What was your first position?

A It was called a customer account professional cap, entry level.

Q Okay. Where did you go from there?

A To not handling non-injury claims.

Q What's the -- Can you give me an example of a non-injury claim.

A Okay. So a entry-level claim would be no -- one vehicle. You're not really having to make too much of a liability decision when you have two vehicles. No property damage, really, exposure.

Q Right.

A Just comp loss of a collision loss.

Q Okay.

A So when you get to the non-injury level, it's, for the most part, it would -- it could be a one vehicle as well, occasionally. But you're looking at two vehicle accidents where you're having to do an investigation, but there's no injuries related. But you're investigating and you're handling property damage along with the collision piece.

Q Okay. Then from there you went to your

current position?

A From there I went to injury, which was just minimal soft-tissue type injuries.

Q Okay.

A And then --

Q That's not all of them? I'm kidding.

A No.

MR. WHELAN: In some perhaps it is.

A Then from there, eventually, I went to -- it got to examiner, which is where I am now handling severe injuries.

Q Okay. How is at USAA, how is a severe injury claim? How does it meet that cap, or that threshold?

A What is considered a severe injury?

Q Right. What's the difference between soft tissue and severe, according to USAA?

A We look at it --

MR. WHELAN: Object to the form.

Go ahead. I'm sorry.

A We look at it as with -- Examiners handle surgery cases, death cases, severe scarring, paraquadriplegic, so something with that type of severity.

Q Does it have a, like, a medical special

dollar amount affixed to it, or is it more subjective?

A It's based on the injury itself.

Q Okay. Who decides that, decides how to classify or assign a claim?

A The -- it could be the person taking the claim who -- if somebody's calling in and saying, either I'm the one hurt and this is the, this is the severity of my injury, or I've had surgery or this is what's happened. Or, this is something happened; I know, I'm aware this has happened to someone else, so they would know it right away. Or, potentially, you know, it changes down the road.

So you may -- It could be through life of the claimant. It may get transferred once. Additional information is known, or becomes a more severe injury case at that time, later on down the road.

Q Okay. And when someone just calls in to make a claim, who -- where does that call go? I mean, I assume, for example, you don't take all those calls, right?

A No. So they, when they call in, there is, like, it kind of -- it asked you, it prompts you

to, hey, what is your, what type of -- does it involve an injury, the severity. And so sometimes it can be routed to us just like that, and we may pick the call up based on that, what's being told.

Q Automated?

A Correct. And sometimes it can be, if it's overnight or something, later hours, we have a company -- or within USAA that's kind of our reporting unit that may take it in and just assign it, based on what they're being told.

Q Okay.

A Now, it could be that they go to the automated system, the person puts in the wrong information and they -- it gets taken. And it just gets assigned correctly, based on the person that's keying it in, because they find out, oh, it's worse than we thought that we have here. So multiple different ways.

Q If a claim ends up being -- comes to you, for example, and you say this is not a severe claim, how does it get kicked back down?

A That doesn't.

Q It doesn't. Do you --

A I would just keep it.

Q Okay.

A For customer service.

Q Okay. That's good.

The lower -- What's under examiner again?

A It's Adjuster-I is under.

Q Adjuster-I.

Okay. So for Adjuster-I, if they get a claim and then they say, no, this is a, this is more severe than was reported, how do they kick it up?

A Depending on when they find it out. They can go through their manager or they can just transfer it themselves.

Q Just by changing it in the system?

A We have -- There's a way that you can, say reassign claim, reassign claim. And it prompts you to examiner.

Q All right. Are you able to see on the software all of the claims in your Management Service Team?

A I am not, no.

Q Okay. Are you only able to see claims that are officially assigned to you, or are you able to see claims in addition to that?

A Let me -- Can you clarify. Do you mean like what's, what I'm currently handling, am I the

only one that can see what I'm currently handling? Is that what you mean?

Q No, no. Are you able to see claims in addition to what you're currently handling, is what I'm asking?

A If I was to -- If I needed to go into someone else's pending?

Q Right.

A Then, yes, I can. But I would have to go in, literally, go into that. So --

Q Right.

A -- I think I might have misunderstood your previous question.

Q No. I think we're on the same page.

A Because I had said before that I couldn't see, so maybe --

Q No. And I'm not trying to trick you.

A Okay.

Q I mean, I understand -- Correct me if I'm wrong.

When you sit down, you call up your computer, you call up the software. What you initially have on there are just your claims --

A Correct.

Q -- correct?

A Yes.

Q But you are able to, through the software, go and see someone else's pending claims?

A If I change the information, yes.

Q Yes. And when you say change the information, you just mean there's a way, I assume, to change it from seeing your pending to seeing John Smith's pending?

A Correct.

Q Okay. And is that a company-wide process? In other words, you can see pending claims that are not part of your M.S.T., if you change the information?

MR. WHELAN: Object to form.

A I would assume, yes.

Q Okay. Not something you do --

MR. WHELAN: I'm sorry.

When he interrupts her, are you getting the little dash?

THE COURT REPORTER: Yes. If I don't, trust me, I will speak up.

MR. WHELAN: No --

THE COURT REPORTER: But I know what you're saying. Yes. I'm dashing off when she's cutting him off, the same way when

he's cutting her off.

MR. WHELAN: Okay. Thank you.

MR. WILLEY, IV: I'm not trying to do that. Sorry.

THE COURT REPORTER: If it's to the point I can't get it, I will let them know.

MR. WHELAN: Yeah. I mean, I just want to make -- So she's not done with her answer and then he asks a question, I just want to make sure that's noted.

Thank you.

MR. WILLEY, IV: He's just trying to make a good record. I'm bad at that, 'cause I feel like you've answered and then still want to say something.

BY MR. WILLEY, IV:

Q So if I do cut you off and you're not done, just say so, okay. I'm not trying to -- It's not a strategery to it where I'm trying to cut you right there in the middle of the sentence to get you to say something that you don't want to say.

So my understanding is that's not something you do on a daily basis, correct, go and look at other people's claims?

A No.

Q Okay. But you're able to?

A Yes.

Q Okay. Does USAA, to your understanding, have any sort of ethos or code of ethics, you know, that the company asks employees to abide by?

MR. WHELAN: Object to form.

A Yes.

Q Okay. What is that?

A Integrity, honesty. I know they're two more. I'm sorry. Those are the ones I can remember.

Q That's okay. If they come back to you at some point, just let me know.

A Okay.

Q And that's, like I said, I'm not trying to trick you. I'm certainly not going to type up the transcript and say, hey, Missy forgot two of these.

Where would you find those? You know, and what I'm asking is, like, some companies put them up on the wall, you know. Sometimes they're on a poster in the bathroom or whatever.

A They are, I believe, on one of the walls when you first come in the build -- or like on one hallway.

Q Okay.

A Loyalty I think is one of them.

Q Makes sense. Okay.

Is there, is there a different training that you go through for moving into an examiner position from an Adjuster-I position?

A There was some. It's just been a while. So there was some form, some form of training as some of it was O.J.T., kind of like on-the-job. But there was a little bit of both.

Q Okay. Do you remember what, specifically, the additional training consisted of?

A It had to do with partially homeowner liability claims, because that's something totally, totally new.

Q Right.

A And then just the handling of serious injury cases and what you're to do with those when that's recognized.

But that's the -- Mainly, I remember so much about the homeowner liability because that was something so new.

Q Right. Does the company give you any kind of manual or handbook to outline, you know, how to do investigations, how to go through the adjustment

process, how to value a claim, how to negotiate; any of those things?

A No, no.

Q So when you get the training, when you got training, you just -- How did that happen?

A It's, you know, it's been a building -- For me, it's been a building process.

Q Right.

A You know, when you start off handling minor claims, you learn that. And then as you -- they become more severe, you learn what those values are. It's a learning process.

So I don't -- I don't even remember what, maybe, the initial, what my initial -- what I did initially or what, how --

Q Okay.

A -- I learned that initially.

Q All right.

A Obviously, my manager -- That would have been involved with my manager, certainly --

Q Okay.

A -- at the time back then and moving forward even.

Q Okay. Do they give you any kind of like, you know, checklist or outline to follow, you know,

so you don't miss any steps in the process?

A Of investigation?

Q Investigation adjustment. At any time in the process, is there any checklist or processes outlines; anything like that?

A I'm not aware of that.

Q Okay.

A And I think the job is a building, building block of -- Because the investigation never changes.

Q Right.

A And never has, and not changed since probably the beginning.

Q Okay.

A And everything we just spoke on that, so. You just kind of know and know and know what you know.

Q And, I mean, how -- So how does that start initially? Like, does the manager sit with somebody for a period of time? I mean, I'm assuming USAA doesn't just like, hey, new adjuster, here is the phone and a computer; have at it.

A I mean, I don't know so much about the processes now.

Q Okay.

A Just because I don't really see them that much --

Q Right.

A -- for what we do.

I know that there was -- I don't necessarily know that it's the manager that has the -- They have, whether it's training classes. They have a way that they come in and learn our systems and the processes. And they go through that before they really hit the floor. So I don't understand, because it's very different than when I first started --

Q Okay.

A -- of how we get -- how they get there.

Q All right. Is there an electronic process or checklist that you go through in an investigation, negotiations of a claim?

A Again, not -- I'm not, no. I'm not aware of any type of checklist; no, huh-uh.

Q All right. Is there any sort of narrative process that you can refer to that provides educational and investigation or negotiations of claims?

MR. WHELAN: Object to form.

A I'm not sure exactly. I know what you're,

what you -- I guess what you're looking for what we have available to us.

Q Right. That's what I'm asking, just what's available.

A I mean, we have -- our computer -- in our computer system we have what's called K.D., knowledge delivery --

Q Okay.

A -- that if we have questions, you can -- they're relating to anything, whether it's policy, things like that, you can go to that and the information is there.

Q It's like a help guide or --

A Correct.

Q Correct.

Okay. And that's actually on your computer, not in a hard copy?

A Correct.

Q All right. Is there anything else on the computer like that that gives any guidance if you need it, or is that kind of all encompassing?

A That's all encompassing.

Q Okay. Is there ever -- Have you ever seen any kind of best practices circulation -- I will give you some examples so you know what I'm talking

about.

Some companies, if a particular team comes up with a new best practice for the way they do something, they will circulate that, you know, whether it's through a memo, or once a year they might recognize and implement new policies; things like that.

Is there anything at USAA like that, that you're aware of?

MR. WHELAN: Object to form.

A Not -- I would think that it -- The only thing that I can think of would be the same as in K.D., in the knowledge delivery.

Now, if there was some type of changes that were coming for some type of change that was company-wide, then our managers would be communicating that to us, usually. But that's just a verbal communication. And usually we have huddles.

Q How often do you all -- That was kind of my next question.

How often do you all, as a M.S.T. huddle, you know, get together?

A We meet -- We huddle with our managers usually daily.

Q Okay. What types of things, topics, do you all discuss at the huddle?

A That can vary.

Q Okay.

A If -- It could just be what I just mentioned, if there was some type of change that came down. It may just be something quick about, you know, what's, you know, what's going, what's the week look like;, you know, things are going on, like that.

And usually it's four days a week, not -- It's four a week, not five. And, yeah, just if -- it's a case-by-case basis, just --

Q Do you all regularly discuss specific claims at those huddles?

A No.

Q Okay. Do you ever discuss specific claims at those huddles?

A I guess we have. I don't know that it's common practice, but I'm not going to say we haven't; so, yes.

Q Okay.

MR. WHELAN: If you're going to change topics, I need to use the restroom.

MR. WILLEY, IV: I'm not, but we can

take a break. I assume, whenever. It's not a marathon. Let's break.

(Whereupon, a recess was had from 2:10 p.m. to 2:17 p.m.)

MR. WILLEY, IV: What was my last question?

THE COURT REPORTER: You had asked, "Okay. Do you ever discuss specific claims at those huddles?"

Her answer: I guess we have. I don't know that it's common practice, but I'm not going to say we haven't; so, yes.

BY MR. WILLEY, IV:

Q Okay. Do you ever have meetings or huddles with other M.S.T.s, other than your own?

A Have I ever?

Q Right, yes.

A Yes.

Q How often?

A I haven't had any recently, but I have in the past.

Q Okay. For what reasons? Why would that happen?

A To meet with -- We don't have examiners in the regular units any longer, because we are --

examiners are separated. So it kind of -- The Adjuster-I's, Adjuster-II's lose that piece, you know, ability to, you know, if they have questions or what have you, you know.

So I would -- we would, our examiners, maybe would go down to and just offer kind of like a mentoring, like, if you have any questions, something you don't understand; opportunity. So just that, you know.

Q How many examiners are there? Do you know?

A Oh, I don't. In our total building?

Q Yeah.

A I mean, I know in my unit, you know --

Q Right.

A -- like I said, but -- Yeah.

Q Okay. When you huddle with other M.S.T.s, do you all ever discuss specific claims?

A No, huh-uh.

Q You don't, okay.

Is there ever any kind of, like, department-wide trainings where everyone gets together and gets trained on a specific topic or subject?

A There can be.

Q Okay.

A If there's something new that comes out.

Q And when you say something new that has come out, what's an example?

A That probably, like, they're going to be changing the way we handle total losses; so, you know, we're going to be -- we'll be getting together, most likely, with groups of people so they can go over that with us. And that isn't specific to examiners or, you know, that we'll all be doing that. So they will do that.

And then we've had another total loss meeting previously, and that was all of us. I'm sure there's other times in the past it's been other things, like, changes that we've made internally that, you know, I just can't think of anything right now.

Q Are you a veteran?

A I'm not.

Q How did you come to work at USAA?

A My dad was in the Navy, but --

Q Okay.

A And my grandfather. But, so I was aware of it through that. But then a friend of mine, you know, she was going to apply there, so I applied

too and just -- I don't know.

Q Got the job?

A Yeah.

Q She get the job?

A She got a job too.

Q She still there?

A No. She's a stay-at-home mom.

Q Okay.

A So.

Q Good. That's the harder job.

A Exactly.

Q What did you do before you went to work at USAA? You were in middle school or something?

A Yes, I was. I was just a young child. I was a pharmacy tech --

Q Oh, okay.

A -- with the same girl I said that we both left the same place to come there.

Q Okay. Interesting.

And are you from Tampa?

A I'm from Land O' Lakes, which is just north of here.

Q Okay. Do you have, do you have any family in South Carolina?

A I do not.

Q What about know anybody in Charleston County, South Carolina? Do you know anybody?

A Friends?

Q Friends.

A No.

Q No, okay.

With your auto claims, what percentage of those claims are underinsured motorist claims?

A I don't -- I couldn't really even tell you. I mean I can give you a guess.

Q Yeah. Just a guess. I'm not going to hold you to it --

A No.

Q -- and say you can work them all, you know.

A Because, obviously, it's just pretty much what I get.

Q Right.

A It's what comes in and what the investigation reveals.

Q Right.

A But I -- I mean, I don't know. Forty percent maybe, maybe.

Q Okay. And is that pretty typical?

MR. WHELAN: Object to form.

A Yes.

Q Okay.

A Uh-huh.

Q All right. When a claim comes in, I'd like for you to walk me through the process of what you do. And when I say claim, I'm specifically talking about auto claims in this instance.

A So when I get a new claim. When I get the new claim, I -- first thing I look at is where the loss occurred; where the base of the policy is; who was driving the vehicles, as far as our insured's vehicle. Look at the, what kind of coverages we have available, all of them, everything we have.

Once I determine that, make contact with the insured, get all my statements from anybody that was -- that vehicle; get a police report, talk to all the parties involved, any witnesses, statements from all of that; photos of the vehicle.

Any -- Let me stop there and say that, you know, each claim, again, has to be handled on its own merits. And any investigation is different, based on what -- some need more, some need less. So this is just kind of a, you know, all the possibilities that I may need, you know, maybe have to do a scene investigation.

Q What was that word?

A Scene --

Q Scene.

A -- investigation.

Q All right.

A And sometimes it's just based on what information is given to us. Because as we learn more and get more, maybe that means I need to do a little bit more, or find out more things or get more information. Just each one, each thing is different.

Q So to back up, how do most claims come to you? And what I'm asking is, imagine -- I'm going to go on a little narrative for this question, okay.

Imagine I'm coming into USAA tomorrow and I'm going to have no access to the K.D., and I'm not going to be able to ask anybody questions. I need you to tell me everything I need to know in order to find my first claim, where it is, how I get it and what I do with it to set it up.

Does that make sense?

MR. WHELAN: Object to form.

Q Just those kind of first initial steps, where the claim is.

A I mean, it would -- If I'm answering this correctly, and I hope this is what you're asking. If it's -- By getting the claim -- Well, it could be called in, so it's going to be there. It's on the phone.

Q Right.

A So it's going -- I'm going to be keying that whole loss report.

Q So the phone rings, I have the ability on my computer to mash a button?

A Yes.

Q All right.

A And then you can enter all the information that's provided to you by whoever is calling in, calling that in --

Q Okay.

A -- and what they have.

Q And that sets up the new claim?

A Correct.

Q Okay. Then what I do? Am I responsible as the examiner for figuring out who the witnesses are and where it occurred?

A The person that calls it in, if -- depending on what they're able to give you, you know. Sometimes depending on who it is that's

calling you. Sometimes it's a person involved. Sometimes it's a spouse, parent, child, you know, that doesn't really know a whole lot. So you get as much as you can from that person, which may be the witness.

South Carolina, for instance, you have an F.R.-10, so you're going to have some information if they have that.

Q Okay.

A But that's not going to have any witnesses on there, it's just going to have the people involved and maybe the other insurance companies. So we'll go with -- We're dealing with South Carolina. We'll say that.

So we'll get what we can from that. And then everything is going to be on me or on the person that's handling the claim to get what we can, either from the person calling. I mean, I will request the police report if they don't have it.

Q Right.

A Which normally they do not, so we typically request that. So, but, again, each thing is different. You know, you're going to be seeing what information as much you can get from the

person that's calling it in. And then from there you move forward based on what you get.

Q Right.

A And then the next call would be to our insureds, if that's possible, to maybe get a little bit more information.

Q Okay.

A And we continue to investigate it that way. Maybe there's an attorney calling me. They're the ones that have the information. Maybe there is an attorney that we can call and see if we can get.

But, again, each claim is different. So you can't say that each time it's going to necessarily take you in this direction or that direction, because, you know, sometimes a first notice of loss is an attorney rep letter that comes in with, hey, this accident happened. And that's it.

Q Right.

A And now here we are, you know, trying --

Q And they won't take your calls?

A So, you know, so here we are trying to then get ahold of whoever we can. So each claim is, that you get is different.

Q Okay. Once you get the basic information, the stuff we just talked about, the police report, statements, if you need them from witnesses, any photographs, et cetera, who would make the determination about whether or not to do a scene investigation?

A Could be the current file -- the person that's handling the claim.

Q Okay.

A Maybe they review it with a manager and they, you know, after that discussion they determine that they may need a scene investigation so it could be done.

Q What's the process for that? Like, you got a wreck in South Carolina --

A Uh-huh.

Q -- I assume that they're not saying, Missy, long weekend in Charleston, have fun.

How does that, how does somebody get assigned to go do it? Who is that person?

A Oh, how do we get a scene investigation?

Q Right.

A We have outside adjusters that we can hire --

Q Okay.

A -- to go and do those for us.

Q Right.

A So that's typically what we do.

Q Okay.

A And depending on what we need.

Q And is there a list somewhere of those that you have access to?

A I believe there might be. I typically use Crawford and Company, just because I've always -- I'm not -- There may be other ones --

Q Right.

A -- we can use. That's just the --

Q All right. That's another question.

So lay down the line -- I'm going to skip around a little bit. We're going to come back to this, okay.

But when we're deciding which defense counsel to hire, assuming the case is going to go into litigation, is that a decision that you make?

A I can, I could, potentially, but not always.

Q All right.

A Depends on -- I mean, typically not. I will say that. But I'm not going to say that I haven't had a defense attorney who I haven't worked

with the defense attorneys and assigned something myself for other reasons.

Q Okay. Who typically does that assignment?

A Our litigation department. Once we know there's going to be -- the lawsuit is filed, it usually gets transferred to them and then the -- If for some reason I need to, we need to do something, then they would let us know who to contact.

Q Okay. So once you do the basic, call it liability investigation, at what point are reserves set on particular coverage?

MR. WHELAN: Object to form.

A They should be set when the claim is open -- or when the coverage, I'm sorry, is open.

Q And does the examiner or adjuster set that reserve?

A Yes.

Q Does anyone else have input on the amount of that reserve, other than the examiner or adjuster?

A Typically it is just the adjuster, the person that's handling, that's their responsibility. If for some reason you might have discussed it with your manager, maybe there was a recommend -- you know, there would have been

guidance or discussion to increase the reserve or set it higher for some reason.

Q At USAA what is a reserve?

MR. WHELAN: Object to form.

A What do we reserve it for, or are you asking what it --

Q What is it? What is it? Like if the jury doesn't understand what that term means. At your company, what does it mean?

MR. WHELAN: Object to form.

A It's what we anticipate -- what we --

Based on the information at the time thinking that the claim is valued at, at that given time, or based on the information we've received.

Q Okay. So the reserve is the claim valuation as of the moment that it is set --

MR. WHELAN: Object --

Q -- is that an accurate statement?

MR. WHELAN: Object to the form.

A Based on the information that we have.

Q Right.

A So we may not -- Obviously, we don't -- we could only know, you know, the information that we have at that time. If somebody calls in and says, oh, yes, the person went to the hospital and they

looked okay. And, so you think, okay, well, maybe it's just a treat and release. And then you find out later it's a fracture. Well, obviously, that wouldn't have been an accurate, but we wouldn't have known that. So it's based on the information we have at the time.

Q Okay. So the reserve amount is the claim valuation based on the information that the examiner or adjuster has at the time that that reserve is set?

A Correct.

Q Okay. How would somebody know what amount to set a reserve at?

A Based on your experience with settling claims and based on the accurate information you've been given, you know, it's an estimation or guesstimate of what the claim may settle for.

Q Are there any sort of guidelines or approximations available in the K.D., or otherwise, with respect to setting a reserve?

A As far as? Do you mean like --

Q Like if you have a broken leg, that might be estimated at "X"?

A No, huh-uh.

Q Okay.

A Because that would, you know, it's, you know -- No, no.

Q Okay. Just have to know.

A Based on your experience. And, obviously, the amount of coverage available as well.

Q Right. So I guess that's my next question.

You're never going to set a reserve above the available coverage, right?

A Correct.

Q And each coverage on a policy gets its own reserve, correct?

A Yes. Let me just go back to that.

Q Okay.

A On U.I.M. if you have stacking, obviously, it might show more.

Q Fair enough.

A So --

Q So if you have U.I.M., B.I. and you got two policies that's stacked --

A Then it's --

Q -- it could go up to the stackable limit?

A Correct, uh-huh.

Q But you're never going to have liability B.I. and U.I.M., B.I. combined on the same reserve;

is that right?

A That is correct.

Q Do you know why that is, why those coverages are kept separate?

A I would only assume it's because they're written separate.

Q Okay. Do you ever handle the liability and U.I.M. claims on the same wreck?

A Yes.

Q Okay. Do you always handle, if you were handling one of the claims, the other claim involving the same wreck?

So if you're handling the liability claim and there's a U.I.M. claim made, would you always be assigned that U.I.M. claim?

A No.

Q Okay.

A It depends on the circumstances.

Q Right. That's my next question.

Tell me the circumstances under which you would not be assigned both claims?

A If there was a bodily injury liability claim being made against our named insured, or like driver of our insured vehicle --

Q Right.

A And then that driver of our insured vehicle was also making a U.I.M. claim.

Q Okay.

A At that point I wouldn't handle both of those.

Q Do you know why?

A It's always -- this is the way it's always been done from my understanding. And this is the way I know it to be is that when you are investigating the claim and you are investigating that somebody's making a liability claim against our insured driver, saying they are responsible for an accident and you are looking at that, you have that person, that set of eyes looking to determine and protect our insured as we need to.

And then when our insured is then saying, hey, you know, I was injured in this and I have an underinsured motorist claim and I was not at fault, then we need somebody to investigate that with another set of eyes to determine if there was something owed to the insured as the -- for a coverage that they paid for.

Q Okay.

A So we have two sets of eyes on it, two different sets, if that --

Q All right. And the person handling the U.I.M. claim, what are they protecting?

MR. WHELAN: Object to form.

A Protecting the insured to make sure that we, that we're paying the insured what we owe them, if something is owed to them.

Q So it's not that individual's job to try to keep the U.I.M. money from the insured; is that fair?

A Correct.

Q And it wouldn't be that person's job to try to hide a fact that is known to them in order to keep the U.I.M. money from the insured, correct?

A Correct.

Q And if that person did take part in keeping facts hidden from the insured which helped the insured's claim, that person would not be doing their job, would they?

A If they had hidden facts, no.

Q Okay. Is it your understanding that it's not USAA goal to prevent their insured from collecting as much of the U.I.M. coverage as possible?

MR. WHELAN: Object to the form.

A You're asking it's not USAA goal to

prevent?

Q Right. Is it your understanding that USAA does not have the goal of preventing its insured from collecting as much of the U.I.M. coverage as possible?

MR. WHELAN: Object to form.

A I mean, our goal is to pay what we owe, investigate a claim and pay, you know, what we owe.

Q Okay. And what is owed would be determined by the true set of facts and circumstances relative to that particular wreck, correct?

MR. WHELAN: Object to the form.

A Yes.

Q Okay. And if an adjuster at USAA participated in keeping facts hidden in order to not pay an insured what they are owed, that individual would be violating USAA's policies and ethics, correct?

MR. WHELAN: Object to the form.

A Yes. If that had happened.

Q In your position, and I don't want to know the specifics of your salary or anything like that, okay. Be clear on that.

Is your -- What is your pay structure? Is

it a salary? Is it hourly? How are you compensated in your position?

A I'm hourly.

Q And is that true for all examiners, as far as you know?

A Yes.

Q Okay. Same with adjusters?

A Yes.

Q All right. And is that hourly rate based on your experience and years of service?

A I don't really know that. I mean, I know that there's, in each level, there's a, I guess a rate or range of what you can make.

Q Okay. How do you get from one level to the next?

A To be -- You have to be promoted.

Q Is there a set of written criteria that you have to meet in order to move from one level to the next?

A There are some. And then there are some recommendations. Again, it's been so long I couldn't really tell you specifics though. But I know that there are some that are required and some that are recommendations.

Q Okay. Where are those written down? Like

if you wanted to go look and see how you could get to the next level, where would you go?

A I don't really know. I know that when they post the position --

Q Okay.

A -- you know, like, you know, hey, there's an examiner posting coming. And then it would, I know it would say it then --

Q Okay.

A -- for sure. You know, in order to post you have to have been an Adjuster-I for "X" amount of years and you have to maybe at least have a degree or have something else and it -- you know.

Q Within the examiner position, are there different levels?

A No.

Q Okay. So is it your understanding that all examiners are paid the same?

A I don't know --

Q Okay.

A -- what anyone else makes.

Q Okay. How long have you been an examiner?

A Since 2012.

Q Okay. And has your pay -- And, again, I don't want to know how much or what you make or

anything like that.

Has your pay increased during that period of time?

A It has.

Q Okay. What was that increase or those increases based upon?

MR. WHELAN: Object to form.

A It can involve projects. It can, you know, furthering your education. And I just think -- That's the best of my memory.

Q Okay. What have, in those seven years, have you done to further your education? What are some examples of that?

A Taking some, like, continuing education courses, P.L.R.B. courses, but it's not continuing education 'cause it's -- That's all I -- the word I can use. Because it doesn't go toward my, necessarily go toward my licensing. But courses just have to do with, you know, insurance adjusting.

Q Where have you taken those courses?

A I take them online at home.

Q Okay. And when you say involvement in projects, what does that consist of?

A I am on a Medicare reporting team where I

handle Medicare checks or, you know, checking the portal and getting those things handled.

Q She deserves all the money for that. Medicare is a nightmare.

A Mentoring projects. There probably have been other things, but I can't remember.

Q All right. So one of the numbers that you called off is you knew how many cases you have pending?

A Uh-huh.

Q What other numbers do you keep tabs on --

MR. WHELAN: Object to form.

Q -- related to your work? I'm not -- I mean, you might know, you know, the local --

MR. WHELAN: That might be the weirdest question I've heard.

Q -- baseball team's record or something. I don't want to know that. I want to know statistics related to your work. Sorry.

A Probably the only other thing I can tell you, is I know average claim volume --

Q Okay.

A -- that I get in a week, but only myself. Because I can only see my own self, so, you know,

that's probably about it.

Q What is that?

A Usually five to seven claims a week.

Q Okay. And I guess that's about how many you close out every week to keep it coming?

A Try to.

Q Okay.

A Sometimes more, sometimes less.

Q Okay. Are there any tracking mechanisms, in terms of negotiation or settlement of claims below a reserve or within specific ranges or anything like that?

A Maybe that someone else can see. We don't see that. We can't see that.

Q Okay. Are there any kind of awards or bonus systems, bonus, you know, programs related to claims handling, specifically?

A No.

Q Okay. Are there any kind of award programs or bonus programs at all for examiners or adjusters?

A No.

Q Okay. Do you ever have any communication with anyone related to settlement amounts? In other words, the amount that you're settling a

particular claim or particular claims for within USAA? I'm not talking about outside attorneys, or the insureds. Obviously, you talk to them about it.

But any internal conversations about that that take place?

A In what sense, like --

Q Well, it's my understanding from what you said that the examiner does the investigation, gets the meds, sets the reserve, does the negotia -- handles the negotiations; is that right?

A Yes.

Q Okay. And so my question is, is there ever any communication, file note, e-mail, meeting, where somebody says, you know, you might have settled that case for a little more than you should have; or, you might have set -- you might have should have set that reserve a little higher to start with, so we know what we're dealing with on the front-end? Anything like that take place from time to time?

A There's no discussion, no, about settlement amounts or what we settled anything for after the fact.

Q Okay. What, if any, correspondence or

conversations take place on the front-end about those topics?

A With?

Q Anyone. So when you set a reserve amount, you get a demand letter --

A Uh-huh.

Q -- it says I demand the moon, the sky, the stars and the sun for good measure, what happens next?

A Demand comes in, should be sending a copy to our insured, copy of the demand letter talking about it. Potentially an access letter either has already been sent; or, if it hasn't, for whatever reason, then you would send it at that point in time.

And that would be it. Depending on, you know, where you need to go with it from there.

Q Okay.

A You evaluate it and you go from there.

Q And what does the evaluation process look like?

A Just break out the, you know, break down the demand, the medicals; put them in a file and determine the value of it, and then determine if you need to get authority.

Q Do you use a software program in order to value claims?

A I do not, no. Within USAA?

Q (Nods head.)

A Yes.

Q Okay.

A Some people could, yes.

Q Who uses the program?

A Depending on the value of the claim, any claim valued -- Well, there's criteria for it. Under twenty-five thousand. As long as they're not treat and release, they would be entered in our colossus system.

Q Okay. And so anything over twenty-five thousand does not go into colossus?

A Correct. Or U.I.M. claims.

Q No U.I.M. claims?

A No.

Q No?

A No, no.

Q Do you know why U.I.M. claims do not?

A There's some type of suit.

Q Have you ever had a meeting, or how do you know what you know about that?

MR. WHELAN: Object to form.

A Just always told.

Q Okay. Just water cooler talk?

A No. Just, we just -- through -- It wasn't a direct communication, like a document, but through manager, verbal.

Q Okay. Just at some point they said, we're not doing U.I.M. on colossus anymore?

MR. WHELAN: Object to form.

A Correct. And it's probably in our K.D. as well.

Q Okay. So those claims aside.

A Uh-huh.

Q U.I.M. claim comes in, demand is made, you set a reserve, right?

THE COURT REPORTER: Yes?

Q Yes?

A Yes.

Q Without communicating with anyone, typically?

A Typically, yes.

Q Okay.

A But each case, again, each case on its own merit, so it just depends on the specifics. But once you look at all the information.

Q Typically you set it as the examiner?

A Correct.

Q If you do need to talk to somebody, you talk to your manager?

A First.

Q First?

A Yes, uh-huh.

Q Can you give me an example of a situation where you would need to talk to your manager before doing that?

A Before setting the reserves?

Q Right.

A Maybe if there was some kind of, something in question. A questionable relatedness of the injury or -- Potentially.

Q All right. Where does it go from the manager? You said you talk to your manager. Do you always get a final decision there?

A Not necessarily.

Q Okay.

A Maybe we then might meet with the director, if needed.

Q Okay. And that's a meeting you would have with the director?

A With the manager.

Q Okay. And then the manager would meet

with the director?

MR. WHELAN: Object to form.

A The three of us.

Q The three, okay. That's what I'm trying to get.

Some companies are very chain of command oriented. Others are more collaborative. So that's all I'm trying to get at, okay?

A (Nods head.)

Q Yes?

A Yes.

MR. WHELAN: Object to form.

Q All right. We set a reserve, we have to respond, right?

A Yes.

Q How do we decide how to respond?

A To the demand?

Q Right.

A If -- Again, case by case.

Q Right.

A You know, maybe I'm doing it by myself and I can write it up and either it's within my authority, or it's not and I have to get authority, or I maybe need some additional information, so --

Q Okay.

A -- then I just -- we make the determination of how we're going to respond and then we move forward, or I make that determination. It just depends.

Q Okay. So let's -- The different authority levels, what is your authority level?

A Forty-five thousand.

Q Okay. And is that true for all examiners, as far as you know?

MR. WHELAN: Object to form.

A I don't know what anyone else's authority is.

Q Okay. Has your authority ever changed while you've been an examiner?

A Yes.

Q Okay. How often?

A Maybe twice, maybe three times. I can't remember.

Q Okay. What was it last?

A Either thirty or thirty-five.

Q Okay. And do you know what an Adjuster-I's authority is?

A I do not.

Q Okay. If you need to offer above forty-five thousand dollars on a case, how do you go

about that? What's the process?

A After I evaluate the claim, the injury, and if I feel that it's worth over forty-five thousand, then I would have to send it to my manager --

Q Okay.

A -- for her to review that. And she would have to agree with that, and put the authority in the file for me to make any offers.

Q Okay. What is the manager able to go to?

A My manager has seventy-five thousand, I believe.

Q Okay. Aggregate? So, in other words, another thirty thousand on top of your forty-five?

A Correct.

Q Okay.

A Total per exposure.

Q Exposure.

So if you and your manager agree that it's a hundred-thousand-dollar case, what would happen?

A It would have to go to the director --

Q Okay.

A -- for the authority.

Q Okay. And what is the director's authority level?

MR. WHELAN: Object to the form.

A I think a hundred.

Q Okay. And have you had claims that have resolved above a hundred thousand, you personally?

A Have I paid claims over a hundred thousand?

Q Yes.

A Yes.

Q So if everybody agrees, you, your manager, your director, that you need to offer a hundred and fifty thousand on a claim, what happens?

A It has to go to the executive director.

Q And do you know what -- That's not very good. It's now a guy, it's now --

A Matt.

Q -- Matt, right. Okay.

A Matthew.

Q Do you know what Matthew's authority level is?

A I'm not sure.

Q Okay. And that authority level would apply to reserves and offers, correct?

A So that I can understand that the reserve -- I can't reserve a file without his authority?

Q So let me ask it better.

MR. WHELAN: That's a question. For the record, that's a question she's asking.

MR. WILLEY, IV: Yeah.

Q Let me ask -- That's a question. Let me ask my question better, okay.

If you want to set a reserve above forty-five thousand, you have to get approval from your manager; is that correct?

A No. That is not correct.

Q That is not correct, okay.

So this process, the authority process only applies to the offering of money; is that accurate?

A Yes.

Q Okay. As an examiner, is it accurate to say that you were able to set a reserve at any amount within the coverage without anyone else's approval?

A Yes.

Q Okay. However, you would not be able to offer any amount above forty-five thousand without getting additional authority from your manager, correct?

A Correct.

Q Okay. That's what I was trying --

MR. WHELAN: All right.

MR. WILLEY, IV: You need a break?

MR. WHELAN: Yeah. Let's take a break.

MR. WILLEY, IV: Okay.

(Whereupon, a recess was had from 3:10 p.m. to 3:14 p.m.)

MR. WILLEY, IV: If you don't mind reading my last question.

THE COURT REPORTER: "Okay. However, you would not be able to offer any amount above forty-five thousand without getting additional authority from your manager, correct?"

Her answer is: Correct.

BY MR. WILLEY, IV:

Q So those authority requests, do they go through the computer system? How do they get transmitted? You yell down the hall, post a note?

A Yes. Through the computer system.

Q Okay. Are there preset meetings on authority requests? In other words, do you all get together every Wednesday at three to discuss all

your authority requests, or do you just take them as they come up?

A Take them as they come up.

Q Okay. I think I already asked this. But your manager and director are in close proximity to where you are at work?

A Yes.

Q Okay. The executive director, you don't know where he is, right?

A No.

Q Got that right.

Have you ever been reprimanded at work?

A No.

Q Okay. How does USAA do it? Is there like a -- and I'll give you an example so you know what I'm talking about.

Some companies have a, you know, a verbal warning, then a written warning, you know, and you get two written warnings and you're toast or whatever.

Do you know what USAA's reprimand process is?

A I think it's something like what you said, but I honestly, I don't know.

Q Never been involved with it?

A No.

Q Okay. I figured not. You seem to nice. Do you have any hard copy files that you deal with, or is everything electronic?

A It's all electronic.

Q Okay. Do you keep paper for any reason?

A Not that I keep, no.

Q Okay. Do you, from time to time, take notes on paper at your desk?

A I have. I take my voice mails down on paper and throw those away and maybe scribble something down here and there, but not actual notes.

Q When you take your voice mails down, do you then input them into the claims file, or do you just take it down, return the call and then dispose of the paper?

A Correct. I return the call. And then I will dock in the file that I have, whatever is done.

Q Okay. And is it USAA's policy that every call on a claim is supposed to be documented?

A Yes.

Q Okay. And is it documented in the claims file?

A Claims docs.

Q Claims docs.

Are the meetings that are had, for example, if you met with your manager to get additional authority, is that meeting documented in the claims docs?

A Typically it is.

Q Okay. Supposed to be?

A That I don't know. I mean, maybe it's the reason that you're meeting with them, you know, that just a quick question about something. But if you're conferencing a file, no. The manager docs the file.

Q Okay. You know when you call an insurance company and they say on the thing, this call may be recorded for, you know --

A Qualify purposes?

Q -- qualify assurance purposes. Does USAA record calls?

A They do.

Q Okay. Are those recordings stored in the claims docs?

A No, no.

Q Okay. As an examiner, do you have access to those recordings?

A They're just the, the randomly recorded calls, not anything that we didn't record. Like, if I record a statement, obviously, I have access to that.

Q Right, okay.

A But they're randomly, no, we do not.

Q Okay.

A They're not --

Q And, so USAA doesn't record every call for purposes of inclusion in the claims file; is that correct?

A Correct.

Q Okay.

A That I'm aware of.

Q That you're aware of.

When you want to record a call, for example, record a statement to put into the claims file, how do you do it?

MR. WHELAN: You talking about a statement, not a call, right? You said record a call or a statement.

MR. WILLEY, IV: Well, a call statement. I mean, a person doesn't sit there typically for --

MR. WHELAN: Okay. You talking about

a recorded statement.

BY MR. WILLEY, IV:

Q I will give you an example.

First time you talk to your insured and you say, okay, I'm going to record this call. Tell me what happened. How do you record that call? Like, is there a button on claims doc, or how does that work?

A Yes. There's a button that you push when you're ready to record the statement.

Q Okay. And then that recording gets saved into the claims file?

A Correct.

(Whereupon, Plaintiff's Exhibit Number 1 was marked for identification.)

Q All right. I need an education, okay. All right.

A I will do my best.

Q I know you will.

The first thing I'm going to mark is Plaintiff's Exhibit 1, which is going to be Hood USAA production 001 through 0023.

MR. WHELAN: Let me see that for a second.

MR. WILLEY, IV: Yeah. That's the

most recent one.

MR. WHELAN: Okay.

BY MR. WILLEY, IV:

Q What is it?

A What is this?

Q Yes. And you can flip through it, feel free to flip through it.

A Copy of the claims docs.

Q Okay. And is that printed off the computer? Is that how that's generated?

A It looks like it.

Q Okay. Looking at the first page, your name is on it, right?

A Yes.

Q Okay. Did you open this file; is that accurate? Is that what that first entry is?

A I set the claim up, yes.

Q Okay. How did you get notice of the claim?

A How did you get a notice of this claim?

Q Yes.

A I was already handling the initial claim that was set up. I was handling the liability investigation claim.

Q All right. At the time that you opened

this claim, how long had you been handling that claim?

A I would assume, because I don't really remember, since somewhere, approximately, since the date of the accident in November. I don't know the exact time frame, no.

Q At the time that you opened this claim, had you already conducted an investigation into the facts surrounding the accident at issue in this claim?

A From what I can remember, I was still investigating the accident. It was not completed.

Q Okay. So if that original accident was reported to you in November, this claim was open in May, 2015 --

A Uh-huh.

Q -- correct?

A Yes.

Q Okay. So you were six months into but not completed with your investigation of the underlying facts; is that accurate?

A From what I can remember.

Q Okay.

A Yes.

Q All right. Who -- What was the posture of

the claim that you were handling? Who was trying to get compensated from who?

A From what I remember, Antoine Johnson was presenting the claim to USAA.

Q Okay. Looking at this claims file, are you able to tell me all of the facts that you had gathered in that six-month period as it relates to this wreck, prior to getting this claim?

MR. WHELAN: You talking about just this exhibit or the whole U.I.M. file?

MR. WILLEY, IV: The claims file.

A Just from right here, just from what's here?

MR. WHELAN: You're pointing to the exhibit, but you're saying the claims file.

MR. WILLEY, IV: Right. She said that Exhibit 1 is the claims docs.

MR. WHELAN: Yeah. But you're saying the claims file.

MR. WILLEY, IV: Okay.

A Just from this?

BY MR. WILLEY, IV:

Q From the claims docs.

A Okay. All right. Can I look at this?

Q Yes.

A Okay. Can you repeat your question again. I'm sorry.

Q Yeah. The claims docs that you started on May 20, 2015 --

A Uh-huh.

Q -- it doesn't include all of the facts that you had gathered in your six-month investigation of this wreck, correct?

A Just seems like it's a synopsis.

Q Right. That's what I'm getting at.

So in your file, your claims docs, there would have been more exhaustive information relating to the facts and circumstances of the underlying wreck than what we have here, correct?

A Correct.

Q Okay. For terminology sake, just so I can make sure I have this right, what does I.D. mean? Is that insured driver?

A Yes.

Q Okay. And I.V. is insured vehicle?

A Yes.

Q Okay. C.V. claimant vehicle?

A Correct.

Q Okay. On documentation number four it

says, set up claim for U.I.M. under L/R7. What is that? What is L/R7?

A Loss report number seven.

Q Okay. What does that mean?

A We have -- That's how you distinguish between our -- the claims itself. Our member numbers is pretty much our claims numbers.

Q Right.

A And each date of loss would be, have its own loss report number.

Q Okay.

A But because of -- This one I don't know if I mentioned -- Oh, loss report five would be the one that I handled --

Q Okay.

A -- the liability.

Q Okay.

A So that's kind of -- That's what distinguishes each loss report.

Does that make sense?

Q That does.

Is there anywhere in here that I could look to determine what loss report one, two, three, four and six are?

A No, no.

Q Okay. Where would I find that information?

A In their, their file. Just their entire file.

Q Member file?

A Member file.

Q Okay. Does USAA have a policy or a standard for once a claim is opened how quickly the investigation should begin?

A As quickly as you have the information to be able to start it. So you should be calling on it right away, whoever you had the information for.

Q Okay. Is there a certain number of days that a claim can be opened with no action before it alerts a manager or alerts a supervisor?

Does that make sense?

A It does. And I'm not sure --

Q Okay.

A -- if there's anything that, if there's any type of mechanism or anything like that that's set up.

Q Okay. Is there anything for you, as an examiner, where if you don't touch a file for, hypothetically, forty-five days, you get a message that says, you know, tickler, you haven't touched

this file for forty-five days or anything like that?

A No.

Q Okay. So it's expected at USAA that, basically, you would be actively working on all of your files continuously from the moment that the claim is opened?

A Correct.

MR. WHELAN: Object to the form.

A Depending on what is needed.

Q Right, right.

A So it's not necessarily you would need it every day, to touch it every day.

Q Right.

A Just depending.

Q If you request a police report, you're not going to touch it tomorrow, most likely, right?

A Correct.

Q Okay. Something Robbie doesn't know anything about. But anyway.

The number next to your name, 49086, what is that number?

A That is my employee number.

Q Okay. And if I click that, where do I go?

A To the, I guess, employee profile page

that shows my face.

Q Okay.

A This face, that picture and then that.

Q And is that where you would go to click like your pending list or --

A I don't know that you can do that.

Q Okay.

A I don't know that you can't do that.

Q Right.

A You see information on me and my team.

Q Okay.

A People that work with me and my manager.

Q Okay. All right. The -- there's a little box up here that starts with available actions.

You see that?

A Yes.

Q That has a few options.

A Uh-huh.

THE COURT REPORTER: Yes?

A Yes.

Q The claims documentation option, what, if I click that, what happens?

A You can see just the claim documentation, the claim docs is what you're looking at right now.

Q Okay. If I click start new conversation,

what does that do?

A You -- Let me just say that I, you know, some of this stuff you just like, you're so use to this --

Q I understand.

A You know, you do the same thing day after day, but I think that's how you add new docs --

Q Okay.

A -- add new claims docs. But, again, I don't -- I think I just see the same thing over and over every day, so I don't pay attention, actually, what it says.

Q Muscle memory?

A Yes.

Q So I understand that.

Is there a mechanism on claims docs or on your computer at USAA to have any kind of instant messaging chats with any other member of your team or USAA employee?

A On the computer, on our main computer?

Q Yes.

A Yes. We have instant messaging.

Q Instant messaging.

And what is that program called?

A I.M., I guess, I guess.

Q Okay.

A I.M. I don't know.

Q Is it part of this claims management software? Do you know? Or, is it separate?

A Oh, I think it's separate, but I don't really know.

Q But you don't know.

Do you use that regularly to communicate?

A I do not. I'm bad at that.

Q I'm bad at that too.

Do you know if those messages get stored anywhere on the claims docs or in the claims file?

A No. Not that I'm aware of, because I don't think they're specific to the claim.

Q Got it. If you flip with me to 002, looking at documentation number five. It says conversion of record new to old; old unit, new unit, et cetera.

What is that? What does that mean?

A When I was setting it up -- Initially, when a new claim sets up, gets set up, it -- whoever is setting it up, until you assign it to whoever you're going to assign it to, whether it's yourself or someone else, it starts out in the manager's name.

So at the time in 2015 my unit was 7980. And my manager at the time digits were 41.

Q Okay.

A So that's just how it, that's the way it looks now.

Q Okay.

A That's the way it, if I set up the claim now, it's going to be 7972-41. It's just my manager's now.

So then when I transferred it to -- assigned it to a new person, which that person's unit is 7984-13, which ended up being Diane.

Q All right. So at this point, was your manager Alisa?

A No.

Q Who was your manager at this point?

A I think that it was Neal.

Q Okay. And Neal's last name?

A Schleifer. And I think that is -- I'm going -- It's S-C-H -- If I had a pen. Can I have a pen. Let me just write it.

Oh, we're going to go with that.

Q Okay. S-C-H-L-E-I-F-E-R. And if it's not exactly right --

MR. WHELAN: She's holding her hands

up. It's a guess.

MR. WILLEY, IV: It's a guess.

MR. WHELAN: Is it a guess?

A It's a guess.

MR. WHELAN: Try not to guess, unless he's asked you to guess, okay?

A Okay. Sorry.

BY MR. WILLEY, IV:

Q All right.

A But Cal was my manager at the time.

Q It was Neal Schleifer for who we think is spelled this way?

A Correct.

Q But we're not sure?

A But he's still there.

Q Okay.

A He's still a manager there. I just got -- we got changed around a couple different units --

Q Got it.

A -- quickly.

Q Okay. Do you know why?

A My manager was initially Donna. And then she retired and I got Neal. And then I went to -- somebody got promoted and Alisa's unit lost an examiner, and then she picked me.

Q Okay. Got it.

A I'm not sure.

Q Okay. That's fine. The next item is a view conversation. Is that what shows up when you send a letter or something out, or what is that?

A That is a automated claims communication that goes from USAA.com.

Q Okay. Do you have to do anything special to initiate that?

A No. It's automatic.

Q How does the system know that now is the time to send that communication?

A Because the claim, because the claim was --

Q Okay.

A -- open.

Q Okay. The next documentation six, W-R-C-O-M.

Do you know what that is?

A That is the automated e-mail that's sent that says something similar too.

Q Yes. Got it. I'm with you. Okay.

And we have the PDFs of those so that's why I'm not wasting your time explaining it to me. I just wanted to make sure that's what that was.

Going back to documentation number four, it says arbitration decision that I.D., insured driver, contributed twenty percent for not traveling with headlights on. As witness stated, insured vehicle did not have headlights on, but witness was able to see C.V. Johnson, therefore C.V. Johnson should have been able to see insured vehicle, I.V.

Do you see that?

A Yes.

Q Okay. And was that basically a summary of what you used in your liability investigation of the claim?

A I'm not exactly sure of that. It appears from what I can see. But that is just a summarizing what the arbitration decision was. And I was just putting in that.

Q All right. The next portion says approximate cause was C.V. Johnson failing to yield right-of-way.

Do you see that?

A Yes.

Q That is something that you would have input into claims docs?

A And I'm only going just from what, what it

appears here, that that's still part of arbitration decision, that they were saying the proximate cause of the accident.

Q My question is, you would have input that into the claims docs system?

A This, this one we're looking at?

Q Yes. That sentence.

A Yes.

Q Okay. And you used the arbitration decision in your liability investigation, correct?

A I'm not looking at my file, so I can't necessarily say that I would do that, no.

Q That's my next question.

So in order to be able to determine all of the facts that you used in your liability investigation, you would need to refer to your claims file?

A What I remember from this was that I wasn't -- hadn't finished any investigation when it got transferred.

Q Right.

A So I have some memory of this claim. And I don't -- The investigation wasn't concluded when it got transferred. So I don't think that the arbitration issues would have mattered, but I

hadn't concluded my investigation.

Q And at this particular point in time, you can't tell me all of the facts that you had in your investigation in your claims file without actually looking at it; is that accurate?

A Not all of it, no.

Q The arbitration referral, is that a proper way to say it, transfer? How do you all say that?

A It just -- Arbitration was filed.

Q Okay.

A Filing.

Q All right. And do you know if USAA filed that or if Geico filed that?

A I can't say for certain based on the time frame. I would think it would be Geico.

Q All right. Documentation number eleven, it says 99999 and a dash with no name.

Do you see that?

A Yes.

Q What does that indicate? Who would have input that?

A System generated.

Q Okay.

A That they -- The claim information was sent to I.S.O.

Q And what is that?

A I don't know, and I'm not -- I don't know what that stands for.

Q Right.

A But it's a system that we send -- some insurance companies send the claims information to.

Q Okay. On the next page, documentation number twelve starts with Diane Martin. It has some additional information at twelve and thirteen and fourteen.

Why did it move to Diane, this claim?

A Because of being a U.I.M. claim, claim is being made under the U.I.M. coverage. And I was handling the B.I. investigation. So we had to split out -- We split out claims in that situation, so it was moved to her for handling of it.

Q Okay. How does the decision get made who it moves to?

A It would be the next available examiner, as long as they're not in your unit.

Q All right. Does the computer determine that?

A The computer can determine the next available examiner that's --

Q Okay.

A -- that's, in essence, oh, she hasn't had a claim, so she's next on the --

Q Okay.

A -- next to get a claim.

Q So it's just like a list?

A It's just a, you know, it's all internal system.

Q Got it, all right. And, so the system would have populated it to her without any human inputs?

A Correct.

Q Did you after that point have anymore interaction with this claim?

A Going into this claim?

Q Yes.

A Not that I'm aware of.

Q Okay. What about did you ever have any discussions with Diane about the claim or any meetings with her about it?

A I don't remember specifically, but I -- she most likely either called me or -- We sat across in aisle from each other. So she probably when she got it turned around and asked me, hey, you know. But it would be the same as her picking the phone up. But because we were in close

proximity that she might have asked me what was going on.

Q And do you remember when Alisa, when you joined her team exactly?

A I do not.

Q Okay. Did she -- Was she Diane's manager before she was yours? Do you know?

A Yes.

Q Okay. Did she switch, or did you switch during the pendency of this claim?

A No.

Q Okay. If you will go to page 10 of that and look at documentation number forty-five. It's just a note from Alisa about suit being filed.

Documentation forty-five at the bottom.

A Uh-huh.

Q So at this point she was Diane's manager?

A Okay.

Q Is that accurate?

A Yes.

Q Okay. Who's Jerry Wolfe? If you look up two entries.

A He is our physical damage specialist in the field.

Q Once the file down here in documentation

forty-five it says, suit filed, served, handled under L/R number five and answer filed, would that indicate a relation back to a previous loss report?

A Right. Loss report five is me.

Q Is you, right?

MR. WHELAN: You have a question or --

Q Would that involve a relation back to that previous loss report number five?

A This doc?

Q Yes.

A It appears -- Hang on.

So this appears to say this file is for the U.I.M. and that suit, there's suit then filed and served on loss report five.

Is that what you're asking?

Q Yes. So the suit that was filed in this case --

A Uh-huh. At this time.

Q Right. That is the subject, the underlying suit, that is now subject of this case, was handled under your loss report when it was answered, correct?

MR. WHELAN: Object to the form.

A I don't -- I'm not sure.

Q Okay. The entry says suit filed, slash, served; handled under L/R number five and answered filed, right?

A Yes.

Q Okay. Appears majority of liability, L.I.A.B., on C.D. Johnson insured with Geico.

Do you see that?

A Uh-huh.

Q Okay.

THE COURT REPORTER: Yes?

A Yes.

Q What does handle under L/R number five mean to you, in your experience, reviewing claims docs?

MR. WHELAN: Object.

A It does appear to me that this suit, that it -- suit was handled under loss report number five.

Q Okay.

A But I don't know if it's -- which suit, because they both filed suits. So that's what I don't --

Q Right.

A -- I can't speak to.

Q But we do know, based on this, is that

what we're talking about here is the suit where Johnson is a claimant driver, right --

MR. WHELAN: Object to the form.

Q -- based on this note? Looking at documentation number forty-five. It says C.D. Johnson --

A Uh-huh.

Q -- right?

THE COURT REPORTER: Yes?

A Yes.

MR. WHELAN: What? Is the question that it says C.D. Johnson?

A Then it would be the B.I. suit that's being handled under loss report five.

Q Right. So based on this note, what we're -- what it's referencing is the suit being handled under your loss report, which involves claimant driver Johnson, correct?

MR. WHELAN: Object to form.

Q That's what this note says?

MR. WHELAN: Asked and answered. Object to the form.

A That it appears, correct.

Q Okay. So moving onto the next page, which is a continuation of documentation number forty-

five, it says comp neg, which is comparative negligence, right?

A Yes.

Q Presumably.

Eighty percent on Johnson and twenty percent on I.D., based on arb, correct?

A Yes.

Q And I.D., again, is insured driver, which would have been Therese Hood?

A Yes.

Q Okay. Then it says pending insured driver records, bills for eval of U.I.M. claim, right?

A Yes.

Q Okay. So at this point, we can summarize that suit's been filed, right?

A Yes.

Q And suit's being answered under the loss report that you're handling with the B.I. loss report, right?

A That's what it appears, yes.

Q That we have made a comparative negligence note of eighty percent on Johnson and twenty percent on Hood based on the arbitration, right?

A That's what our file for the property damage, yes.

Q And at this point we're just waiting for the records and the bills for the evaluation of the U.I.M. claim?

MR. WHELAN: Object to form.

Q Correct?

A That's what I see here from the manager, yes.

Q Okay. All right. The next. Received suit for U.I.M., Hood verse Johnson. Due date 7-3-15. Suit has already been answered by adverse and a countersuit has been filed against insured driver.

The countersuit is being handled under L/R6, right?

A Yes.

Q Okay. And the countersuit in the case styled Hood v. Johnson, would be Johnson's counterclaim against Therese Hood, right?

A I'm sorry? Again.

Q This is telling us that we received a suit styled Therese Hood v. Johnson, right?

A Yes.

Q Okay. That that suit has been answered by the adverse, which is Johnson --

A Uh-huh.

Q -- right?

THE COURT REPORTER: Yes?

A Yes.

Q And Johnson has filed a countersuit against Hood, right?

A Yes.

Q Okay. And that the countersuit is being handled under loss report number six, right?

A I do see that's what that says, yes.

Q Okay. Are you able to determine from this note, or you can flip through a few if you want, but who was handling loss report number six?

A I don't know, and I don't -- Is that a typo?

Q I don't know either.

A It potentially could be.

Q Okay.

A Because -- That's what my thought is.

Q Okay. All right. Who is Marsha, I think Eichman?

A She is one of our litigation directors, I think is her title.

Q Do you know how the litigation teams are set up?

A I do not.

Q Saved you about five questions.

MR. WHELAN: More like fifty.

Q What about Peter Munroe, you know who he is?

A No. I never heard that name.

Q Never?

A No.

Q Okay. All right. Kathy -- we're going to talk to her. We don't need to go through that.

Do you know Kathy?

A I do.

Q You do. Do you speak with Kathy regularly?

A I do not.

Q Is Kathy in your office?

A No. She's, I believe she's a work at home, maybe.

Q Oh, that's nice.

A I think so.

Q How do you get that gig?

MR. WHELAN: Object to the form.

Q What, I'm not saying it's a bad thing.

How do you get to work at home?

A You just ask for it, I guess.

Q Okay.

MR. WHELAN: She said I guess.

Q I guess, all right.

Have you ever worked on the litigation team?

A No, I have not.

Q Every time that it says five nines, dash, blank name, does that always mean the same thing as the person making the entry? So, for example, if you will look at page 16 is where I'm at. I'm looking at documentation number seventy, seventy-one, seventy-four where it says the input person was 99999, dash, no name.

A Yes. That -- And I'm only going to make the assumption --

Q Okay.

A -- that that's -- those are automated payments.

Q Okay. Because in the pre-litigation, is the all nines with the dash and blank, always associated with an automated entry?

A Not -- No. 'Cause we can make -- we have automated payments as well.

Q Okay. So in your department, you can also make an automated entry and it would look exactly the same, in terms of the nines?

A I can't say for sure.

Q Okay. All right.

MR. WILLEY, IV: I will mark 0024 through 0027 as Plaintiff's Exhibit Number 2.

(Whereupon, Plaintiff's Exhibit Number 2 was marked for identification.)

Q All right. It's kind of small type. If you want to look at it. If you need to see anything on mine, let me know, because I can blow it up, okay.

First, looking at the top left at what I would call the index. Yes.

What -- Are all of these things separate parts of the claims file?

A I mean, I guess that's one way to look at them. It's -- would just be it would take you some place if you clicked on that, maybe. This is the way our claim file looks.

Q Okay. So, for example, if you clicked on claims plan, where would that take you?

A To a screen that shows -- Everything that's kind of set up in the, all the -- I'm trying to think -- exposure is not the right word I'm thinking to use.

I can't, I can't explain it. I don't know what else to say.

Q Okay.

A I see it every day and I don't -- I mean, it just gives you some more information, but --

Q Tell me what kind of, like what, for example, just would be listed there?

A It may -- Information that you might have to, may -- Information that's pending.

Q Okay.

A It may show that the statements that are taken or maybe they haven't been taken. If a police report's been received; if the liability assessment's been updated; if we've gotten the appraisal done on the vehicles; if total loss is still pending. And it kind of list all those things out, like, kind of pending items. Maybe that's --

Q How do things get added to the claims plan?

A They're added -- This is called the tree view.

Q Are they added by you?

A They could be. If you say add to the loss here, sometimes they're added when the claim is set

up. And it's automatic.

Q That's what I'm getting at.

So when you set up a claim and you look at the file for the first time and you determine, I want to talk with witness A, B, C; I want to get a copy of the police report; I want to get a copy of the scene investigation -- I want to do a scene investigation; I want to get a statement from this person, you would put those things listed in the claims plan?

A It's automatic.

Q Right.

A It's there.

Q Okay.

A And then, say the police report. You see the police report is here?

Q Uh-huh.

A Once you actually receive it and you file it, it's going to show completed in the claims plan. It will automatically.

When you get that statement from, even from each person, whether it's the witness, any witnesses or drivers or passengers, it will automatic, and you complete, once you take it and you hit a complete radio button, it completes it in

the claims plan.

Q That's kind of what I was asking earlier. And I should have been better with my question. But is it true to say that the claims plan is basically the checklist of all the things that you would like to do on a claim?

MR. WHELAN: Object to form.

A Possibly.

Q Right.

A Not necessarily though.

Q Maybe not all inclusive, right?

A Yes.

Q Okay. But it is what it says it is, which is a plan for the claim, right?

A Yes.

Q Okay. And if you click that link, it would take you to a separate page that would show all of those items which have been complete and which were pending, correct?

A Yes.

Q Okay. And it would also show you when the completed items were completed, right? Does it give you a date?

A Maybe somewhere. I'm not sure exactly if this shows in there or not.

Q In looking at 0024, if you look at the kind of tabs on claim docs where injury evaluation is in blue.

Do you see that?

A Yes.

Q If you were in the claims plan section, would that section be blue?

A Yes.

Q Okay. So my basic question is if we got a printout of the claims plan section, we would know it was the claims plan section if it looked like this, except 0024 instead of injury evaluation being highlighted, the claims plan tab was highlighted?

A I believe so.

Q Okay. This injury evaluation tab section --

A Uh-huh.

Q -- who inputs this information?

A The file handler.

Q Okay. Are other individuals, like, managers able to document things in there?

A I guess they have the ability to, but normally that's not what -- Usually, it's kind of a working document that we use.

Q Okay. And this document builds as you go through the process; is that fair?

MR. WHELAN: Object to form.

Q In other words, the information that is on this document that we're looking at may have been entered at different times?

A Correct, yes.

Q All right. Do you know whether or not in setting up the claim you would have entered any of this information into the injury evaluation?

A I would not have, no.

Q Okay. And how do you know that?

A Because I would have just set the claim up, specifically, to get it assigned and moved it on.

Q When someone documents and says that a U.I.M. coverage is, for example, twenty-five, slash, twenty-five, what does that mean in USAA's world?

A Well, it would mean that -- What it would mean to me is twenty-five thousand per person, twenty-five thousand per occurrence, which I don't think that exist.

Q Right.

A But that's what, typically, that's what we

would look at it to mean.

Q So here under physical evidence, if you look. Can you see that where it says hard impact, compelling photos, USAA U.I.M five hundred, slash, five hundred.

A Uh-huh.

Q To you that would mean?

A Five hundred thousand per person, five hundred per occurrence.

Q Right. Which is -- The reserves on this particular sheet at this moment in time, I have two hundred and fifty thousand.

Do you see that?

A I do.

Q Okay. Do you know, does USAA have a policy of paying out the undisputed U.I.M. amount? I'll give you -- You need an example?

A Yes, please.

Q Okay. And then I'll reask my question.

Some insurance companies say that in order to fairly compensate our insureds or what have you, if we think thirty thousand U.I.M. is coverage is owed and the insured thinks a hundred thousand in U.I.M. coverage is owed, we will go ahead and pay the thirty thousand that's undisputed out and

litigate over the seventy thousand.

Have you ever seen a time where USAA has done that?

MR. WHELAN: Object to the form.

A Not any of my files.

Q Have you ever seen that in anyone else's files?

A I can really only speak to my own.

Q Okay. So you're not aware of USAA ever having done that?

A Not -- Again, I can only, really, only speak to my own, anything that I've ever handled.

Q Right.

A And I've not ever done that.

Q Okay. Have you ever thought of that before today?

A I have not.

Q Okay.

A Property damage, maybe.

Q Okay. Right. You think that's a good practice --

MR. WHELAN: Object to the form.

Q -- to protect your insured?

A I would have to look at -- It would, again, be a case-by-case basis situation. You

know, am I getting a release. I mean, it's a whole situation.

Q Well, let's just talk about it generally. So we talked earlier about USAA's ethics of honest, integrity, loyalty, and it's kind of stand by the insured idea, right?

A Certainly.

Q Okay.

A Well, hang on a second.

Q You said --

A Wait. Say that again.

Q The ethos, I think you said were on the wall.

A Yes.

Q Honesty, integrity, loyalty and maybe one other, right?

A And standing by our insured.

Q The idea, right?

A You know, I mean, if we can support them, you know, and that's what -- We want to investigate the claim.

Q Right. And you said earlier that USAA's purpose of handling U.I.M. coverage is to determine how much the insured should be compensated from that coverage, right?

A If there's a claim owed and paying what we owe, yes, right.

Q And, so my question is, just to you generally, there's no dispute about a particular amount being owed? In other words, USAA agrees it's owed and the insured agrees its owed, don't you think it would be appropriate for USAA to go ahead and pay that undisputed amount to their insured?

A Again, I can't speak to every single case because there's so many factors that come in. You know, am I getting a release for that, because I'm going to need that. And I don't believe that I would be getting a release, if there's other factors that are going to come into play. So I, I just don't know.

Q Let's talk about the release factor. The release, its purposes is to protect the rest of the coverage that USAA is not paying, right?

MR. WHELAN: Object to the form.

Q Would you agree with that? That's what a release does?

A Correct.

Q It says, we will pay you "X"; you will sign this and we will never pay you another dollar,

right?

MR. WHELAN: Object to form.

A Yes.

Q Basically. So, no, you wouldn't get a release under that circumstance, but rather than being able to hold the disputed amount hostage and basically negotiate against your insured, the company would be paying the insured what everybody agrees the insured is owed and only disputing the disputed amount, doesn't that seem more fair than holding the undisputed amount to try to get the insured to take less on the disputed amount in exchange for a release?

MR. WHELAN: Object to the form.

Q Just as a person, I mean?

A That's just not my decision to make.

Q I understand that.

A So I, you know, I can't speak to that. It's just not for, it's not for me to make that decision.

Q And I'm just asking you based on your claims handling experience. I'm not asking you to make a decision for USAA or to tell them what they should do. I'm just saying, from a common sense perspective, if our purpose is to stand by our

insureds, pay what we believe is owed, doesn't that make more sense?

MR. WHELAN: Object to form.

A Not necessarily. That's all I can -- I just don't feel like -- I feel like it's a case-by-case basis, so I can't say that that, that that --

Q All right. So in this case at this particular point in time where this injury evaluation is printed, the reserves were set at two hundred and fifty thousand, right?

A Yes.

Q That's the internal evaluation of the case, right, the reserve?

A I don't know why it was set at that.

Q Right. But it is set at that?

A It is set at that, correct.

Q Okay. And if you go to the next page, we see that the total specials allowed are two hundred and seven thousand two hundred and two dollars.

Do you see that?

A Yes.

Q Okay. I'm going to have a short conversation about medicals claim verse medicals allowed.

Medicals allowed is the amount that USAA

agrees is actually compensable?

MR. WHELAN: Object to the form.

Q Is that accurate?

A That they feel is owed or they feel is related?

Q Right. So, for example, sometimes people claim -- They get in a car wreck, they go to the hospital, they get treated and then they get a pregnancy test on the way out. Pregnancy test is on the bill. That may be part of medicals claim, but it wouldn't necessarily go on medicals allowed, right?

A Possibly.

Q Right. So in this case, the total specials that were allowed, including the medicals at this point in time were two hundred and seven thousand two hundred two dollars, right?

A Yes.

Q Okay. And we got the reserve set at two hundred and fifty thousand.

So do you see any reason, given your experience in claims handling that it would not have been appropriate to compensate Ms. Hood for the two hundred and fifty thousand, and just argue over the remainder?

MR. WHELAN: Object to form.

A Because we hadn't settled the claim.

Q So you don't think it would be appropriate to compensate the undisputed amount without her signing a release, releasing her right to collect additional money, right?

MR. WHELAN: Object to form.

A Based on the information that I have here and that we didn't have a settlement.

Q Okay. All right.

On authorization notes which is about halfway down on page 0025 --

A Uh-huh.

Q -- it says claims authority conference conducted today and authority granted for two hundred and fifty thousand regarding U.I.M. claim for Therese Hood.

Do you see that?

A I do.

Q Okay. How would I determine what day that claim authority conference was held on? Is there somewhere else in the claims docs I could look to find that?

A I don't know if it would be somewhere else. I'm not sure.

Q Where else might it be if that information were going to be somewhere else, on what sections would be possible?

A I'm not -- You know, I mean, I have ones that look like this. My files look like this where my manager docs, and it doesn't show a date either.

Q Okay.

A It just shows that I made an offer after that, so.

Q All right. If I -- And I'm not trying to pin you down to one section or another, I'm just saying, if I came to your desk and said, Missy, I need to know when this client authority conference was held, where would you kind of go to see if you could find it?

A I don't -- Again, this is, I think a litigation file.

Q Okay.

A And I don't know if they have -- do something any different than what I do. So I don't know.

Q All right. So in your file it doesn't look like that?

A It does look like this, but I don't -- it did. The conference, fact that there was a

conference, I don't have a conference. My manager just looks at it.

Q All right.

A And there's no conference.

Q Okay. All right.

A So it wouldn't have been a conference.

Q This next section, do you have this section called Negotiation Points and Strategy in your --

A Yes.

Q Who inputs that information?

A The file handler.

Q Okay. Anyone else?

A And when I say file handler, that would be the person in litigation as well. But I don't know if -- I'm not saying a manager can't put information in there. I don't, you know -- I can only speak to what my manager, doesn't normally doc anything in there.

Q Okay. What's the purpose of that section?

MR. WHELAN: Object to the form.

A Everybody has a different kind of use for it, but when you look at this, it's kind of a lot of information in there, and it kind of helps you break down -- makes it a little more concise for

you.

Q Is it specifically to give you -- to remind you of facts or things to negotiate on when you're trying to resolve a case?

MR. WHELAN: Object to form.

A I mean, it can. Again, everybody -- I've seen it used for different purposes for different people.

Q Right. I mean, it's under the subject of strategy. And the ultimate goal is to get the case resolved, right? That's the goal of every claim, get it resolved?

A For everyone involved, yes.

Q Right. And you have a goal, you have objectives, you may have a strategy, whatever. The strategy is to get the case resolved, as far as little payment as possible, right?

MR. WHELAN: Object to form.

A No.

Q All right. You said the reserve, for example, in this case, two hundred and fifty thousand, right?

MR. WHELAN: You said you set the reserve?

MR. WILLEY, IV: USAA.

Q The reserve is set at two hundred and fifty thousand, okay.

Would you expect that opening offer to be two hundred and fifty thousand?

A I don't know what to expect, because I don't know what was going on in this claim.

Q Typically when you're handling claims, is your first offer the full amount of the reserve that's set on that claim?

A Not -- For myself, not typically, but that doesn't mean it hasn't happened.

Q Right. And would you expect that for other claims handlers their first offers are very rarely the full amount of the reserve set for their claims?

MR. WHELAN: Object to form.

A It just -- I can't speak to what anyone else might do. Each case -- It's a case-by-case basis.

Q Isn't part of the training that you get at USAA about how to negotiate claims with attorneys and claimants? Isn't part of the training USAA gives claims examiners and adjusters about negotiating claims with attorneys and claimants?

A Yes. At some point I had some training.

Q All right. And isn't the purpose of trying to resolve the claim to resolve it at as low of a payment as possible?

A Is that the purpose?

Q That's the purpose of trying to negotiate a claim, right, to resolve it at the lowest number possible where both sides accept the settlement?

A No. It's just to pay what we owe and to come to a mutual agreement, whatever that number may be. There isn't --

Q Okay. Right. But USAA has determined that the reserve on a claim, for example, here it's set at two hundred and fifty thousand. I think we've agreed that it would be very rare, I will submit to you in this case they did not, USAA ever offer two hundred and fifty thousand as its first offer, right?

MR. WHELAN: Object to the form, if that's a question.

A Again, I don't know what went on with this and how it was negotiated, how -- what offer was initially made and what was the, you know, what the specifics were when everything transpired. I can't speak to that.

Q And I'm not -- Right. And I'm not asking

you for specifics on what happened with the negotiations.

What I'm saying, what I'm asking you is, isn't it true if we went and looked at USAA's files, negotiation files, you would expect that it would be the rare file where USAA's first offer to resolve a case was at the full amount of the reserve that was set?

A Again, I don't -- Possibly. I just don't know. I don't have enough information.

Q Okay.

A I can only speak to my own.

Q All right. And you agree that that would be rare for your files, to find a file where the first offer that you made to a claimant or a claimant's attorney was the full amount of the reserve authority you had on that file?

A In fact, it would be rare. But I'm not saying it couldn't happen.

Q Right. And isn't part of the negotiation process, to attempt to get that claimant attorney, or claimant, to agree to accept as low a number as possible, but to accept? It has to be mutually accepted. But to accept as low a number as possible to resolve the claim?

A No.

Q Okay. It's never your goal when you go into a claim negotiation to pay the full amount of the reserve, is it?

A Is it my goal to pay what we owe and to settle it amicably with the party?

Q Right.

A So, I mean, that's the way I think about it.

Q Right.

A That's what I do.

Q Right. And I understand that, and I don't disagree with what you're saying. It has to be amicable settlement where both sides agree, correct?

A Yes.

Q Okay. And it is the company's objective to make that agreement number as low behind the reserve as possible, right?

A I'm not aware of that, no, I don't.

Q No one has ever said to you, or you've never seen a report or you've never been in a meeting where they discussed claims paid as a percentage of reserves?

A No.

Q Okay. You've never been in a meeting or seen a document or had any information distributed to you about your team's performance in terms of total payment of claims over a assessed value or anything like that?

A No, to be honest.

Q Okay. Do you believe that the claims examiner's job to pay the claimant as much money as possible?

A I believe that it's my job to pay what we owe on a claim.

Q Right. And the payment of the owed amount is based upon the valuation of the claim, right?

A Yes.

Q And the internal valuation of the claim is what you use to set the reserve, right?

MR. WHELAN: Object.

A I'm sorry?

Q The internal valuation of the claim is what is used to set the reserve amount, correct?

A Typically the high value of the claim is what the reserve is set at.

Q Right. Based upon the internal valuation of the claim, right?

A Correct.

Q Okay. What I'm getting at is the claimant has no input on the reserve on a typical claim, right?

A Correct.

THE COURT REPORTER: Can we take a break?

MR. WILLEY, IV: Sure.

(Whereupon, a recess was had from 4:37 p.m. to 4:44 p.m.)

BY MR. WILLEY, IV:

Q So looking back at Plaintiff's Exhibit 2, I'm going to go to the last page of that, which is 0027.

We're going to be done with this one.

Look again at the index on the left-hand side. I call it the index.

A We'll go with that.

Q Okay. At the bottom of the loss event overview where it says Cary Tanrath, witness; Missy Howard, X443XX handling B.I. claim; Jack Daniel, those three. What would you expect to be there?

A Should there -- Are you asking should there be anything different or should there --

Q Like if you click that --

A Oh.

Q -- where would it take you, would you expect?

A It would just take you to a screen that looks similar to this.

Q Okay.

A When I say similar, it would just have a place for somebody's name, address and phone number.

Q Okay.

A So that's the -- So like Jack Daniel, his information is probably there.

Q Okay.

A His contact information, maybe --

Q Yeah.

A -- e-mail address and things like that, is what I'm assuming, if that's the screen.

Q Yeah.

A Because these are under add to loss. There -- that becomes a drop down.

Q Got it.

A And it can -- there's a -- You can add something that says other party.

Q Okay.

A Because, typically, what this is, when you

add, when it's add to loss, it's going to be claimant vehicle, witnesses --

Q Got it.

A -- personal property, different things that might be associated with this. And there's one that's other party.

Q Okay.

A And then that's how I got added, or that's how my name got added and Jack Daniel --

Q Okay.

A -- if you have to add another party.

Q And, so if you went there, would it, would you expect to see like a summary if you all talked on the phone sort of thing?

A No.

Q Okay.

A It's really just information.

Q Got it, okay.

A Like if you were to go to detail under where we are now --

Q Uh-huh.

A -- it would list Therese Hood's name, address and phone number --

Q Okay.

A -- and maybe e-mail.

Q All right.

A And that's what it would look like.

Q Well, I hope to be able to see all that one day, but we'll figure that out.

Let me ask you about Plaintiff's --

MR. WHELAN: Jack Daniel's e-mail address?

MR. WILLEY, IV: No.

What this tab showed.

MR. WHELAN: She just told you.

Q Let me show you Plaintiff's Exhibit 3.

(Whereupon, Plaintiff's Exhibit Number 3 was marked for identification.)

Q Which is Hood USAA 0028 through 0044. Just take a minute and familiarize yourself.

Do you know what this document is?

A Not just by looking at it, no.

Q Okay. It doesn't look like anything that you're familiar with, as far as USAA's forms and all like that?

A Wait a second. It looks like all the information that's from our screens, but I don't know where it's coming from.

Q Okay. Fair enough.

A Yeah. I don't -- I'm not sure.

Q Who is Ronald Vestal? Do you know him?

A I did know him.

Q How is he?

A He passed away.

Q What was his role?

A He was, maybe a litigation director --

Q Okay.

A -- possibly. I'm not sure his exact title. But he passed away a couple years ago, maybe a year or two ago.

Q Okay. All right. Sorry to hear that.

Have you ever seen the, what I'm going to mark as Exhibit 4, which is Hood USAA 0045.

(Whereupon, Plaintiff's Exhibit Number 4 was marked for identification.)

A I'm sorry. What was the question?

Q Have you ever seen that?

A Have I seen this screen before?

Q Yes.

A On other files, yes.

Q And what is that?

A It's the reserve history. When the reserves were changed or opened and closed or, and/or changed.

Q And that's what I was going to ask you.

So there's -- You see where it stays a hundred thousand for a while, but there's several entries for that, like, 5-21, 6-22, 6-22, 6-22?

A Yes.

Q Why -- How does --

When you say open, does that open and close -- I'm trying to figure out why there would be multiple entries for the same amount.

A I'm not exactly sure --

Q Okay.

A -- about everything.

Q Okay.

A Okay. I can tell you that when there's a change, you're going to get like a change -- This is the file handler code, like --

Q Yeah.

A So like -- or not -- The employee number, I apologize. So Diane is 46902.

Q Right.

A Okay. So as soon as the file changes over, when it went M0085, it's always going to -- Then it will make an update.

Q Right.

A And then when there's an increase, it will make an update.

Q Right.

A The other things, and this is what I'm not sure on. This is just going to be what I --

Q Just the best of your knowledge.

MR. WILLEY, IV: You can't tell her not to answer. She's allowed to answer.

A It's just that it -- We have reserve remainders that we can look at that we get.

Q Uh-huh.

A I don't know if that's what that is or not.

Q Okay. How would you be able to determine what that is? Is there any way in the claims file?

A Not that I know.

Q Other than on the claim docs, Exhibit 1, would there be anywhere you could look to determine why a reserve was changed? Would that be notated anywhere else, other than as a documentation on Exhibit 1?

A Not that I'm aware of.

Q Okay.

MR. WILLEY, IV: All right. I will mark 0046 through 0384 as 5.

(Whereupon, Plaintiff's Exhibit Number 5 was marked for identification.)

MR. WHELAN: These are all the pages from 0046 through?

MR. WILLEY, IV: Yes. The full, unless somebody stole one on the plane.

BY MR. WILLEY, IV:

Q Okay. You don't need to flip through that.

If you will go with me to 0077.

All right. What is this?

A Recorded statement transcript.

Q Okay. And you took this recorded statement, correct?

A I did.

Q Okay. You said earlier when you take a recorded statement you, obviously, tell the person you go up top and you hit the button to record, right?

A Yes.

Q Okay. And then you have the opportunity to record statement, obviously. And you also take notes in the claims doc of the file?

A Yes.

Q Okay. And sometimes might those notes be useful, for example, for negotiation points or liability issues related to the incident?

MR. WHELAN: Object to the form.

A Regarding what happened, yes.

Q Okay. This recorded statement is part of L/R7, okay, which is the one part, I will say, at least of the U.I.M. claim file, okay. That's where this is, or at least it's been represented to me.

This recorded statement would have been taken by you under L/R5, correct?

A Correct.

Q Okay. And L/R5 is where you would have notated anything that you took down during that call, correct?

In other words, you're not going to have any notations in Plaintiff's Exhibit 1 that you made about this call, right?

A I wouldn't have docked anything in loss report seven, but, I mean, this recorded statement is, is the facts of --

Q What happened?

A -- what happened.

Q Right. And if you go to 86, which is the last page of that recorded statement.

This recorded statement was transcribed on what day? December --

A December 11, 2014.

Q Okay. And according to the first page, you took the recorded statement on November 13, 2014.

Does that sound like a typical gap, in terms of getting a transcription back on a statement you took?

A I don't transcribe every statement I get.

Q Okay. If you do transcribe a statement, does it generally take about a month; is that a fair estimate?

A I wouldn't think so.

Q Okay. Is it generally faster?

A Yes.

Q Okay. And at the time that this statement was taken and transcribed L/R7 was not open yet, correct, the U.I.M. claim file?

A Correct.

Q As you sit here today, do you know why you asked to have this particular statement transcribed?

A I could only think of one reason.

Q What's the one reason you can think of?

A That -- and I don't know for sure for sure.

Q Right.

A Is that if this Mr. Johnson got an attorney and the attorney requested a copy of the statement.

Q But you don't know for sure that was the reason?

A No.

Q Okay. Would you generally have documented that reason in your communication requesting the transcription?

A Let me go back on that.

Q Okay.

A Is that the -- our sub department, subrogation department could have requested it for arbitration.

Q Is another possible way?

A Yes.

Q But you don't know in this case, as we sit here today, whether it was one of those, the other or either, right?

A No.

Q Okay. You need to look at the date that you requested the transcription to determine that, right?

A Yes.

Q Do you know how a recorded statement from

L/R5 would get into the claims file for L/R7?

A No.

Q Okay. Is that typical?

MR. WHELAN: I'm sorry. One second.

Yeah. I just wanted to see that last question.

Okay. I'm sorry.

A I, and I don't know for sure. I could have copied it over when I created the U.I.M. file.

BY MR. WILLEY, IV:

Q Okay. Would that be reflected on the claims doc for L/R7 if you had input a document into the file?

A I don't know that it would show in here or not, that it wouldn't.

Q Okay. But you just flipped through that. You don't see it in there, do you?

A No, huh-uh.

Q Is it possible that somebody handling that file went into your pending B.I. claim and transferred it subsequent?

A They could have asked me or could have called another person if I wasn't in the office and had someone else, you know, transfer.

Q Right. So they could have gained access

to, they being the people handling the U.I.M. claim, could have gained access to your B.I. file and transferred documents, that's possible, correct?

MR. WHELAN: Object to the form.

A They would have -- They wouldn't have gone into it.

Q Right. An intermediary could have gone into it and transferred information, correct?

MR. WHELAN: Object to form.

A Possibly.

Q In fact, somebody had to go into the file at some point and move your recorded statement from that file L/R5 to L/R7 in order for it to be in there --

A A copy of it.

Q -- right?

A Yes.

Q If you go to 88. This is a recorded statement that Diane Martin took, correct?

A Yes.

Q Okay. And Diane Martin testified earlier was the individual that the system randomly selected to assign the U.I.M. file to after you opened it, right?

A Correct.

Q Okay. If you will go to page 94. The date this statement was transcribed is January 29, 2015, correct?

A Yes.

Q And that would have been prior to May 20, 2015 when you actually opened the U.I.M. file, right?

A Yes.

Q Do you have any idea why Diane Martin would have been taking this recorded statement five months before the U.I.M. file was assigned to her?

A It appears, because it says here that -- Hang on a second. Something about Mysti, I think that's what Mysti was interested in.

So she must have been taking it on my -- taking the statement for me.

Q Where did you see that, Miss?

A Hang on.

Q Spell the word miss at.

A On the top of page 94. It says --

Q Oh.

A -- okay, that's probably what Mysti was interested in. It says Mysti.

Q Okay. Right.

A But I thought I saw that somewhere else too, something here references my name.

Oh, right here. Mr. Smith, is there anything else you would like to add to the statement.

Q I see the middle of 93.

A "I think for Mysti's sake, uhm, one of the issues is gonna be were the headlights on".

Q Right.

A So she must have -- maybe I was out and she just happen to be the one that answered the phone the day they called.

Q And, so this transcription was done in January of 2015, which means that the statement would have been taken prior to January 29, 2015, right?

A Yes.

Q And there's not a date on the first page of it, at least.

A Oh.

Q So Diane's involvement at that point, she took a recorded statement for the B.I. file, which was L/R5 five months, at least five months before the U.I.M. file was opened and assigned to her; is that a fair statement?

A Yes.

Q So she would have known, obviously, when she got assigned the U.I.M. file that this statement existed, right?

A I don't know that she would have wouldn't have remembered.

Q Okay. Fair enough.

A I can't speak on that.

Q All right. I'm going to blow your mind again. Let's go to 96. It gets even better.

Who took this recorded statement?

A All right. I think it's me.

Q You think it's you?

A I believe it's me.

Q Okay. Are you sure? Not a hundred percent but --

A Ninety-nine.

Q Ninety-nine, okay.

Where could we find out for sure? If we looked in L/R5, we'd be able to see the number associated, the employee number associated with that recorded statement, right?

A Yes.

Q That would tell us who took it, right?

A Yes.

Q Okay. Did you handle the B.I. claim all the way through?

A No.

Q Once it went into litigation, you handed off that claim; is that right?

A Correct, yes.

Q There are some e-mails between you and defense counsel that was hired to defend the B.I. claim.

Do you recall any conversations with a man by the name of Chris Nickels?

A I know Chris Nickels, but don't remember any communication with Chris.

Q How do you know him?

A Just through other files or, you know, calling him to see if I can get information or assistance.

Q When not handling litigation claims, when would you ever need to contact him?

Does that question make sense?

A If I need maybe a minor court approval.

Q All right. Betsy Kushner (Phonetically), do you know her?

A Yes.

Q She was the senior litigation manager?

A I know she works in our office.

Q Okay. Would it be typical for her to ask you to speak with an attorney hired to defend a B.I. claim?

A I can't say that she would or wouldn't. I just don't know.

Q Okay.

A I don't remember.

Q If she did --

MR. WILLEY, IV: I don't have a copy for you, but I will show you the e-mail.

MR. WHELAN: You have the whole e-mail? I just, I got some notes when I --

MR. WILLEY, IV: Oh, that's okay. No, the notes are fine.

MR. WHELAN: I think you should show her the whole e-mail.

BY MR. WILLEY, IV:

Q Yeah. You can take a look at it. It goes in reverse, okay. So this one is -- Hold on a second. Go all the way back. How about that.

Guys, I spoke with the plaintiff's office already. Alex Myrtle (Phonetically) is handling attorney on the Kucks over there. It's kind of

immaterial at that point.

MR. WHELAN: Well, it's still not all the way back. It's responding to something.

MR. WILLEY, IV: That's where she gets pulled in.

MR. WHELAN: Good gracious. Eight pages.

MR. WILLEY, IV: Yeah.

BY MR. WILLEY, IV:

Q So you get pulled in up here with Betsy. Let's see. I lost my spot. So --

MR. WHELAN: Let's me just take a look at that.

MR. WILLEY, IV: You have all this. It's all plaintiff's production.

BY MR. WILLEY, IV:

Q All right. So plaintiff's production 2284 is kind of where it starts. And you get brought in on what is actually plaintiff's production 2282, which is an e-mail from Betsy which says, good morning, attached please find lawsuits which have now been filed on behalf of William and Mary Kuck. And that is sent to you, Alisa and Chris Nickels from Betsy Kushner.

Do you -- And your e-mail back was, thank you; do you know if they have been served; Missy Howard; April 10, 2016, eight-eighteen a.m.

You typically get to work that early?

A Yeah.

Q You're an early one?

A Yeah.

Q Okay. Do you have any independent recollection of this e-mail thread?

A No.

Q Okay. Later Betsy says, Chris, and, Melody, do you have confirmation of service upon the insured of these two suits for William and Mary Kuck. And Chris says, it's possible that their personal lawyer, Kevin Smith, accepted service. We will reach out to him and find out.

Then there's a conversation about the plaintiff's lawyers in this case, okay. Chris Nickels replies and says, with you on the e-mail, Betsy Kushner, Melody Reeves (Phonetically), recommend extreme caution, perhaps a quick T.C., telephone call, I assume that means next week. Then the call was set up, okay. Please coordinate with Missy.

There is an e-mail from you indicating

what times work for you and then the e-mail from Melody Reeves who is Chris Nickels paralegal setting the time, okay. Chris will call you.

Do you remember that phone call?

A I do not.

Q Okay. And --

MR. WHELAN: Object to form.

Q Would that phone call have been documented in L/R5, L/R6 or L/R4, 3, 2, 1?

Do you know where that would have been documented?

A I would think -- I mean, L/R5, but I don't remember.

Q Okay.

A I don't remember it.

Q All right. Would you expect that it would have been documented somewhere by you?

A If there was a phone call, yes.

Q Okay. How long does, if you know, maybe you don't know, USAA keep its claims files after a claim is closed?

A Oh, seven years, ten years.

Q Okay.

A But I'm really not sure.

Q I understand. There's an e-mail which is

Hood, plaintiff production 2378 dated May 21, 2015. So we're now at the point where you've opened the U.I.M. file and it's been transferred to Diane, right?

A Yes.

Q This is an e-mail from Diane to Chris Nickels copying you, okay.

MR. WHELAN: Let me see it.

MR. WILLEY, IV: You have all these?

MR. WHELAN: Well, Roy, you're supposed to bring copies of the exhibits to the deposition. I mean, there's three thousand pages.

MR. WILLEY, IV: Four thousand.

MR. WHELAN: Four thousand pages.

MR. WILLEY, IV: You don't have them on your computer?

MR. WHELAN: I do not.

MR. WILLEY, IV: Well, read just that e-mail.

MR. WHELAN: Okay.

MR. WILLEY, IV: Okay. All right.

BY MR. WILLEY, IV:

Q This is, just show you, Hood plaintiff production 2378. And the second highlighted line

just says, this claim went to arb and that decision was eighty percent on claimant Johnson and twenty percent on USAA Hood for no headlights. Missy is handling the B.I. at a twenty percent liability based on that outcome.

Do you see that?

A Yes.

Q Okay. And is that in fact an accurate reflection of how you handled the B.I. claim on eighty percent Johnson, twenty percent Hood comparative?

A I can't accurately say that. I know that that's what that says, but I didn't type that. So I don't know.

Q Okay. And in order to accurately be able to say that, would you have to look at your claims file?

A I didn't handle the B.I. claim, so I didn't settle it.

Q Right. But at that point in time she says you're handling the claim. I know it didn't settle.

A I mean, I never even got a demand. I was still --

Q Right. You did an investigation?

MR. WHELAN: You got the interruption?

THE COURT REPORTER: Yes.

Q You did an investigation, right, on liability?

A I was in the process -- You know, I, from what I remember, was that I always wanted to get Kuck's statement to assist with finalizing my liability decision.

Q Right.

A And that was, that was -- And I don't know that I ever got that prior to it getting transferred.

Q Okay. And that information would be in L/R5, your claims file, right?

A Correct.

Q Okay. And what your investigation showed and how you were handling the claim up until that point would also be in your claims file, correct?

A Yes.

Q Okay. And if the statement was in fact still being waited on, you still wanted that, you would expect to see that as an uncompleted item in your claims plan, right?

A Yes.

Q Okay. You have any questions for me?

MR. WHELAN: Object to the form.

A No.

MR. WILLEY, IV: Okay. Thank you for your time. That's all I have.

MR. WHELAN: All right.

CROSS-EXAMINATION

BY MR. WHELAN:

Q All right. Ms. Howard, are reserves a reflection of -- he's also said they're a reflection of exposure, as opposed to value?

A Yes.

Q Okay. And looking at when you opened up this U.I.M. file, you would have -- there would be nothing in it, correct, on May the 20th; is that right?

A Correct.

Q Okay. And, so in your file you would have had factual information, such as the police report and the statements that you took, right?

A That is correct.

Q Would you have take -- Would it be your practice to take that information and put it into the U.I.M. file when you opened it?

A Yes. That is what I do.

Q Okay. So let me ask you this.

Now, on Exhibit 3, is that over there?

Thank you.

Looking at page 2 of Exhibit 3. Mr. Willey was asking you about what he called the index on the document with the blue tabs. And he was asking you about where it had a link for Cary Tanrath.

You remember that?

A Yes.

Q These witnesses. And he said it would have their address, basically?

A Yes.

Q Looking at page, the second page of Exhibit 3 under Cary Tanrath, is that, that essentially the information that you would get when you click on that link?

A That is correct, yes.

Q All right. And then same thing with respect to Jack Daniel down below?

A Yes.

Q All right. Then see where it says Missy Howard XX44366? Again, that's the same thing on that blue tab?

A Yes.

Q Okay. But you have not seen this info -- In your day-to-day job, you don't see the information presented as it appears in Exhibit 3 that we have here today; is that fair?

A Yes.

Q It's in a different format?

A Right.

MR. WHELAN: All right. I think that's all I have for you. Thank you.

MR. WILLEY, IV: It's not early, but it's not late.

THE COURT REPORTER: You need this transcribed, Mr. Willey?

MR. WILLEY, IV: Yes.

THE COURT REPORTER: You need a copy, Mr. Whelan?

MR. WHELAN: Oh, yes, please, please.

(Whereupon, the deposition was concluded at 5:30 p.m.)

ERRATA SHEET

DO NOT WRITE ON TRANSCRIPT - ENTER CHANGES HERE

IN RE: Therese Hood v. USAA

CASE NO. 2018-CP-10-0666

PAGE NO.	LINE NO.	CHANGE	REASON

Under penalties of perjury, I declare that I have read my deposition and that the facts stated in it are true and correct subject to any changes in form or substance entered here.

_____ _____

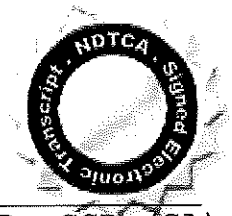
CERTIFICATE OF OATH

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

I, ROBERTA TURNER, Registered Professional Reporter and Notary Public, State of Florida, duly commissioned, qualified and authorized to administer oaths and to take and certify depositions, do hereby certify that the above-named GAIL (MISSY) HOWARD was by me, before the giving of her deposition, first duly sworn to testify as to the truth, the whole truth and nothing but the truth.

WITNESS my hand and official seal this 3rd day of April, 2019.



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My Commission No. FF 235676
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REPORTER'S DEPOSITION CERTIFICATE

STATE OF FLORIDA

COUNTY OF ORANGE

I, ROBERTA TURNER, Registered Professional Reporter, hereby certify that I was authorized to and did stenographically report the deposition of GAIL (MISSY) HOWARD; that a review of the transcript was not requested; and that said deposition was later reduced to computer transcription under my personal supervision, and pages 4 through 157 is a true and complete record of my stenographic notes.

I further certify that the deposition was taken at the time and place specified herein above and that I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of any of the attorneys, counsel connected with the action, nor am I financially interested in the action.

Dated this 3rd day of April, 2019.

ROBERTA TURNER, RPR, FPR, CLR, CCR (GA)
Registered Professional Reporter
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WITNESS NOTIFICATION LETTER

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APRIL 3, 2019

GAIL (MISSY) HOWARD
C/O ROBERT W. WHELAN, ESQ.
Nelson, Mullins, Riley & Scarborough, LLP
Liberty Center, 6th Floor
151 Meeting Street, Suite 3500
Charleston, South Carolina 29401

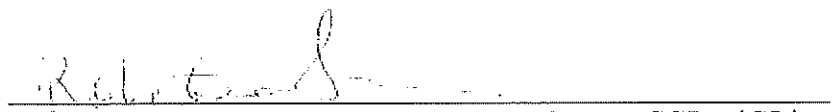
RE: Therese Hood v. USAA
CASE NO. 2018-CP-10-0666

The transcript of the above-referenced proceeding has been prepared and a copy is enclosed here for your review.

Any corrections you wish to make to the transcript should be made on the errata sheet. Please do not write on the transcript itself.

Please complete review of your transcript by May 3, 2019 and return the errata sheet to our office. You need not return the entire transcript.

Sincerely,



Roberta Turner, RPR, FPR, CLR, CCR,(GA),

CC: Roy T. Willey, IV, Esq.
Robert W. Whelan, Esq.

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