THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2025-000801

(Incorporated from Appellate Case No. 2017-000902)

RECEIVED
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SC Court of Appeals

Daniel O'Shields And Roger W. Whitley, A Partnership d/b/a O&W Cars,

Appellants

v.

Columbia Automotive Company, LLC d/b/a Midlands Honda,

Respondent.

RECORD ON APPEAL

VOLUME I OF VI

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INDEX

ORDERS, JUDGMENTS, DECREES, and DECISIONS

ORDERS UNDER APPEAL

Order on Post-Trial Motions, filed 12-02-16 1

Order on Plaintiffs' Motion Pursuant to Rule 59 and Motion for Supplemental Attorney Fees, filed 3-16-17 24

Order on Plaintiffs' Motion for Supplemental Attorney Fees for December 2016 through March 2017, filed 8-14-17 30

OTHER ORDERS, JUDGMENTS, AND DECISIONS

Form 4 Order Resolving Motion to Dismiss, filed 4-19-13 35

Order on Plaintiffs' Motion to Amend Complaint, filed 5-09-13 37

Form 4 Order noting that Plaintiffs' cause of action for constructive fraud is withdrawn and denying Defendant's Motion for Summary Judgment, filed 10-01-15 41

Stipulation of Dismissal with Prejudice as to Defendant Nationwide Insurance Company, filed 4-21-15 42

Verdicts on Actual Damages, 4-21-16 43

Jury's Answers to Special Interrogatories 45

Verdict on Punitive Damages, 4-22-16 47

PLEADINGS

Summons and Complaint, filed 1-17-13 48

Answer of the Defendant PSC Automotive,[1] filed 2-27-13 60

Amended Complaint, filed 5-09-13 67

Amended Answer of Defendant PSC Automotive Group to Plaintiffs' Amended Complaint, filed 10-21-15 78

Amended Answer to Plaintiffs' Second Amended Complaint, filed 8-31-16 84

Second Amended Complaint, filed 9-13-16 92

[1] Respondent Columbia Automotive Company, LLC was referred to as "PSC Automotive" or "PSC Automotive Group" until April 15, 2016.

TRANSCRIPTS AND ASSOCIATED MATERIALS

ACTUAL DAMAGES PHASE

Charles Ecklund Video Deposition Published to the Jury

Location in trial transcript of Charles Ecklund Video Deposition Published to the Jury from 09:52 A.M. until 10:30 A.M April 19, 2016 311

Charles Ecklund – Transcript Excerpts of Video Deposition Published to the Jury ..... 102[2]

Direct Examination by Mr. Moskos 103

Redirect Examination by Mr. Moskos 139

Exhibits from Ecklund Video Deposition Published to the Jury						
Ecklund Deposition Pls.' Ex. #		Trial Pls.' Ex. #		Description		Page in Record
1		1		Damage Disclosure Form		936
11		11		Nationwide Estimate of Repairs		947
12		12		Midlands Honda's Certified Pre-owned Window Sticker for '03 Civic		954
13		13		Midlands Honda's Handwritten Buyer's Order (8-02-08)		955
14		14		Midlands Honda's Typed Buyer's Order (8-02-08)		956
15		15		Certified Pre-owned Vehicle Customer Info. (Ecklund)		957
16		16		"We Owe" (Ecklund)		958
17		17		8-6-08 Ecklund Invoice		959
18		18		9-30-08 Ecklund Invoice		961
19		19		Ecklund's Buyer's Guide		962
20-42		20-42		8X10 Color Photos of Civic from Ecklund		965-987
43		43		Affidavit & Notification of Sale of Motor Vehicle		988

[2] For the convenience of the Appellate Court, the deposition testimony that was published to the jury has been bracketed.

44		44		Ecklund's Power of Attorney to Midlands Honda		989

ADESA via Joseph Richard Guyer Video Deposition Transcript Excerpts Published to the Jury

Location in Trial Transcript of Joe Guyer Video Deposition Published to the Jury from 11:47 AM until 01:12 PM 311

ADESA via Joseph Richard Guyer – Transcript Excerpts of Video Deposition Published to the Jury ..... 140[3]

Direct Examination by Mr. Moskos 141

Cross-Examination by Mr. Walker 210

Redirect Examination by Mr. Moskos 215

Exhibits from Guyer Video Deposition Published to the Jury						
Guyer Deposition Pls.' Ex. #		Trial Pls.' Ex. #		Description		Page in Record
1		1		Damage Disclosure Form		936
2-10		2-10		Nationwide's Photos of Original Wreck Damages		938-946
11		11		Nationwide Estimate of Repairs		947
32		32		20 8X10 Color Photo of Civic from Ecklund		977
45		46		ADESA Inc. Power of Attorney		991
46		47		ADESA Indemnity and Hold Harmless Agreement		992
48		50		ADESA Dealer Acknowledgment Form		993
49		51		ADESA Auction Terms and Conditions		994
50		52		Arbitration Rules		996
51		53		ADESA Screen Shot Vehicle Info '03 Honda Civic		1011

[3] For the convenience of the Appellate Court, the deposition testimony that was published to the jury has been bracketed.

52		54		ADESA Screen Shot Vehicle Info '03 Honda Civic		1012
53		55		ADESA Sale Contract (Seller)		1013
54		56		ADESA Sale Contract (Buyer)		1014
55		57		Vehicle Info printed 12-10-13 @ 09:55 am		1015
56		58		Google Map - ADESA Compound		1016
57		59		Street view ADESA @ Gate 3		1017
58		60		Photo/Street view		1018
59		61		Photo/Street view		1019
60		62		Google Map - Westinghouse Blvd		1020
61		63		Google Map - Street view WH Blvd		1021
62		64		Google - Aerial View ADESA		1022
63		65		Google - Aerial View ADESA		1023

ADESA via Joseph Richard Guyer Video Deposition Transcript Excerpt Played Only to the Trial Judge

Cross-Examination by Mr. Walker 220

Exhibit from Guyer Video Deposition Excerpt Played Only to the Trial Judge						
Guyer Deposition Def.'s Ex. #		Trial Pls.' Ex. #		Description		Page in Record
1		51		ADESA Auction Terms and Conditions		994

Transcript of Record of Trial 223

Opening Statements

By Mr. Moskos 280

By Mr. Walker 292

Brent Ferrell

Direct Examination by Mr. Moskos 342

Cross-Examination by Mr. Walker 404

Redirect Examination by Mr. Moskos 412

Randy Threatt

Direct Examination by Mr. Moskos 414

Cross-Examination by Mr. Walker 448

Redirect Examination by Mr. Moskos 451

Brian Allen

Direct Examination by Mr. Moskos 474

Cross-Examination by Mr. Walker 514

Redirect Examination by Mr. Moskos 519

Greg Nalewaja

Direct Examination by Mr. Moskos 521

Cross-Examination by Mr. Walker 554

Redirect Examination by Mr. Moskos 563

Roger Whitley

Direct Examination by Mr. Moskos 582

Cross-Examination by Mr. Walker 624

Redirect Examination by Mr. Moskos 653

Closing Arguments – Actual Damages Phase

By Mr. Moskos 739

By Mr. Walker 767

Rebuttal by Mr. Moskos 782

Jury Charges – Actual Damages Phase 823

PUNITIVE DAMAGES PHASE

Transcript of Record of Trial

Greg Nalewaja (recalled for Punitive Damages Phase)

Direct Examination by Mr. Moskos 884

Cross-Examination by Mr. Walker 903

Redirect Examination by Mr. Moskos 907

Closing Arguments – Punitive Damages Phase
By Mr. Moskos 911
By Mr. Walker 923
Jury Charges – Punitive Damages Phase 927

Trial Exhibits

Trial Pls.' Ex. #		Description		Page in Record
1		Damage Disclosure Form		936
2-10		Nationwide's Photos of Original Wreck Damages		938-946
11		Nationwide Estimate of Repairs		947
12		Midlands Honda's Certified Pre-owned Window Sticker for '03 Civic		954
13		Midlands Honda's Handwritten Buyer's Order (8-02-08)		955
14		Midlands Honda's Typed Buyer's Order (8-02-08)		956
15		Certified Pre-owned Vehicle Customer Info. (Ecklund)		957
16		"We Owe" (Ecklund)		958
17		8-6-08 Ecklund Invoice		959
18		9-30-08 Ecklund Invoice		961
19		Ecklund's Buyer's Guide		962
20-42		20 8X10 Color Photos of Civic from Ecklund		965-987
43		Affidavit & Notification of Sale of Motor Vehicle		988
44		Ecklund's Power of Attorney to Midlands Honda		989
45		ADESA Corp. Personal Guaranty		990
46		ADESA Inc. Power of Attorney		991
47		ADESA Indemnity and Hold Harmless Agreement		992

48-49		[None entered]		
50		ADESA Dealer Acknowledgment Form		993
51		ADESA Auction Terms and Conditions		994
52		Arbitration Rules		996
53		ADESA Screen Shot Vehicle Info '03 Honda Civic		1011
54		ADESA Screen Shot Vehicle Info '03 Honda Civic		1012
55		ADESA Sale Contract (Seller)		1013
56		ADESA Sale Contract (Buyer)		1014
57		Vehicle Info printed 12-10-13 @ 09:55 am		1015
58		Google Map - ADESA Compound		1016
59		Street view ADESA @ Gate 3		1017
60-61		Photo/Street view		1018-19
62		Google Map - Westinghouse Blvd		1020
63		Google Map - Street view WH Blvd		1021
64		Google - Aerial View ADESA		1022
65		Google - Aerial View ADESA		1023
66		Midlands Honda 159-point Certified Pre-Owned Inspection Invoice		1024
67		8-02-08 Carfax		1026
68		3-11-10 Carfax		1029
69		ADESA Corporation Acknowledgment Form		1033
70		3-11-10 Handwritten Telephone Message		1034
71-89		Photos from Plaintiff's expert Brian Allen		1036-1054
90		04-2-10 Check in amount of $6,960.00		1055
91		$550.00 Repair Bill		1056
92		Bill of Sale		1057
93		$10.00 Bill for Relay Switch		1058

94		Deal Recap Sheet		1059
95		Deal Recap Sheet		1060
96 (ID)		Midlands Honda's 2015 Dealer Financial Statement and Balance Sheet		1061

Defendant's Requests To Charge

Defendant's Request to Charge # 16 1062
Defendant's Request to Charge # 17 1063
Defendant's Request to Charge # 21 1064
Defendant's Request to Charge # 24 1066
Defendant's Request to Charge # Punitive Damages "B" 1068
Defendant's Request to Charge Punitive Damages "C" 1070

POST-TRIAL PHASE

Transcript of Hearing on Post-Trial Motions, July 27, 2016 1071

OTHER MATERIALS

PRE-TRIAL

Motion to Dismiss on Behalf of Defendant PSC Automotive Group, served 2-25-13 1181

Plaintiffs' Motion to Amend Complaint, served 5-01-13 1184

Offer of Judgment by Defendant PSC Automotive Group to Plaintiffs, served 1-26-15 (not filed) 1186

Plaintiffs' Offer of Judgment to Defendant PSC Automotive Group, served 2-04-15, filed 2-06-15 1187

Defendant's Motion for Summary Judgment, served 7-10-15 1190

Plaintiffs' Answers to Defendant PSC Automotive Group d/b/a Midlands Honda's Interrogatories 1197
ADESA Sale Contract (Seller) (Pls.' Trial Ex. 55) 1013
Roger W. Whitley deposition condensed transcript excerpt 1204
Arbitration Rules (Pls.' Tr. Ex. 52) 996
Roger W. Whitley deposition condensed transcript excerpt 1205

Plaintiffs' Brief in Opposition to Defendant PSC's Motion for Summary Judgment, served 9-30-15 1206

Ex. 1 Page 1 from Midlands Honda's 159-point Certified Pre-Owned Inspection Invoice (Pls.' Trial Ex. 66) 1024

Ex. 2 3-11-10 Handwritten Telephone Message (Pls.' Trial Ex.70) 1034
Ex. 3 Arbitration Rules (Pls.' Trial Ex.52) 996
Ex. 4 ADESA Inc. Power of Attorney (Pls.' Trial Ex.46) 991
Ex. 5 ADESA Sale Contract (Buyer) (Pls.'. Trial Ex.56) 1014
Ex. 6 Damage Disclosure Form (Pls.' Trial Ex.1) 936
Ex. 7 3-11-10 Carfax (Pls.' Trial Ex. 68) 1029
Charles Ecklund deposition condensed transcript excerpt 1223
Greg Nalewaja deposition condensed transcript excerpts 1226
ADESA via Joseph Richard Guyer deposition condensed transcript excerpts 1229
Roger W. Whitley deposition transcript excerpts 1244

Motion to Dismiss on Behalf of Defendant Columbia Automotive Co., LLC, served 4-15-16 1256

Plaintiffs' Pre-Trial Brief, served 4-18-16 1259

POST-TRIAL

Defendant's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative a New Trial, or a New Trial Nisi Remittitur, served 5-02-16 1277

Defendant's Motion to Require Election of Remedies, served 5-02-16 1294

Defendant's Motion to Enforce North Carolina Punitive Damages Cap, served 5-02-16 1297

Defendant's Motion for Setoff or Recoupment, served 5-02-16 1299

Plaintiffs' Post-Trial Motions, served 5-02-16 1301

Plaintiffs' Brief in Support of Treble Damages, served 5-02-16 1303

Plaintiffs' Brief in Support of Interest under Offer of Judgment, served 5-02-16 1305
Ex. 1 Plaintiff's Offer of Judgment 1187
Ex. 2 Costs and Expenses After Offer of Judgment 1308

Plaintiffs' Brief in Support of Plaintiffs' Request for Prejudgment Interest, served 5-02-16 1310

Plaintiffs' Brief in Support of Plaintiffs' Request for Attorney's Fees, served 5-02-16 1316
Affidavit of Attorney's Fees of C. Steven Moskos in Support of Plaintiff's Motion for Attorney Fees, served 5-02-16 1333
Ex. 1 Timesheets of C. Steven Moskos for pursuing Plaintiffs'' claims against Defendant Columbia Automotive Co. under the NCUTPA from 6-29-2011 through 5-01-2016 1343
Ex. 2 C. Steven Moskos' Paralegal's Timesheet 1357

Ex. 3 Timesheets of C. Steven Moskos for pursuing claims against Defendant Nationwide Insurance Co. ... 1358
Ex. 4 Order of 7-21-14 in *Karesh v. Elite Auto Wholesale, et al.* ... 1361
Ex. 5 Affidavit of Mary Leigh Arnold in Support of Plaintiffs' Request for Attorney Fees ... 1371
Ex. 6 Affidavit of Brian L. Boger in Support of Plaintiffs' Request for Attorney Fees ... 1375
Ex. 7 Plaintiff's Costs and Expenses ... 1379
Ex. 8 Defendant's Offer of Judgment ... 1186

Email from Judge Cothran's law clerk, James R. White, re: election of remedies, 5-18-16 ... 1434

Plaintiffs' Election of Remedies, served 5-23-16 ... 1435

Plaintiffs' Motion for Reconsideration, served 5-23-16 ... 1438

Defendant's Response to Plaintiffs' Election of Remedies, served 5-27-16 ... 1440

Plaintiffs' Brief Opposing Defendant's Motion to Enforce North Carolina's Punitive Damages Cap, served 7-20-16 ... 1443
Ex. 70 3-11-10 Handwritten Telephone Message (Pls.' Trial Ex. 70) ... 1034

Plaintiffs' Brief Regarding Defendant's Response to Plaintiffs' Election of Remedies, served 7-20-16 ... 1450

Plaintiffs' Brief Regarding Election of Remedies, served 7-20-16 ... 1454

Plaintiffs' Brief Opposing Defendant's Motion for Setoff or Recoupment, served 7-20-16 ... 1457
Ex. 11 Nationwide Estimate of Repairs (Pls.' Trial Ex. 11) ... 947

Plaintiffs' Brief Opposing Defendant's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, a New Trial, or a New Trial Nisi Remittitur, served 7-20-16 ... 1464
Ex. 46 ADESA Power of Attorney (Pls.' Trial Ex. 46) ... 991
Ex. 50 Dealer Acknowledgement Form (Pls.' Trial Ex. 50) ... 993
Ex. 52 Arbitration Rules (Pls.' Trial Ex. 52) ... 996
Ex. 68 3-11-10 Carfax (Pls.' Trial Ex. 68) ... 1029
Ex.70 3-11-10 Handwritten Telephone Message (Pls.' Trial Ex. 70) ... 1034
Excerpts from Directed Verdict Transcript ... 1511

First Supplemental Affidavit of Attorney Fees of C. Steven Moskos in Support of Plaintiff's Motion for Attorney's Fees, served 7-21-16 ... 1529
Ex. 1 Timesheets of C. Steven Moskos – work performed 5-02-16 through 7-20-16 ... 1537
Ex. 2 Expense Receipt ... 1541

Affidavit of Brooks R. Fudenberg, served 7-21-16 1542

Attach. Timesheets of Brooks R. Fudenberg – work performed 04-22-2016 through 7-20-2016 1544

Ex. 1 Affidavit of Jason Scott Luck 1549

Defendant's Brief in Opposition to Plaintiffs' Motion to Treble Damages, served 7-22-16 1552

Defendant's Brief in Opposition to Plaintiffs' Motion for Interest Under Offer of Judgment, served 7-22-16 1554

Defendant's Brief in Response to Plaintiffs' Motion for Prejudgment Interest, served 7-22-16 1559

Defendant's Brief in Opposition to Plaintiffs' Motion for Attorney Fees, served 7-22-16 1562

App. 1 Complaint in *Allen v. Hoover Automotive* 1581

Complaint in *Kincer et al. v. Midlands Automotive, LLC, d/b/a Carolina Chrysler, Dodge, Jeep, Ram, et al.* 1594

Complaint in *Henderson v. Summerville Ford-Mercury, Inc., et al.* 1610

App. 2 Plaintiffs' First Interrogatories to Defendant Midlands Honda 1623

Plaintiffs' First Requests for Production to Defendant Midlands Honda 1635

Plaintiffs' First Set of Interrogatories to the Defendant Midlands Automotive, LLC, d/b/a Chrysler, Dodge, Jeep, Ram, in *Kincer et al. v. Midlands Automotive, LLC, d/b/a Carolina Chrysler, Dodge, Jeep, Ram, et al.* 1648

Plaintiffs' First Request for Production to the Defendant Midlands Automotive, LLC, a/b/a Chrysler, Dodge, Jeep, Ram, in *Kincer et al. v. Midlands Automotive, LLC, d/b/a Carolina Chrysler, Dodge, Jeep, Ram, et al.* 1657

Plaintiff's Interrogatories to Defendant Summerville Ford-Mercury, Inc., in *Henderson v. Summerville Ford-Mercury, Inc., et al.* 1670

Plaintiff's Request to Produce to Defendant Summerville Ford-Mercury, Inc., in *Henderson v. Summerville Ford-Mercury, Inc., et al.* 1683

App. 3 Time entries relating to punitive damages 1692

App. 4 Time entries relating to pursuing claims against Co-Defendant 1695

App. 5 Unnecessary travel time 1698

Attach. Affidavit of H. Clayton Walker, Jr. 1701
Attach. Affidavit of Robert L. Reibold 1707

Defendant's Memorandum in Further Support of Motion for Motion for Judgment Notwithstanding the Verdict ("JNOV"), or, in the Alternative, a New Trial, or a New Trial Nisi Remittitur JNOV, served 7-22-16 1711
Ex. 1 Defendant's Motion in Limine 1716
Ex. 2 Excerpts from Partial Transcript of Trial 1722

Email from Judge Cothran's law clerk, John Furse, regarding post-trial motions, 8-29-16 1731

Email from C. Steven Moskos to Judge Cothran re Midlands-Honda award, 8-29-16 1732

Affidavit of C. Steven Moskos in Support of Plaintiffs' Motion for Attorney Fees, served 8-30-16 1734
Ex. 1 Email from C. Steven Moskos to Robert Reibold, re *Henderson v. Summerville Ford-Mercury, Inc., et al.*, 3-07-12 1777
Ex. 2 Letter from Brooks R. Fudenberg to Robert Reibold, re *Henderson v. Summerville Ford-Mercury, Inc., et al.*, 9-30-13 1778
Ex. 3 Order Granting Plaintiff's Motion for Statutory Fees and Costs in *Henderson v. Summerville Ford-Mercury, Inc., et al,* filed 10-06-14 1780
Ex. 4 Settlement Demand to Hoover Chrysler Jeep by C. Steven Moskos on behalf of Richard M. Allen, 1-29-16 1788
Ex. 5 Correspondence from H. Clayton Walker, Jr. to C. Steven Moskos re: *Kincer et al. v. Midlands Automotive, LLC,* 2-23-15 1789
Ex. 6 Time Line of events in the instant case 1791
Ex. 7 Roger W. Whitley deposition transcript excerpt 1796
Exs. 8-18 Emails and letter correspondence between counsel re the present case, 12-04-13 through 1-23-15 1800-1811
Ex. 19 Plaintiffs' Offer of Judgment to Defendant CAC, 2-04-15 1812
Ex. 20 Letter from H. Clayton Walker, Jr., to Hon. L. Casey Manning, 4-07-2015 1814
Ex. 21 Email from H. Clayton Walker, Jr. to counsel, 4-07-2015 1815
Ex. 22 Letter from H. Clayton Walker, Jr., to Hon. L. Casey Manning, requesting order of protection, with attachment, 2-26-2014 1816

Ex. 23	Letter from C. Steven Moskos to Hon. L. Casey Manning, re: status conference and Defendant Nationwide's motion for summary judgment, 6-03-14	1819
Ex. 24	Letter from H. Clayton Walker, Jr., to Hon. L. Casey Manning, requesting order of protection, with attachment, 7-25-2014	1820
Ex. 25	Letter from H. Clayton Walker, Jr., to Hon. L. Casey Manning, requesting order of protection, with attachment, 3-16-2015	1822
Ex. 26	Email from H. Clayton Walker, Jr., to C. Steven Moskos, requesting consent to continuance, 4-02-2015	1824
Ex. 27	Letter from H. Clayton Walker, Jr., to Hon. L. Casey Manning, requesting status conference, 4-07-2015	1825
Ex. 28	Email from H. Clayton Walker, Jr., to C. Steven Moskos, re: scheduling, 4-07-2019	1826
Ex. 29	Letter from H. Clayton Walker, Jr., to Hon. L. Casey Manning, requesting case not appear on trial roster until the week of July 27, dated 4-10-2015	1827
Exs. 30-31	Email from C. Steven Moskos to H. Clayton Walker, Jr, with attached letter, proposing mediation dates in August, 7-16-2015	1829
Ex. 32	Out of office auto-reply email from H. Clayton Walker, Jr. to C. Steven Moskos, 7-16-15	1831
Ex. 33	Letter from H. Clayton Walker, Jr., to Hon Allison Renee Lee, requesting order of protection, with attachment, 7-22-2015	1832
Ex. 34	Letter from H. Clayton Walker, Jr., to Hon Allison Renee Lee, with consent motion to delay trial from week of April 11 to week of April 18, 2016, and supporting affidavit, 3-28-2016	1833
Ex. 35	Plaintiff's proposed Stipulation of testimony from Nationwide Insurance Company	1840
Ex. 36	Randy Threatt Deposition Transcript Excerpts	1842
Ex. 37	Brent Ferrell Deposition Transcript Excerpts	1844
Ex. 38	Scott Austin Deposition Transcript Sections	1846
Ex. 39	Nancy Lynn Watkins Deposition Transcript Sections	1848
Ex. 40	Email from H. Clayton Walker, Jr., to C. Steven Moskos, 4-07-15	1850
Ex. 41	Email from H. Clayton Walker, Jr., to C. Steven Moskos, 7-06-15	1851

Letter from H. Clayton Walker, Jr., to Judge Cothran re: Moskos Affidavit, dated 9-01-16 1852

Plaintiffs' Election of Remedy, served 9-08-16 1854

Ex. 1 Email from Judge Cothran's law clerk re post-trial motions, 8-29-16 1731

Defendant's proposed Order on Post-Trial Motions, served 10-17-16 1855

Letter from Brooks R. Fudenberg to Judge Cothran, dated 11-01-16 1879

Plaintiffs' Motion Pursuant to Rule 59 and Motion for Supplemental Attorney Fees, and Memorandum in Support, served 12-15-16 1884

Ex. 1 Email from Judge Cothran's law clerk re post-trial motions, 8-29-16 1731

Ex. 2 Plaintiffs' Election of Remedy, 9-08-161854

Ex. 3 Defendant's proposed Order on Post-Trial Motions, 10-17-16 1856

Ex 4. Letter from Brooks R. Fudenberg to Judge Cothran, dated 11-01-16 1879

Ex. 5 C. Steven Moskos timesheets – work performed 6-29-11 through 7-20-16, revised in light of the trial court's order of 12-02-16 1899

Ex. 6 Timesheets of C. Steven Moskos – work performed 7-21-16 through 12-15-16 1960

Ex. 7 Brooks R. Fudenberg – work performed 6-29-11 through 7-20-16, revised in light of the trial court's order of 12-02-16 1972

Ex. 8 Timesheets of Brooks R. Fudenberg – work performed 7-21-16 through 12-14-16 1981

Plaintiffs' Motion for Supplemental Attorney Fees, served12-15-16 1992

Letter from H. Clayton Walker, Jr. to Judge Cothran, re: motion for setoff and time to respond to Plaintiffs' Rule 59 and Supplemental Fees motions, dated 12-30-16 1993

Email from C. Steven Moskos to Judge Cothran, re: time for Defendant to respond to Plaintiffs' motions, 1-03-17 1994

Email from Judge Cothran's law clerk, John Furse, inquiring as to what issues remain to be ruled on, 1-13-17 1996

Email from Robert Reibold to Judge Cothran, with attachments, 1-13-17 1997

Letter from H. Clayton, Walker, Jr., to Judge Cothran, dated 1-13-17 1998

Defendant's Response to Plaintiff's Motion Pursuant to Rule 59 and Motion for Supplemental Attorney's Fees 1999

Attach. Affidavit of James Y. Becker 2005

Ex. 1 Confidential Settlement Communication from

James Y. Becker to C. Steven Moskos, dated 9-14-16 2007
Ex. 2 Email from James Y. Becker to C. Steven Moskos, 10-03-16 2009
Defendant's proposed Order on Plaintiff's Motion Pursuant to Rule 59 and Motion for Supplemental Attorney's Fees 2011
Email from Brooks R. Fudenberg to Judge Cothran, 1-20-17 2017
Attach. List of Issues Pending/Draft Order 2019
Email from Cesairé Chase to Judge Cothran, with attachments, 1-23-17 2027
Letter from H. Clayton, Walker, Jr. to Judge Cothran, re issues pending, dated 1-23-17 2028
Defendant's proposed Order on Plaintiff's Motion Pursuant to Rule 59 and Motion for Supplemental Attorney's Fees 2011
Email from Judge Cothran's law clerk, John Furse, regarding motion to reconsider, 1-26-17 2029
Letter from H. Clayton Walker, Jr., to Judge Cothran, dated 2-06-17 2031
Attach. Defendant's proposed Order on Plaintiff's Motion Pursuant to Rule 59, SCRCP 2032
Attach. Defendant's proposed Order on Plaintiff's Motion for Supplemental Attorney's Fees 2035
Plaintiff's Reply in Support of Plaintiffs' Rule 59 Motion and Motion for Supplemental Attorney Fees, served 2-07-17 2039
Ex. 1 Email from Judge Cothran's law clerk, John Furse, inquiring as to what issues remain to be ruled on, 1-13-17 1996
Ex. 2 Email to Judge Cothran from Brooks R. Fudenberg 1-20-17 with List of Issues Pending/Draft Order 2019
Ex. 3 Second Supplemental Affidavit of C. Steven Moskos 2048
Ex. 4 First Supplemental Affidavit of Brooks R. Fudenberg 2051
Letter from H. Clayton Walker, Jr. to Judge Cothran, dated 2-22-17 2054
Email from Judge Cothran's law clerk, John Furse, re Order on Motion Pursuant to Rule 59, 2-27-17 2055
Plaintiff's Motion for Supplemental Attorneys' Fees for December 2016 Through March 2017, and Memorandum in Support, served 3-30-17 2058
Ex. 1 Timesheets of C. Steven Moskos – work performed 12-19-2016 through 3-28-2017 2065
Ex. 2 Timesheets of Brooks R. Fudenberg – work performed 12-15-2016 through 3-29-2017 2070
Ex. 3 List of Issues Pending/draft order 2019

Email from Brooks R. Fudenberg to Judge's Clerk transmitting copy of Notice of Appeal, 4-11-17 2083

Notice of Appeal, filed 04-13-17 2086

Email from Judge Cothran's law clerk, John Furse, regarding motion for supplemental attorney fees, 6-02-17 2087

Defendant's proposed Order on Plaintiff's Motion for Supplemental Attorneys' Fees for December 2016 Through March 2017, served 6-12-17 2088

Plaintiffs' Memorandum in Opposition to Defendant's proposed Order, served 6-28-17 2093

Exs. 1–10(A) Correspondence between counsel for the parties, 4-20-17 through 6-27-17 2106-2133

Ex. 11 Second Supplemental Affidavit of Brooks R. Fudenberg 2134

Timesheets of Brooks R. Fudenberg – work performed 3-30-17 through 6-28-17 2137

Ex. 12 Third Supplemental Affidavit of C. Steven Moskos 2143

Timesheets of C. Steven Moskos – work performed 3-30-17 through 6-28-17 2146

Letter from H. Clayton Walker, Jr., to Judge Cothran, dated 7-25-17 2149

Defendant's proposed Order on Plaintiff's Motion for Supplemental Attorneys' Fees for December 2016 Through March 2017, served 8-07-17 2150

Email from Judge Cothran's law clerk, John Furse, re Judge's intent to sign Defendant's proposed Order, 8-08-17 2156

Notice of Appeal, served 9-05-17 2158

Certificate of Counsel 2160

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars, *Plaintiff* v. Columbia Automotive, LLC d/b/a Midlands Honda, *Defendant.*	)	IN THE COURT OF COMMON PLEAS Civil Action No. 2013-CP-40-0319

RICHLAND COUNTY
FILED
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JEANNETTE W. McBRIDE
C.C.P. & G.S.

ORDER ON POST-TRIAL MOTIONS

This case was tried from April 18-22, 2016, resulting in a jury verdict of $6,645 in actual damages on the following causes of action asserted by Plaintiff Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars ("Plaintiff"): (1) breach of contract; (2) negligent misrepresentation; (3) the North Carolina Unfair Trade Practices Act ("NCUTPA"); and (4) fraud. The jury also returned a verdict of $2,381,888 in punitive damages on the fraud claim.

This matter is before the Court on the post-trial motions filed by the parties, which were heard on July 27, 2016. In addition, the Court includes in this order its review of the punitive damages award reached by the jury. The motions before the Court are:

I. Plaintiff's Motion

Plaintiff filed a single motion seeking four additional measures of recovery.

1. Trebling Plaintiff's verdict under N.C.G.S. § 75-16;
2. Awarding Plaintiff's attorney's fees and costs against the Defendant;
3. Awarding interest under S.C. Code § 15-35-400; and
4. Awarding prejudgment interest under N.C.G.S. § 24-5.

II. Defendant's Motions

1. Motion for Judgment Notwithstanding the Verdict ("JNOV"), or, in the Alternative, a New Trial, or a New Trial Nisi Remittitur;
2. Motion to Require Election of Remedies;
3. Motion to Enforce North Carolina Punitive Damages Cap; and
4. Motion for Setoff or Recoupment.

The Court will address each of these motions below with the exception of the motion for setoff or recoupment, which will be addressed in a separate order.[1]

DISCUSSION

I. Defendant's Motion for JNOV or, in the Alternative, a New Trial or a New Trial Nisi Remittitur.

The motion is denied. The Court provides further discussion of some of the arguments raised in the following discussion, together with its review of the punitive damages award.

The Court notes that Defendant's motions are properly before it. Plaintiff has argued that Defendant failed to renew its directed verdict motions at the close of all evidence, and is therefore precluded from seeking JNOV. The Court finds that it was not necessary to renew any motions for directed verdict at the close of the punitive damages phase of the case. Defendant presented no evidence in the punitive damages phase of the trial which would have impacted the Court's rulings on the motions for directed verdict, and there was no passage of time sufficient for the Court to reconsider its rulings. Any renewal of the motions at that point in trial would have been futile. *See Fettler v. Gentner*, 396 S.C. 461, 469, 722 S.E.2d 26, 31 (Ct. App. 2012) ("This court does not require parties to engage in futile actions in order to preserve issues for appellate review.").

[1] As a preliminary matter, the parties and the Court agree that North Carolina substantive law applies in this case. North Carolina is the place of the contract at issue and the location of the alleged injury. Thus, under both contract and tort conflict of law rules, North Carolina law applies to all substantive matters. *See Lister v. NationsBank of Del., N.A.*, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997).

A. Due Process Review of Punitive Damages Award.

The multi-million dollar punitive damages award is the proverbial elephant in the room, and the Court will consider arguments related to the punitive damages verdict at the outset. The jury returned a verdict of $6,645 on Plaintiff's fraud cause of action. Following the punitive damages phase of the trial, the jury returned a verdict of $2,381,888 in punitive damages—more than 358 times the actual damages awarded. Defendant challenged the punitive damages award on multiple grounds, and the Court concludes that the punitive damages award cannot stand.

1. North Carolina Punitive Damages Review.

Following a challenge, North Carolina law mandates written judicial review of punitive damages awards. The Court elects to perform this review in connection with its ruling on the Defendant's post-trial motion. The applicable statute reads:

> [w]hen reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages in accordance with G.S. 1D-15(a), or regarding the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages, in light of the requirements of this Chapter.

N.C.G.S. §1D-50. N.C.G.S. § 1D-35 lists the following factors to be considered in assessing a punitive damages award: (1) the reprehensibility of the defendant's motives and conduct; (2) the likelihood, at the relevant time, of serious harm; (3) the degree of the defendant's awareness of the probable consequences of its conduct; (4) the duration of the defendant's conduct; (5) the actual damages suffered by the claimant; (6) any concealment by the defendant of the facts or consequences of its conduct; (7) the existence and frequency of any similar past conduct by the defendant; (8) whether the defendant profited from the conduct; (9) the defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.

a. Reprehensibility.

The conduct here is not sufficiently reprehensible to justify the jury's punitive damages award for several reasons. First, the United States Supreme Court has stated that while suppression of a material fact can support tort liability and even a modest punitive damages award, this conduct is less reprehensible than a deliberate false statement, particularly where, as here, there is a good-faith basis for believing no duty to disclose exists. Punitive damages must bear a reasonable relationship to compensatory damages. *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 580 (1996).

In this case, there is little or no evidence that the Defendant was aware of the change in auction rules. Similarly, there is no evidence that Defendant ever made a false representation directly to Plaintiff or was even aware that the auction had completed and provided a North Carolina damage disclosure form. Finally, Defendant had a good-faith basis for believing that there was no duty to disclose, as the sale was made to another dealer at a red-light sale and the contract was marked "as is." There was no evidence showing that Defendant's conduct was anything other than an isolated incident. The condition of the subject vehicle was unique, and Plaintiff presented no evidence that Defendant had ever violated the auction rules or North Carolina statutory law on any other occasion. Moreover, the harm suffered was purely economic and did not result in any personal injuries. Given this evidence, the Defendant's conduct does not justify an extraordinary punitive damages award.

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b. Likelihood, at the Relevant Time, of Serious Harm.

This case did not involve personal injury, but rather concerned the sale of a high mileage used car between two dealerships. The measure of actual damages was the difference between the sales price of the car and its value at the time of sale, a difference of less than $5,000. Moreover, Plaintiff had a duty under the auction rules and a common law duty as North Carolina

motor vehicle dealers to inspect the vehicle. These facts indicate that even if Defendant concealed information, there was little, if any, chance of harmful consequences to the Plaintiff.

c. Degree of Defendant's Awareness of the Probable Consequences of its Conduct.

The following facts were undisputed a trial: (1) Defendant sold the vehicle as a red light vehicle; (2) the contract was marked "as is;" (3) the vehicle had visible wreck damage; and (4) the vehicle had a visible change in paint scheme. Given these facts and Plaintiff's contractual and legal duties to inspect the vehicle, it would have been difficult for Defendant to foresee serious harm. This factor does not support the punitive damages award.

d. Duration of the Defendant's Conduct.

This case involves a discrete transaction that did not occur over any appreciable period of time and largely involved the conduct of a third-party, the auction. Therefore, this factor does not support the punitive damages award.

e. Actual Damages Suffered by the Plaintiff.

The jury determined that the actual damages were $6,645. This award does not support a punitive damages award of $ 2,381,888.

f. Any Concealment by the Defendant of the Facts or Consequences of Its Conduct.

There was no direct communication between Plaintiff and Defendant prior to this transaction, nor was there any contact after the transaction until Plaintiff contacted Defendant after discovering the vehicle's condition. Additionally, Plaintiff's own expert explained that the vehicle's problems were immediately apparent if anyone looked under the car. The Court concludes that Defendant did not attempt to conceal the consequences of its conduct, and this factor does not support the large punitive damages award in this case.

g. Existence and Frequency of Similar Past Conduct.

This case involved a single used vehicle with a unique repair history and condition. Plaintiff introduced no evidence of misconduct of any kind involving any other vehicle, and there was no evidence of any other violations of the auction rules or North Carolina law. This factor does not support the punitive damages award.

h. Whether the Defendant Profited from the Conduct.

Defendant made a profit from the sale of this vehicle. However, the economic benefit received by Defendant was slight. At best, this factor is neutral.

i. Defendant's Ability to Pay Punitive Damages.

The Defendant's net worth exceeds the punitive damages award entered in this case. This factor is the only factor which might support the jury's punitive damages award. However, the United States Supreme Court has cautioned that a defendant's wealth alone cannot justify an otherwise unconstitutional punitive damages award. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003).

Given the analysis of each of the factors set forth in the North Carolina statute, the applicable factors fall far short of what is needed to support the staggering punitive damages award reached by the jury.

2. Constitutionality of Punitive Damages Award.

There are constitutional limits on the amount of punitive damage awards. Punitive damages must bear a reasonable relationship to compensatory damages. *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 562 (1996) ("[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeaser."). In *Gore*, the Supreme Court set forth three guideposts for determining the constitutionality of a punitive damages award: (1) reprehensibility of the defendant's conduct; (ii) the disparity

between the harm suffered and the punitive damages award; and (iii) the difference between the punitive damages award and civil penalties authorized or imposed in comparable cases. *Id.* at 575; *see also Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). This punitive damages award does not survive this review.

a. Reprehensibility.

The Court has previously discussed this element in connection with the North Carolina factors. In addition, the Court finds *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010) instructive. *Austin* involved claims for fraud and unfair trade practices based upon a car dealer's misrepresentations about wreck damage on a vehicle it sold to a consumer. *Id.* at 31, 691 S.E.2d at 139. The South Carolina Supreme Court stated that the car dealer's conduct in that case exhibited an extremely high degree of reprehensibility and affirmed a ratio of punitive damages to actual damages of 8.21 to 1. *Id.* at 53, 691 S.E.2d at 151.

In some ways, *Austin* is similar to this case. Both involve alleged fraud or unfair trade practices against a car dealer with respect to prior wreck damage. In addition, the plaintiff in both cases was represented by the same attorney. Yet, there are key differences. For example, in *Austin*, the sale was to a consumer who intended to use the vehicle as his primary means of transportation. The sale here was between two car dealerships and the car was sold "as is" with obvious wreck damage. In addition, *Austin* included evidence that the dealer forged the plaintiff's signature on a buyer's guide. *Id.* There is no similar evidence of additional fraudulent or reprehensible conduct here. Given these differences, while the Court concludes the conduct in this case is somewhat reprehensible, it also concludes that the degree of reprehensibility exhibited here does not rise to the level exhibited in *Austin*.

b. Ratio.

The United States Supreme Court has stated that, while there is no bright-line rule, an award of "more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm*, 538 U.S. at 425 (2003); *Pacific Life Ins. Co. v. Haslip,* 499 U.S. 1, 23 (1991). In most cases then, an award more than four to five times the compensatory damages is unconstitutional. For the rare case in which a greater ratio is appropriate, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425. Here, the jury's verdict results in a ratio of 358:1 and therefore fails any ratio test.

c. Civil Penalties.

The comparable civil penalties for the conduct at issue under applicable North Carolina law are found in North Carolina's damage disclosure statute, N.C.G.S. § 20.71-4, and NCUTPA, N.C.G.S. § 75-16. North Carolina's damage disclosure statute requires that a transferor of a motor vehicle disclose whether the vehicle has been reconstructed. N.C.G.S. § 20.71-4. It also provides that a violation may be redressed by a civil action under N.C.G.S. § 20-348, "Private Civil Action." *Id.* This section authorizes recovery of "[t]hree times the amount of actual damages sustained or one thousand five hundred dollars ($1,500), whichever is greater."[2] The maximum recovery for a violation of the NCUTPA is treble damages. N.C.G.S. § 75-16. Thus, the jury's punitive damages award vastly exceeds any comparable civil penalty.

Based on a review of the required factors, the Court therefore concludes that the punitive damages award in this case is excessive and violates due process. In deference to the jury, the Court can do no more than determine the upper limit of the range of punitive damages awards consistent with due process and set the amount of punitive damages accordingly. *Hollis v.*

[2] Violation of the damage disclosure statute is also a class 2 misdemeanor. To the extent criminal penalties are relevant in this analysis, a class 2 misdemeanor carries a maximum fine of $1,000. N.C.G.S. § 15A-1340.23(b).

Stonington Development, LLC, 394 S.C. 383, 404, 714 S.E.2d 904, 915 (Ct. App. 2011). In the Court's view, the conduct at issue is sufficiently reprehensible to justify exceeding the 4 or 5 to 1 ratio discussed in *State Farm*. However, it is not sufficiently reprehensible to justify more than a single digit ratio. The Court therefore believes the appropriate ratio of punitive damages to actual damages is 7:1—this is less than the 8.21:1 ratio in *Austin* discussed previously because the Court finds the conduct here to be less reprehensible than the conduct at issue in *Austin*. The award of punitive damages is hereby reduced to seven times actual damages, or $46,515.[3]

B. New Trial Arguments Relating to Punitive Damages.

The Court takes this opportunity to separately address Defendant's argument that it was entitled to a new trial on punitive damages because the jury should not have been permitted to consider evidence or arguments on "safety," and its argument that the Court erred in failing to provide the jury with a complete recharge on the elements of fraud.

1. Evidence of Safety.

Plaintiff's principal argument to the jury on punitive damages was that the subject vehicle was unsafe, and, by placing the vehicle back in the stream of commerce, Defendant could have harmed third parties. Defendant objected to the introduction of safety evidence on multiple occasions, including before and during the closing argument on punitive damages.

Defendant is correct that courts have cautioned against use of potential harm to third persons as a basis for awarding punitive damages. *Phillip Morris, USA v. Williams*, 549 U.S.

[3] The Court's reduction of the punitive damages award affects the outcome of certain other motions filed by Defendant. Defendant's motion to enforce North Carolina's statutory cap on punitive damages is moot because, as reduced, the punitive damages award does not exceed the statutory cap of $250,000. Defendant's motion for a new trial based on the amount of the punitive damages verdict is also affected. The Court does not believe that the punitive damages verdict, as reduced, is so excessive as to require a new trial and therefore the motion is denied on this ground. Finally, because the punitive damages verdict has been reduced, Defendant's motion for a new trial *nisi remittitur* is denied.

346 (2007); *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010); *Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004). As stated in *Phillip Morris*:

> [t]he Constitution's Due process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.

549 U.S. at 354. Yet *Phillip Morris* also states that "where the risk of that misunderstanding is a significant one – because, for instance, of the sort of evidence introduced at trial or the kinds of argument the plaintiff made to the jury – a court, *upon request*, must protect against that risk." *Id.* at 357 (emphasis added). Defendant here objected to Plaintiff's use of evidence of safety and potential harm to third persons, but Defendant did not request a limiting instruction. Under these circumstances, the Court does not believe allowing Plaintiff to argue as it did rises to the level of a due process violation. Defendant's motion for a new trial based upon use of harm to third parties to award punitive damages is therefore denied.

2. Recharge on Elements of Fraud.

During the trial, the jury informed the Court that it had reached a verdict on all but one cause of action and asked the Court for additional information on an element of fraud. The Court instructed the jury to continue to deliberate. The jury submitted an additional request to be instructed again on the elements of fraud. The Court recharged Defendant's Requested Charge No. 16, a basic charge on the elements of fraud. Defendant requested that the Court also recharge Defendant's Request to Charge No. 17, which explained the reasonable reliance element of fraud in North Carolina, and, in particular instructed the jury that reliance cannot be reasonable unless the plaintiff was denied the opportunity to investigate, and the Court denied this request. Shortly after the recharge, the jury returned a verdict on all claims against Defendant, including the fraud cause of action.

Defendant argues that the Court erred in failing to recharge the jury fully. When the jury requests additional charges, it is sufficient for the Court to charge only the parts of the initial charge which are necessary to answer the jury's request. *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985). "Its failure to charge in greater detail is not error if the details were fully covered in the original charge." *Id.* Here, the Court believes the recharge was a correct statement of law and properly addressed the jury's question. Defendant's motion for a new trial on this ground is therefore denied.

II. Recovery under the NCUTPA.

A. Treble Damages.

North Carolina law mandates that the Court treble the actual damages verdict rendered by the jury on the NCUTPA claim. N.C.G.S. § 75-16. Accordingly, the Court trebles the actual damages award of $6,450 to $19,350.

B. Attorney's Fees.

In this case, only one claim gives rise to the possibility of an attorney's fee award for a prevailing plaintiff— the NCUTPA claim. Under the NCUTPA, attorney's fees may be awarded to a prevailing plaintiff under the following conditions:

> [i]n any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit . . . .

N.C.G.S. § 75-16.1. To recover attorney's fees under this statute, "a plaintiff must prove the following: (1) that the plaintiff is a prevailing party; (2) that the defendant willfully engaged in the prohibited act; and (3) that the defendant's refusal to fully resolve the matter was

unwarranted. A plaintiff must prove these factors by a preponderance of the evidence." *Llera v. Sec. Credit Sys., Inc.*, 93 F. Supp. 2d 674, 676 (W.D.N.C. 2000).

The parties extensively briefed entitlement to fees under this statute. After reviewing all of the materials submitted, the Court has determined that a reasonable attorney fee in the amount of $21,264 should be awarded.[4]

The Court finds that Plaintiff was the prevailing party under the NCUTPA as the jury returned a full award of $6,645. Moreover, the jury was also charged with assessing willfulness, which the Court assumes was implicit in the fraud verdict. Thus, the Court finds the prevailing party and willfulness elements are met.

In analyzing the materials submitted by the parties, the Court finds that Defendant's settlement efforts were directed to the NCUTPA claim and were reasonable with respect to the resolution of that claim, but were not tailored "to fully resolve the matter which constitutes the basis of [this] suit." As shown in the affidavits presented by counsel, the sticking point with respect to settlement rested on punitive damages. On the one hand, Plaintiff did not make any offer below $280,000, and on the other hand, Defendant's highest offer was $15,000 "plus a reasonable attorney's fee." On this basis, the Court finds there was an unwarranted refusal to settle the entire claim prior to trial.

The purpose of attorney's fees under the NCUTPA is to encourage private enforcement of the NCUTPA. *Shepard v. Bonita Vista Properties, L.P.*, 191 N.C. App. 614, 625, 664 S.E.2d

[4] At the hearing, Plaintiff asked for leave to submit an additional affidavit in support of the request for attorney's fees. The Court agreed, but asked that any affidavit be filed quickly. More than thirty days later and after the Court has issued guidance to the parties about its rulings, Plaintiff submitted a lengthy affidavit. Defendant objected, citing, among other things, the lateness of the affidavit and the fact that the affidavit contained legal arguments and opinions rather than additional facts. The Court notes that much of the affidavit is improper as it contains legal arguments and speculation about which the Affiant lacked personal knowledge, but it has considered the factual representations as part of its analysis.

388, 396 (2008), *aff'd*, 363 N.C. 252, 675 S.E.2d 332 (2009). They were not meant to, and do not, allow for recovery of time spent in pursuing punitive damages, which are not available under the NCUTPA. As shown in the settlement correspondence and in the affidavits of Plaintiff's counsel, the vast majority of the effort expended in this case was devoted to the recovery of a large punitive damages award and not the pursuit of a claim under the NCUTPA.

The Court therefore limits the award to the realm of a reasonable award on the NCUTPA claim and the work expended by Plaintiff's counsel on that claim. Plaintiff bears the burden of proving a reasonable attorney's fee for this cause of action. North Carolina law requires that attorney's fee requests be reviewed using the following factors: (1) time and labor expended; (2) the skill required; (3) the customary fee for like work; and (4) the experience or ability of the attorney. *United Laboratories, Inc. v. Kuykendall,* 403 S.E.2d 104, 111 (1991), *aff'd,* 437 S.E.2d 374 (1993). North Carolina courts do not employ a multiplier. *Nakatsukasa v. Furiex Pharmaceuticals, Inc.*, 2015 WL 4069818 (N.C.Sup.Ct. 2015) ("[p]laintiffs have not cited to, and this Court is unable to find, any reported case in which a North Carolina court has applied a 'multiplier" to increase the lodestar amount.").[5]

1. Time and Labor Expended.

The most useful starting point for determining the amount of a reasonable attorney's fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Southeast Air Charter, Inc. v. Stroud*, 2015 WL 4897790 at * 3 (N.C. Sup. Ct. 2015) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Hours that are excessive, redundant, or

[5] In any event, a multiplier increasing the fee award would be inappropriate. Plaintiff bears the burden of establishing that a multiplier should be used, and the burden is a heavy one. Multipliers should be used only in rare and exceptional circumstances. *Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 552 (2010). The Court finds that this is not such a case.

otherwise unnecessary are removed and should not be included in the trial court's assessment of attorney's fees. *Id.*

Here, Plaintiff has made no effort to delineate the number of hours expended on the NCUTPA cause of action (other than removing a few hours attributable to a settling co-defendant). Instead, Plaintiff has chosen to ask the Court for an award of nearly all of its fees, seeking an award of attorney's fees and costs totaling $370,543.12 for a claim under which the maximum recovery was $19,935. The Court does not believe this approach is appropriate as it is not reflective of the fees reasonably expended on this cause of action.

As an initial matter, Plaintiff has not discounted the total time spent in this case to reflect the claims on which it was not successful. Plaintiff initially asserted claims for violation of the South Carolina Unfair Trade Practices statute, S.C. Code Ann. § 39-5-10 *et seq.* and violation of the South Carolina Dealer's Act, S.C. Code Ann. § 56-15-10 *et seq.* These claims were abandoned after Defendant sought to dismiss them. In addition, Plaintiff withdrew a claim for constructive fraud after Defendant filed a motion for summary judgment. Lastly, the Court found the economic loss rule barred Plaintiff's negligence claim and granted Defendant's motion for directed verdict. Thus, Plaintiff abandoned or was unsuccessful on half the claims asserted against this Defendant (4 of 8).

Nor does the Court believe attorney's fees should be awarded for time spent pursuing punitive damages, which are not recoverable under the NCUTPA. Indeed, the evidence and the arguments of counsel make it clear that the majority of Plaintiff's efforts were aimed at recovery of punitive damages, rather than recovery under the NCUTPA. For example, the first settlement demand from Plaintiff came in a letter dated January 23, 2015. That letter demanded $350,000 and stated "your clients have exposure of $250,000 in punitive damages under North Carolina

law. I am sure a jury will reach that number easily." The question of admissibility of evidence on punitive damages was discussed extensively in pre-trial motions before the Court and at directed verdict in connection with the economic loss rule arguments. When the Court commented on the small amount of actual damages in the case, Plaintiff's counsel agreed that damages were small "until you get to the punitive damage phase." By way of further illustration, Plaintiff included the entire punitive damages phase of the trial, which could not possibly have been attributable to the NCUTPA claim. The emphasis on punitive damages is also reflected in the Plaintiff's post-trial submissions and arguments at the hearing on the post-trial motions.

Additionally, although Plaintiff excluded some of the time spent on claims against the original co-defendant, it appears to the Court that the materials submitted by Plaintiff did not exclude all of that time. Plaintiff should not recover from Defendant for time spent in pursuing claims against another party.

Furthermore, the Court finds that any paralegal time should be excluded for two reasons: (1) it does not appear to relate to the NCUTPA claim; and (2) the NCUTPA does not allow recovery of attorney's fees for time spent by non-lawyers. The NCUTPA provides that a court may allow a reasonable attorney fee "to the duly licensed attorney representing the prevailing party." N.C.G.S. § 75-16.1. Time for paralegals and assistants is considered an element of overhead and is not recoverable. *Irwin Indus. Tool Co. v. Worthington Cylinders Wisconsin, LLC*, 747 F.Supp.2d 568, 591 (W.D.N.C. 2010).

The Court also notes that certain time entries submitted by Plaintiff appear excessive. For example, time records indicate that Plaintiff's counsel spent 5.4 hours reviewing the deposition transcript of Mr. Ferrell, which he took, in preparation for summary judgment.

Plaintiff's counsel also attempts to claim between 15.1 and 23.20 hours for review of the deposition of Mr. Nalewaja, whom he deposed.

Finally, a significant portion of the travel time claimed was necessitated solely by the Plaintiff's choice to use a Charleston lawyer to bring suit in Richland County, rather than bringing the action in North Carolina. While Plaintiff was free to file suit in South Carolina, the Court will not impose the extra cost of this decision on the Defendant.

After a thorough review of the materials submitted, the Court has identified approximately 218 hours of entries that contain or could contain time spent on the NCUTPA claim. That said, many of these time entries are vague or relate to large blocks of time, only some of which are attributable to the NCUTPA cause of action. For example, on August 1, 2015, Plaintiff's counsel devoted 6.8 hours to "Prepare for Mediation. Prepare Pretrial Brief. Legal research regarding North Carolina Unfair Trade Practices Statute." Other entries are unrelated in any way to the NCUTPA claim. For example, on April 12, 2016, Plaintiff's counsel spent 5.1 hours as follows:

> Review email from Jamie Flynn. Telephone conference with Jamie Flynn regarding testimony of Nationwide. Telephone conference with Kevin Ivey. Legal research regarding proof of punitive damages. Legal research regarding post trial analysis of punitive damages. Legal research involving procedural aspect of punitive damages. Review or objections and counter-designations of video testimony of Ecklund and Guyer. Begin review of evidence law regarding video depositions.

Given this practice, the Court is unable to precisely calculate the total hours spent on the NCUTPA claim using the records submitted by Plaintiff, and must therefore base its calculations on a percentage reduction of the hours claimed by Plaintiff. To account for block billing and the

other issues the Court has identified above, the Court finds a reduction of 75% is appropriate.[6] This approach is consistent with that taken by the Superior Court of North Carolina, Business Court in *Out of the Box Developers, LLC v. Doan Law, LLP*, No. 10 CVS 8327, 2014 WL 4298329, at *10–11 (N.C. Super. Aug. 29, 2014) (removing certain hours from lodestar and applying percentage discount to account for claims other than the NCUTPA). Therefore, the Court determines that 54.525 hours reflects a reasonable amount of time and labor devoted by Plaintiff's counsel to the NCUTPA claim.

2. Skill Required.

This case was not complex for Plaintiff's counsel. Plaintiff's counsel primarily handles "auto fraud and unfair trade practice type cases." He makes similar claims in many cases, using form complaints and form discovery. The Court has accounted for this experience in accepting the hourly rate presented by Plaintiff's counsel as discussed below.

This case required the application of North Carolina law, but this factor does not justify the enormous attorney's fee sought for two reasons. First, this case did not have to be brought in South Carolina. Plaintiff resides in North Carolina and the transaction occurred in North Carolina. North Carolina's long arm statute would have permitted Plaintiff to sue in North Carolina with a North Carolina attorney. Again, Plaintiff was free to bring suit in South Carolina, but the Court will not make Defendant pay the extra cost incurred because of that choice. Second, while North Carolina law varies from South Carolina in certain respects, there is no significant difference between North Carolina law and South Carolina on the basic elements

[6] The Court notes that this percentage reduction is also consistent with the number of claims submitted to the jury (of the four claims submitted, only one carried an entitlement to an award of reasonable attorney's fees).

of a claim for unfair trade practices. Thus, the Court finds that this case was not exceptionally complicated for Plaintiff's counsel.

3. Experience or Ability of the Attorney.

The Court accepts the affidavits of Plaintiff's attorneys with respect to the recitation of their experience or ability in cases such as this one.

4. Customary Fee for Like Work.

The Court accepts the affidavits presented by Plaintiff's counsel that indicate a rate of $400/hour is consistent with the market rate for similar work performed by attorneys with skill and experience in this area. For that reason, the Court accepts Plaintiff's proposed rate of $390/hour and will apply that rate to the number of hours identified above, resulting in a total fee award of $21,264.

The Court further notes that it is customary for Plaintiff's attorneys to accept cases such as this one on a contingency basis under which the attorney will receive 40% of any verdict. In this case, 40% of the fraud verdict (including punitive damages) as adjusted by the Court earlier in this order results in a total of $21,264. In addition, this award is consistent with the trebled award under the NCUTPA.

Given the above analysis, the Court finds a reasonable attorney's fee award in this case is $21,264.

C. Costs.

Plaintiff also seeks an award of costs in the amount of $14,866.62. The vast majority of this amount is not recoverable. Unlike most issues in the case, the award of costs is governed by South Carolina law. *Restatement (Second) of Conflicts § 122*, cmt. a (noting that a court applies its own rules to matters of judicial administration, such as costs).

Under Rule 54, SCRCP, only the following costs are recoverable:

(1) Costs authorized by statute and sanctions imposed in favor of the prevailing party;
(2) Fees of the clerk;
(3) Fees of the sheriff;
(4) Fees incurred in service of process;
(5) Witnesses' Fees;
(6) Fees for exemplification of copies of papers necessarily obtained for trial.

Costs for such items as deposition fees, expert witness fees, mailings, publications, and travel expenses such as meals, lodging, car rental and mileage are not recoverable. *Black v. Roche Biomedical Laboratories*, 315 S.C. 223, 433 S.E.2d 21, 25 (Ct.App. 1993). Applying these standards to the itemization of costs submitted by Plaintiff yields the following list of recoverable costs:

	Date	Item	Amount
1.	1/14/13	Filing fee to Richland County	$150.00
2.	9/22/15	Motions filing fees	$125.00
3.	4/2/15	Richland County Sheriff, service of deposition subpoenas	$30.00
4.	5/22/15	Payment to SW Process Service	$10.00[7]
5.	4/4/16	Trial check for Brent Farrell	$31.80
6.	4/4/16	Trial check for Randy Threatt	$31.80
7.	4/7/16	Payment to SWS Process Service for trial subpoenas	$20.00
8.	4/7/16	Payment to James Ruopoli for service of trial subpoena	$10.00
9.	4/17/16	FedEx office printing costs	$85.47
10.	4/18/16	Richland County jury roster	$10.00
11.	4/28/16	Post-trial motion filing fee	$25.00
		Total:	**$529.07**

Thus, the Court awards $529.07 in costs.

III. Defendant's Motion to Require Election of Remedies.

Defendant moved to require Plaintiff to elect remedies. Election of remedies involves a choice between two or more different and coexisting modes or procedure or forms of relief afforded by the law for the same injury. *Save Charleston Foundation v. Murray*, 286 S.C. 170,

[7] In all cases, the service of process fee has been reduced to $10, the amount charged by the sheriff. Rule 54(e)(4), SCRCP.

333 S.E.2d 60 (Ct.App. 1985). Stated differently, "[e]lection of remedies is the act of choosing between different remedies allowed by law *on the same state of facts.*" *Boardman v. Lovett Enterprises, Inc.*, 283 S.C. 425, 428, 323 S.E.2d 784, 785 (Ct. App. 194), *rev'd on other grounds*, 287 S.C. 303, 338 S.E.2d 323 (1985). Courts must ensure that litigants do not receive a double recovery. *See Collins Music Co. v. Smith,* 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998); *MRD Motorsports v. Trail Motorsports, LLC*, 694 S.E.2d 517 (N.C. App. 2010) (plaintiff is entitled to only one redress for a single wrong); *see also* N.C.G.S. § 1D-20 ("A claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute that provides for multiple damages.").

In this case, Plaintiff's claims all arose from the same transaction, involved the same injury, and the jury returned a verdict for the same amount of actual damages on each claim. The Court concluded initially, and still concludes, that election of remedies is required.[8] Permitting Plaintiff to recover actual damages on more than one claim would amount to more than one recovery for a single injury.

After consideration of the post-trial motions, and as set forth herein, the Court reduced the punitive damages award to $46,515, and awarded reasonable attorney's fees of $21,264. The Court then required Plaintiff to elect between the following options: (1) NCUTPA actual damages of $6,645 trebled to $19,935 plus reasonable attorney's fees of $21,264; or (2) fraud actual damages of $6,645 plus punitive damages of $46,515. Plaintiff elected the first option, foregoing the fraud claim, and taking recovery under the NCUTPA.

21c

[8] The Court originally required Plaintiff to elect soon after the verdict was returned, and Plaintiff elected actual damages for fraud, punitive damages for fraud, and attorney's fees under the NCUTPA. Defendant objected to this election, and Plaintiff moved to reconsider, asking that it be permitted to delay election until after the Court ruled on post-trial motions. The Court granted this request.

IV. Prejudgment Interest.

A. Offer of Judgment.

Plaintiff seeks an award of more than $236,628.01 in interest and costs of $14,279.82 pursuant to S.C. Code Ann. § 15-35-400, South Carolina's statute governing offers of judgment. Plaintiff argues that recovery of these amounts is authorized because the verdict in this case exceeded the $280,000 offer of judgment made before trial.[9]

The Court need not address the conflicts of law issue because interest under an offer of judgment is not available under either North or South Carolina law. If North Carolina law applies, only defendants may make offers of judgment. Rule 68, NCRCP. If South Carolina law applies, interest under an offer of judgment is not awarded unless the Plaintiff received a recovery at least as favorable as the rejected offer of judgment. S.C. Code Ann. § 15-35-400(b). Plaintiff made an offer of judgment of $280,000 and the elected recovery is well below that amount, making interest and other costs unavailable.

B. General Statutes

Plaintiff sought an award of prejudgment interest under both North Carolina and South Carolina law. The claim for prejudgment interest under North Carolina law is governed by N.C.G.S. 24-5, which provides that:

> (b) Other Actions. – In action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied. Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of entry of judgment under G.S. 1A-1, Rule 58, until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

RJC

[9] As a preliminary matter, § 15-35-400 may not apply. Authorities are split as to whether recovery pursuant to a statute governing offers of judgment is substantive or procedural. *E.g., Southeast Floating Docks, Inc.*, 82 So.3d 73 (Fla. 2012); *but see Paine Webber Jackson and Curtis, Inc. v. Winters*, 579 A.2d 545 (Conn. App. 1990).

Plaintiff argues that it is entitled to prejudgment interest on the award of actual damages of $6,445 at North Carolina's legal rate of interest of eight percent. N.C.G.S. § 24-1 (legal rate of interest). Given the actual damages award of $6,645 is $531.60, the per diem interest accrued is $1.46. Plaintiff seeks prejudgment interest through May 2, 2016 of $1,751.02. Additional interest through October 10, 2016 is $242.36. The Court therefore awards total prejudgment interest of $1,993.38.

Plaintiff has also sought prejudgment interest under South Carolina law. Defendant contends that South Carolina law regarding prejudgment interest does not apply. However, the Court does not need to resolve the question of conflicts of law because, even if South Carolina law applied, prejudgment interest is not available. Prejudgment interest is only available on an unliquidated claim. *Dibble v. Sumter Ice & Fuel Co.*, 283 S.C. 278, 322 S.E.2d 674 (Ct.App. 1984). The Court determines that Plaintiff's damages were not liquidated because the amount of damages rested on evidence of the retail value of the vehicle, which would not be presented until trial. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). In *Austin*, The South Carolina Supreme Court addressed an almost identical claim. It stated:

> [a]lthough [plaintiff] is correct that prejudgment interest is statutorily authorized by the provisions of section 34–31–20 of the South Carolina Code, we find [Plaintiff's] damages were not liquidated at the time his claim arose. [Plaintiff's] lawsuit arose out of his dissatisfaction with the purchase of a used vehicle. Because [Plaintiff] alleged claims of fraud, constructive fraud, negligence, and violations of state and federal motor vehicle acts his prospective damages were unliquidated and could not have been ascertained without evidence of the retail value of the truck. Given [Plaintiff's] monetary recovery could not have been reduced to certainty, the trial judge correctly denied
>
> [Plaintiff's] request for prejudgment interest.

Id. at 58, 691 S.E.2d at 154. Thus, the Court denies this request.

CONCLUSION

For the reasons stated above, individually and collectively, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Defendant's motion for JNOV is denied.

2. Defendant's motions for new trial, including its motion for new trial under the thirteenth juror doctrine and a new trial *nisi remittitur*, are denied.

3. The punitive damages award is reduced to $46,515.

4. Defendant's motion for enforce the North Carolina punitive damages is cap is denied as moot.

5. Plaintiff's motion for attorney's fees and costs is granted in part. Plaintiff is awarded $21,264 in reasonable attorney's fees and costs of $529.07.

6. Plaintiff's motion for interest and costs under its offer of judgment is denied.

7. Plaintiff's motion for prejudgment interest is granted in the amount of $1,993.38.

8. Defendant's motion to require Plaintiff to elect remedies is granted.

9. As a result of this Order and Plaintiff's election, the Court enters the following findings with respect to the amount of Plaintiff's recovery. Entry of final judgment shall take place after the Court rules on Defendant's motion for setoff, as the amount of the final judgment may be affected by that ruling.

Treble Damages under the NCUTPA	$19,935
Attorney's Fees	$21,264
Costs	$529.07
Prejudgment interest	$1,993.38
	$43,721.45

IT IS SO ORDERED.

The Honorable R. Ferrell Cothran, Jr.
Presiding Judge

Nov. 28, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars,	)	Civil Action No. 2013-CP-40-0319
	)	
Plaintiff	)	
	)	
v.	)	
	)	
Columbia Automotive, LLC d/b/a Midlands Honda,	)	
	)	
Defendant.	)	

FILED
2017 MAR 16 PM 2:55
JEANNETTE W. McBRIDE
C.C.P. & G.S.

ORDER ON PLAINTIFF'S MOTION PURSUANT TO RULE 59 AND MOTION FOR SUPPLEMENTAL ATTORNEY'S FEES

Having considered the motion of Daniel O'Shields and Roger W. Whitley, a Partnership d/b/a O&W Cars ("O&W") pursuant to Rule 59, SCRCP and motion for supplemental attorney's fees, the Court makes the following rulings.[1] The Court further directs the Clerk of Court to enter judgment consistent with this order. In the interim since the Court's order was filed Columbia Automotive, LLC d/b/a Midlands Honda ("Midlands Honda") has withdrawn its motion for setoff; therefore, judgment is appropriate at this time as itemized in the Conclusion of this Order.

I. Rule 59, SCRCP Motion

As an initial note, this action stems from one transaction: the sale of one used car by Midlands Honda to O&W Cars. O&W is a partnership, and Daniel O'Shields and Roger W. Whitley are the partners ("O&W"). There was one buyer here, and thus, there is one recovery

[1] Pursuant to Rule 59(f), SCRCP, the Court hereby exercises its discretion to rule on this matter on the briefs without further hearing. O&W submitted these requests in one filing, and the Court addresses them in one order.

and one punitive damages analysis whether the buyer is described as "plaintiff" or "plaintiffs." O&W's argument on this point is therefore denied.

In addition, the Court provides additional discussion on two matters raised by O&W:

1. Interest.

The prejudgment interest award should be adjusted upward to reflect the time until judgment is entered in this case. The Court directs the Clerk of Court to make that calculation on the date of entry as follows: $1993.38 + (number of days since October 10, 2016 * $1.46).

2. Attorney's Fees.

O&W had the burden of establishing the amount of its attorney's fees relating to its claim under the North Carolina Unfair Trade Practices Act ("NCUTPA"). The Court previously concluded that O&W had failed to do so in a number of respects, including by block billing time related to the NCUTPA claim together with time which was unrelated. O&W cannot correct this failure at the Rule 59 stage by providing new affidavits which purport to divide time between recoverable and non-recoverable claims. The Court declines to revisit its rulings on this point.

O&W also presents new time records seeking additional time from May 2, 2016 to July 20, 2016. O&W could have filed a supplemental affidavit or request seeking these fees prior to the hearing. It did not do so, and never sought leave to supplement the record prior to the Court's decision. The Court declines to revisit its rulings on this point.

Finally, O&W seeks to increase the Court's attorney's fee award by arguing that the Court forgot or failed to award fees for time spent by Brooks Fudenberg. The Court disagrees with this contention and clarifies that it did consider Mr. Fudenberg's time in its original fee award.

The remainder of the motion is denied without further discussion.

II. Supplemental Motion for Attorney's Fees after July 20, 2016.

The Court addresses these arguments by time period.

1. July 21, 2016 through July 27, 2016.

O & W's counsel have submitted claims for an additional 36 hours (or $14,040) for the period immediately prior to the hearing in this matter on July, 27, 2016. Based on the same analysis applied in its earlier order which is incorporated by reference here, the Court finds that this figure does not represent a reasonable reflection of the time devoted to the NCUTPA claim. The Court was present at the hearing and notes that much of the parties' time and energy was devoted to the analysis of the punitive damages award. There were also other arguments that were unrelated to the NCUTPA. Additionally, some of the time entries submitted by O&W for this period show that time claimed to have been spent on the NCUTPA was spent on some other aspect of the case or it cannot be ascertained whether the NCUTPA was involved or not. For example, Mr. Moskos's July 22 and July 24 time entries do not contain enough detail to determine whether they involved NCUTPA work. Other entries, asserting that 100% of the time claimed was spent on the NCUTPA, are undercut by the entries themselves that state that some portion of the time was spent on issues such as punitive damages, election of remedies, and offers of judgment. As a result the Court finds a reasonable attorney's fee for this period is $7,020, representing 50% of the time claimed.

2. July 28, 2016 through September 13, 2016.

RJC

Mr. Moskos claims 65.2 hours on NCUTPA related activity during this period. 60.9 of these hours relate to the August 30, 2016 affidavit filed by O&W after the Court's preliminary ruling. The Court has already ruled that "much of the affidavit is improper as it contains legal arguments and speculation about which the Affiant lacked personal knowledge." Based on this finding, the Court finds that the vast majority of this time does was not reasonably expended in

connection with the NCUTPA claim. The Court finds that an appropriate fee for the preparation of an affidavit to respond to the chronology contained in Midlands Honda's response to the request for attorney's fees is $780, representing two hours of work at the previously approved rate ($390/hr).

The remaining time in this period not spent on the affidavit is minimal, 4.3 hours by Mr. Moskos and 1.7 hours by Mr. Fudenberg, producing a total fee amount of $2,340 (6 hours * $390/hr). The Court finds an award of these fees is appropriate.

The total attorney's fees awarded for this time period is $3,120.

3. September 14, 2016 through the Present.

Before attorney's fees may be awarded under the NCUTPA, there must be an unwarranted refusal to settle on the part of the defendant. N.C.G.S. § 75-16.1; *Llera v. Security Credit Systems, Inc.*, 93 F.Supp.2d 674 (W.D.N.C. 2000). The Court previously concluded that Midlands Honda's pre-trial offer of judgment was a reasonable effort to resolve the NCUTPA exposure, but still found an unwarranted refusal to settle because Midlands Honda had not attempted to resolve the entire case.

As shown in the Affidavit of James Y. Becker attached to Midland's Honda's response to O&W's motion, Midlands Honda made another settlement attempt in response to the Court's order that amounted to an effort "to fully resolve the matter which constitutes the basis of [this suit." On September 14, 2016, Midlands Honda, through counsel, hand delivered a settlement offer to Mr. Moskos offering to pay O&W "a sum reflecting actual damages plus the trial court's award of both punitive damages and attorney's fees for a total of $81,069 ($6,645 in actual damages + $46,515 in punitive damages + $21,264 in attorney's fees)." In other words, Midlands Honda offered to pay O&W all of the relief approved by the Court, including alternative relief which would have been foreclosed by O&W's election of remedies. In fact,

Midlands Honda made a slight math error in its settlement offer and, as a result, the offer was greater than the total amount of relief approved by the Court.

On September 16, O&W rejected the settlement offer, stating "I have reviewed Midlands Honda's confidential settlement offer with my clients. While the offer is confusing since it offered $81,069 but the numbers totaled only $74,424, my clients have decided to decline both offers." Midlands Honda twice asked for a counter offer (on September 16 and October 3), but O&W had not responded as of the date of Mr. Becker's affidavit.

As a result, the Court finds that there is no entitlement to any additional attorney's fee award after September 14, 2016 as there was not an unwarranted refusal "to fully resolve the matter which constitutes the basis of such suit" as required by the NCUTPA in N.C.G.S. § 75-16.1.

CONCLUSION

For the reasons stated above, individually and collectively and as provided in the Court's earlier order, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. The prejudgment interest award will be adjusted upward to reflect the time until judgment is entered in this case. The Court directs the Clerk of Court to make that calculation on the date of entry as follows: $1993.38 + (number of days since October 10, 2016 * $1.46).

2. The Attorney's Fee award will be adjusted to include an additional $10,140.

3. As a result, the Court directs that judgment be entered as follows:

Treble Damages under the NCUTPA	$19,935
Attorney's Fees	$31,404 ($21,264 + $10,140)
Costs	$529.07
Prejudgment Interest	$1993.38 + (number of days since October 10, 2016 * $1.46)
	$51,868.07 + Prejudgment Interest as calculated by the Clerk's office pursuant to the formula above

4. O&W's motions are otherwise denied.

IT IS SO ORDERED.

The Honorable R. Ferrell Cothran, Jr.
Presiding Judge

Feb. 27, 2017

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars, *Plaintiff* v. Columbia Automotive, LLC d/b/a Midlands Honda, *Defendant.*	)	IN THE COURT OF COMMON PLEAS Civil Action No. 2013-CP-40-0319

2017 AUG 14 PM 12:41
RICHLAND COUNTY
FILED
C.C.P. & G.S.

ORDER ON PLAINTIFF'S MOTION FOR SUPPLEMENTAL ATTORNEY'S FEES FOR DECEMBER 2016 THROUGH MARCH 2017

Plaintiffs [hereinafter "O&W"] moved for an award of supplemental attorney's fees for work performed by C. Steven Moskos, from December 16, 2016 through March 29, 2017, and for work performed by Brooks R. Fudenberg, from December 15, 2016 through March 29, 2017. Having considered the motions and submissions of O&W's counsel, the Court DENIES the motion for the reasons set forth below:

I. The Court has previously ruled that Plaintiff may not recover for fees incurred after September 14, 2016 as there was no unwarranted refusal to settle by Midlands Honda after that date.

O&W's claim for attorney's fees arises under the North Carolina Unfair Trade Practices Act, and specifically N.C.G.S. § 75-16.1. Before any fees may be awarded under this statute, there must be an unwarranted refusal to settle on the part of the defendant. N.C.G.S. § 75-16.1; *Llera v. Security Credit Systems, Inc.*, 93 F.Supp.2d 674 (W.D.N.C. 2000). The Court has previously ruled that since September 14, 2016, Midlands Honda has engaged in meaningful and reasonable

settlement efforts.[1] As a result, the Court previously ruled that there could be no recovery of attorney's fees for time incurred after September 14, 2016. For that reason, the Court is perplexed as to why this motion, seeking attorney's fees incurred after that date, was filed.

By this order, the Court incorporates and confirms its earlier ruling and denies O&W's petition for attorney's fees incurred between December 2016 and March 2017. The Court further notes that these repeated motions for attorney's fees illustrate that Plaintiff's counsels' primary incentive here is attorney compensation rather than recovery for their client.

O&W's citation to *Printing Servs. of Greensboro, Inc. v. Capital Group, Inc.*, 637 S.E.2d 230 (N.C.App. 2006) for the proposition that once fees are awarded in a case, fees continue to accumulate for post-trial is both an overstatement of the law (as discussed below) and inapplicable on the facts of this case. The Court has determined that there was no longer an unwarranted refusal to settle after a certain date. *Printing Servs.* states only the general principle that appellate attorney's fees may be included in a fee award under § 75:16-1. Neither *Printing Servs.*, nor any of the cases it cites, addresses the situation present in this case, where a defendant engaged in reasonable settlement activity following a jury verdict, and the plaintiff refused to negotiate. In the Court's view, construing § 75:16-1 to require supplemental awards of attorney's fees in the presence of subsequent reasonable settlement efforts by a defendant would permit a plaintiff who was successful at trial to use post-trial motions and appeals as a veritable attorney's fee printing press. Such a result is patently inconsistent with the statute.

[1] That Midlands Honda has continued its efforts to settle this case has no bearing on the Court's determination that there was not an unwarranted refusal to settle as of September 14, 2016. The Court has determined and remains convinced that the offer made as of that date was a reasonable effort to settle this case in its entirety. Subsequent settlement offers do not change that finding, but they do provide further evidence that there has not been an unwarranted refusal to settle on the part of Midlands Honda since that date.

Settlement negotiations can occur at any stage of litigation, and, should be considered when awarding attorney's fees under North Carolina law. For example, in *United Laboratories, Inc. v. Kuykendall*, 403 S.E.2d 104 (N.C. App. 1991), *aff'd*, 437 S.E.2d 374 (N.C. 1993), the North Carolina Court of Appeals reviewed a second request for attorney's fees. The trial court in that case initially issued an award of attorney's fees in the amount of $47,522.23. *Id.* at 106. An appeal followed, which resulted in a second trial. In considering whether further attorney's fees should be awarded, both the trial court and the appellate court reviewed settlement negotiations which occurred after the first trial, after the first appeal, and prior to the second trial. *Id.* at 111. Additional attorney's fees were awarded because the trial court concluded, and the appellate court agreed, that there was an unwarranted refusal to settle in the *post-trial* negotiations. *Id.* In this case, the Court finds Plaintiff is not entitled to any fees after September 14, 2016 based on O&W's reasonable efforts to settle.

II. The Court, in Its Discretion, Elects to Deny Fees.

Additionally and alternatively, an award of attorney's fees under N.C.G.S. § 75-16.1 is always discretionary, even when the factors which would support an award are present. *Basnight v. Diamond Developers, Inc.*, 178 F.Supp.2d 589, 592 (M.D.N.C. 2001) ("[e]ven where the facts of a particular case will support a finding that the requirements of N.C.Gen.Stat. § 75–16.1 have been met and an award of attorney's fees may be warranted, the Court retains the discretion to deny the award"); *Blankenship v. Town & Country Ford, Inc.*, 174 N.C.App. 764, 771, 622 S.E.2d 638, 643 (2005) ("[t]he decision whether or not to award attorney fees under section 75–16.1 rests within the sole discretion of the trial [court]. *And if fees are awarded*, the amount also rests within the discretion of the trial court.") (emphasis added); *Evans v. Full Circle Productions, Inc.*, 443 S.E.2d 108, 110 (N.C. App. 1994) ("[W]e also recognize that the statute

has been designed to award attorney's fees in extreme cases, since even when the statutory requirements are met, an award of attorney's fees is within the trial court's discretion.").

The Court, in its discretion, declines to award attorney's fees for activity following September 14, 2016.

III. Attorney's Fees Are Not Recoverable After September 14, 2016 Because They Were Not Incurred to Obtain or Protect O&W's Status as a Prevailing Party.

North Carolina's statute allows a trial court to award attorney's fees for post-trial or appellate work by a prevailing party on an unfair trade practices claim where such work is expended in an "effort to protect the judgment." *See Faucette v. Carmel Road, LLC*, 775 S.E.2d 316, 326 (N.C.App. 2015); *Cotton v. Stanley*, 380 S.E.2d 419, 422 (N.C.App. 1989) ("[f]ees are authorized for the prevailing party and may be awarded for all time, including appeal, *reasonably expended in obtaining or sustaining the status of prevailing party.*") (emphasis added).

Plaintiff O&W prevailed on the unfair trade practices claim at trial. None of the work performed by Plaintiff's counsel to challenge or increase the Court's fee award was necessary to sustain Plaintiff's status as a prevailing party. Instead, Plaintiff's counsels' primary incentive here appears to be attorney compensation rather than recovery for their client. An award of fees for such purposes is not appropriate under North Carolina law.

For all of the reasons set forth here and the Court's prior orders addressing O&W's ever increasing and repeated demands for attorney's fees, the Court, in its discretion, declines to award attorney's fees for activity following September 14, 2016.

SIGNATURE LINE ON FOLLOWING PAGE

[CONTINUED FROM PAGE 4 OF ORDER DENYING MOTION FOR SUPPLEMENT FEES]

IT IS SO ORDERED.

The Honorable R. Ferrell Cothran, Jr.
Presiding Judge

Aug. 10, 2017

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013-CP-40-00319

Daniel O Shields
PLAINTIFF(S)

PSC Automotive Group
DEFENDANT(S)

Submitted by: _____ **Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other Dismissed without prejudice

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

RICHLAND COUNTY FILED APR 9 AM 9:06 JEANETTE W. McBRIDE C.C.P. & G.

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Motion to Dismiss-Resolved.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge G. Thomas Cooper **Judge Code** 2126 **Date** 4-9-13

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of ____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 19 day of April, 20 13 to attorneys of record or to parties (when appearing pro se) as follows:

C Steven Moskos
ATTORNEY(S) FOR THE PLAINTIFF(S)

Sean Branson Cox, Harry Clayton Walker
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter Bonnie Kelly **Clerk of Court** Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013CP4000319

Daniel O Shields	PSC Automotive Group
Roger W Whitley	Midlands Honda
PLAINTIFF(S)	DEFENDANT(S)

FILED
2013 MAY 16 PM 3:20
RICHLAND COUNTY
JEANETTE W. McBRIDE
C.C.P. & G.S.

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 16th day of May, 20 13 to attorneys of record or to parties (when appearing pro se) as follows:

C. Steven Moskos
ATTORNEY(S) FOR THE PLAINTIFF(S)

Harry Clayton Walker, Jr. Sean Branson Cox
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2013-CP-40-0319
	)	
DANIEL O'SHIELDS AND ROGER W. WHITLEY A PARTNERSHIP D/B/A O&W CARS	)	
	)	**ORDER**
Plaintiffs	)	
	)	
vs.	)	
	)	
PSC AUTOMOTIVE GROUP D/B/A MIDLANDS HONDA, NATIONWIDE MUTUAL INSURANCE COMPANY	)	
	)	
Defendants	)	

FILED
2013 MAY -9 PM 1:15
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter comes before the Court on the Plaintiffs' Motion to Amend their Complaint. For good cause shown and without objection from the Defendants, the Plaintiffs may file their Amended Complaint. Therefore, it is

Ordered that the Plaintiffs may file an Amended Complaint.

AND IT IS SO ORDERED.

Judge Fifth Judicial Circuit

May 9, 2013
Richland, South Carolina

Daniel O'Shields and Roger W. Whitley A Partnership d/b/a O&W Cars v. PSC Automotive Group d/b/a Midlands Honda and Nationwide Mutual Insurance Company
Case No: 2013-CP-40-0319

Consent Order Regarding Motion to Amend Complaint

I SO MOVE:

C. STEVEN MOSKOS, P.A.
Attorney for the Plaintiffs

C. Steven Moskos
535 Stinson Dr
Charleston, SC 29407
Telephone: (843) 763-5297

FILED
2013 MAY -9 PM 1:15
JEANETTE W. McBRIDE
C.C.P. & G.S.

Daniel O'Shields and Roger W. Whitley A Partnership d/b/a O&W Cars v. PSC Automotive Group d/b/a Midlands Honda and Nationwide Mutual Insurance Company
Case No: 2013-CP-40-0319

Consent Order Regarding Motion to Amend Complaint

I CONSENT:

Walker & Reibold, LLC
Attorney for Defendant PSC Automotive Group d/b/a Midlands Honda

Robert L. Reibold by [illegible]
Robert L. Reibold
for Robert Reibold + with his permission and consent.

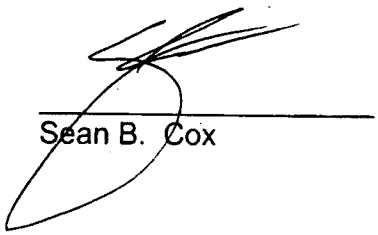
RICHLAND COUNTY
FILED
2013 MAY -9 PM 1:15
JEANETTE W. McBRIDE
C.C.P. & G.S.

Daniel O'Shields and Roger W. Whitley A Partnership d/b/a O&W Cars v. PSC Automotive Group d/b/a Midlands Honda and Nationwide Mutual Insurance Company
Case No: 2013-CP-40-0319

Consent Order Regarding Motion to Amend Complaint

I CONSENT:

Goodman McGuffey Lindsey & Johnson
Attorney for Defendant
Nationwide Mutual Insurance Company



Sean B. Cox

FILED
2013 MAY -9 PM 1:15
JEANETTE W. McBRIDE
C.C.P. & G.S.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013CP4000319

Daniel O Shields	PSC Automotive Group
Roger W Whitley	Midlands Honda
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

Plaintiff's cause of action for constructive fraud has been withdrawn. Defendant's motion for summary judgment is denied.

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge Yanya A. Lyn **Judge Code** 2766 **Date** 10/1/2015

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 2 day of Oct, 20 15 to attorneys of record or to parties (when appearing pro se) as follows:

C. Steven Moskos — Harry Clayton Walker Jr. — Sean Branson Cox

ATTORNEY(S) FOR THE PLAINTIFF(S) — **ATTORNEY(S) FOR THE DEFENDANT(S)**

Court Reporter _____ **Clerk of Court** Jeanette W. McBride

SCANNED

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND COUNTY	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
DANIEL O'SHIELDS and ROGER W. WHITLEY, a partnership d/b/a O&W CARS, Plaintiffs, vs. PSC AUTOMOTIVE GROUP d/b/a MIDLANDS HONDA and NATIONWIDE MUTUAL INSURANCE COMPANY, Defendants.	)	CASE NO.: CASE NO. 2013-CP-40-00319 **DISMISSAL WITH PREJUDICE AS TO ALL CLAIMS AGAINST NATIONWIDE MUTUAL INSURANCE COMPANY**

RICHLAND COUNTY
FILED
2015 APR 21 AM 11:49
JEANETTE W. MCBRIDE
C.C.P. & G.S.

Plaintiff's action against Nationwide Mutual Insurance Company having been resolved. Plaintiffs and Defendant Nationwide Mutual Insurance Company, through their undersigned counsel of record, request the case be DISMISS WITH PREJUDICE as to Defendant Nationwide Mutual Insurance Company only.

This 16th day of April, 2015.

C. STEVEN MOSKOS
csmoskos@earthlink.net
C. Steven Moskos, P.A.
Suite 300
4000 Faber Place Drive
North Charleston, SC 29405
Attorney for Plaintiff

SEAN B. COX
SC Bar No. 100300
scox@gmlj.com
Goodman McGuffey Lindsey & Johnson, LLP
4000 S. Faber Place Drive, Suite 300
North Charleston, SC 29405-8587
(843) 849-6440 Phone
(843) 849-6433 Fax
Attorneys for Nationwide Mutual Insurance Company

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars,

Plaintiffs

v.

Columbia Automotive Company LLC, d/b/a Midlands Honda

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2013-CP-40-0319

VERDICT FORM

RICHLAND COUNTY
FILED
2016 APR 22 AM 11:47
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

1. BREACH OF CONTRACT

On the count of breach of contract, please state the amount of actual damages below:

$6,645.00 Actual Damages

Please proceed to Question No. 2.

2. NEGLIGENT MISREPRESENTATION

On the count of negligent misrepresentation, how do you find:

✓ For the Plaintiff

_____ For the Defendant

If you find of favor of the Plaintiff, please state the amount of actual damages below.

$6,645.00 Actual Damages

Please proceed to Question 3.

3. FRAUD

On the count of fraud, how do you find:

✓ For the Plaintiff

_____ For the Defendant

If you find of favor of the Plaintiff, please state the amount of actual damages below.

$6,645.00 Actual Damages

Please proceed to Question 4.

4. UNFAIR TRADE PRACTICES

Do you find that a violation of the North Carolina Unfair and Deceptive Trade Practices occurred:

✓ YES

_____ NO

If you find that a violation of the North Carolina Unfair and Deceptive Trade Practices occurred, please state the amount of actual damages:

$6,645.00 Actual Damages

Please proceed to Question 5

5. When do you find the North Carolina damage disclosure statement was provided to the Plaintiffs?

✓ AT THE TIME OF THE TRANSACTION

_____ SOMETIME AFTER PLAINTIFFS PAID FOR THE CAR

Please proceed to Question 6

6. If you found in favor of the Defendant on Plaintiffs' claims for negligent misrepresentation, fraud, and unfair trade practices, your deliberations are complete. However, if you found in favor of the Plaintiffs on all or any of these claims, please answer the following question for any of these claims on which you found in favor of the Plaintiffs:

a. NEGLIGENT MISREPRESENTATION (answer if you found in in favor of the Plaintiffs on this claim)

Was your verdict based only on the North Carolina damage disclosure?

_____ YES

✓ NO

b. FRAUD (answer if you found in favor of the Plaintiffs on this claim)

Was your verdict based only on the North Carolina damage disclosure?

_____ YES

✓ NO

c. UNFAIR TRADE PRACTICES (answer if you found in favor of the Plaintiffs on this claim)

Was your verdict based only on the North Carolina damage disclosure?

_____ YES

✓ NO

This is the true verdict of the jury

Kenneth Brown
Jury Foreperson

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars,

Plaintiffs

v.

Columbia Automotive Company LLC, d/b/a Midlands Honda

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2013-CP-40-0319

VERDICT FORM

RICHLAND COUNTY
FILED
2016 APR 22 AM 11:47
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

1. PUNITIVE DAMAGES

$ 2,381,888.00

This is the true verdict of the jury

Kristie Brown
Jury Foreperson

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND DANIEL O'SHIELDS AND ROGER W. WHITLEY A PARTNERSHIP D/B/A O&W CARS Plaintiffs vs. PSC AUTOMOTIVE GROUP D/B/A MIDLANDS HONDA, NATIONWIDE MUTUAL INSURANCE COMPANY Defendants	)	IN THE COURT OF COMMON PLEAS FOR THE FIRST JUDICIAL CIRCUIT CASE NO. 13-CP-40-0319 **SUMMONS**

RICHLAND COUNTY FILED
2013 JAN 17 AM 11:21
JEANETTE W. McBRIDE C.C.P. & G.S.

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the attorney for the Plaintiff, C. Steven Moskos, at his office located at 535 Stinson Drive, Charleston, South Carolina 29407, within thirty (30) days of the service hereof, exclusive of the day of such service.

YOU ARE HEREBY GIVEN NOTICE FURTHER that, if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the Complaint.

C. STEVEN MOSKOS, P.A.
Attorney for the Plaintiff

BY: _____

C. Steven Moskos
535 Stinson Drive
Charleston, SC 29407
Telephone: (843) 763-5297

Charleston, South Carolina
1/14, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 13-CP-40-0319
	)	
DANIEL O'SHIELDS AND ROGER W. WHITLEY A PARTNERSHIP D/B/A O&W CARS	)	
Plaintiffs	)	**COMPLAINT (Jury Trial)**
vs.	)	
PSC AUTOMOTIVE GROUP D/B/A MIDLANDS HONDA, NATIONWIDE MUTUAL INSURANCE COMPANY	)	
Defendants	)	

RICHLAND COUNTY FILED
2013 JAN 17 AM 11:21
JEANETTE W. McBRIDE C.C.P. & G.S.

The Plaintiffs, complaining of the Defendants, allege the following:

1. That the Plaintiffs are a partnership licensed and doing business in North Carolina.

2. That the Plaintiff, Daniel O'Shields is a resident of North Carolina.

3. That the Plaintiff, Roger W. Whitley is a resident of North Carolina.

4. That the Plaintiffs have formed a partnership under the name O&W Cars for the purpose of buying and selling automobiles and truck.

5. That the Defendant, PSC Automotive Group d/b/a Midlands Honda (hereinafter "Midlands Honda") is a corporation organized and licensed under the laws of the State of South Carolina with its principle place of business in the County of Richland, State of South Carolina.

6. That the Defendant Nationwide Mutual Insurance Company is an insurance company doing business in the State of South Carolina.

7. That on or about August 3, 2003, Stokes North, Inc. sold a 2003 Honda Civic VIN:

2HGES1654H577916 to Sandra Jackson Gaskins.

8. On or about July 21, 2004, Mrs. Gaskins daughter was involved in a wreck with the vehicle.

9. As a result of the wreck, the cost of repairing the vehicle was over 75% of the fair market value of the vehicle.

10. That Nationwide Insurance sent its agent and employee to inspect the subject vehicle and to provide and estimate of repairs.

11. That the Defendant Nationwide Insurance declared the vehicle a total loss.

12. That the Defendant Nationwide Insurance knew or should have known that the repair cost of the vehicle was seventy-five percent or more of the value of the vehicle.

13. That the Defendant Nationwide Insurance knew it needed to obtain a "SALVAGE" title for the vehicle.

14. That the Defendant Nationwide Insurance bought the vehicle from Sandra Gaskins for $9,888.10.

15. On or about September 1, 2004 the Defendant Nationwide Insurance had the subject vehicle titled in its name but failed to notify the South Carolina Department of Public Safety, the South Carolina Department of Highways and Public Transportation, the South Carolina Department of Motor Vehicles, or any other State governmental agency that the vehicle was a total loss and needed a "SALVAGE" brand on its title.

16. That the vehicle was placed the back in the stream of commerce by Nationwide selling the subject vehicle through a salvage auction.

17. That the vehicle was purchased, repaired and sold to Nancy Watkins.

18. That on or about June 26, 2008, Defendant Midlands Honda purchased the subject vehicle.

19. That the Defendant Midlands Honda inspected the subject vehicle and discovered the damage previously done to the car.

20. That the Defendant Midlands Honda marketed and sold the 2003 Honda Civic without disclosing the prior wreck damage.

21. That on or about August 20, 2008, Defendant Midlands Honda sold the subject vehicle to Mr. Charles Ecklund for approximately $12,586.00.

22. That upon information and belief, while Mr. Euklund owned the vehicle he was involved in a wreck.

23. That on or about March 27, 2010 Mr. Euklund sold the vehicle back to Defendant Midlands Honda.

24. That the Defendant Midlands Honda again inspected the subject vehicle and again discovered the damage previously done to the car.

25. That the Defendant Midlands Honda marketed and sold the 2003 Honda Civic without disclosing the prior wreck damage.

26. That on or about April 2, 2010, Defendant Midlands Honda sold the subject, by and through the ADESA auto auction in Charlotte to the Plaintiffs.

27. That about 21 days went by before the Plaintiffs was able to secure title to the subject vehicle from the Defendant.

28. That on or about June 28, 2010 the Plaintiffs sold the subject vehicle to M. Kay Gorman and Ms. Kelsey White.

29. That as part of the sale of the vehicle the Plaintiffs agreed to replace the timing belt for Ms. Gorman and Ms. White.

30. That on or about September 9, 2010 the vehicle was taken to Evans Garage to do the promised work to it.

31. That once the vehicle was placed on the lift it was observed that the vehicle was a "clipped car".

32. That the Plaintiffs immediately contacted Ms. Gorman and Ms. White to inform them of the discovery.

33. That because of the liability that the Plaintiffs faced in selling the car to Ms. Gorman and Ms. White the Plaintiffs offered to replace the vehicle with one of equal or better value or a full refund of the money for the purchase of the car.

34. That the owners of the vehicle agreed to sell the vehicle back to the Plaintiffs.

35. That the Plaintiffs contacted the Defendant Midlands Honda's agent and/or employee Brent Farrell concerning the subject vehicle.

36. That Brent Farrell an agent and/or employee of the Defendant Midlands Honda took down the information from the Plaintiffs and promised to call him back about his concerns.

37. That the Plaintiffs have not received a call back from the Defendant Midlands Honda.

38. That the Plaintiffs have had to hire an attorney to represent him in this matter.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

39. That the Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

40. That the Plaintiffs entered into a contract with the Defendant Midlands Honda for the purchase of a vehicle which was in good condition, safe and could be operated and used dependably in the State of South Carolina.

41. That the Defendant Midlands Honda failed to sell to the Plaintiffs a vehicle which was in good condition, safe and could be operated and used dependably in the State of South Carolina.

42. That as a result of the Defendant Midlands Honda's breach of contract, the Plaintiffs have been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with the Defendant, and they have paid more for a vehicle than what it is worth.

43. That as a result of the Defendant Midlands Honda's breach of contract, the Plaintiffs have suffered actual damages, together with the costs and disbursements of this action.

FOR A SECOND CAUSE OF ACTION
(Negligence)

44. That the Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

45. That the Defendants owed a duty to the Plaintiffs in one or more of the following particulars:

a. To research the history of the subject vehicle prior to buying it;

b. To hire appraisers who could properly evaluate damage done to vehicles owned by Nationwide Mutual Insurance Company's insureds;

c. To train properly appraisers to evaluate properly damage done to vehicles owned by Nationwide Mutual Insurance Company's insureds;

d. To inspect the subject vehicle thoroughly prior to sending the title to the State government to have the car titled in Nationwide Mutual Insurance Company's name;

e. To evaluate properly the subject vehicle prior to notifying the State government that the vehicle had only been damaged fifty-nine percent;

f. To repair any defects in the subject vehicle before offering it for sale;

g. To notify the proper government agency responsible for titling the vehicle that the car was a total loss;

h. To notify the Plaintiffs and other consumers of material problems with the vehicle; and

i. To do those things which a reasonable, prudent person or company would do under the circumstances then and there prevailing.

46. That the Defendants failed to perform one or more of the aforementioned duties.

47. That as a result of the Defendants' negligence, carelessness, recklessness, wilfulness, and wantonness, the Plaintiffs have been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with the Defendant Midlands Honda, and they have paid more for a vehicle than what it is worth.

48. That as a result of the Defendants' negligence, carelessness, recklessness, wilfulness, and wantonness, the Plaintiffs demands actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

FOR A THIRD CAUSE OF ACTION

(NEGLIGENT MISREPRESENTATION

49. That the Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

50. That the Defendant Midlands Honda made false representations to the Plaintiffs.

51. That the Defendant Midlands Honda had a pecuniary interest in making the statements.

52. That the Defendant Midlands Honda owed a duty of care to communicate truthful information to the Plaintiffs.

53. That the Defendant Midlands Honda breached that duty by failing to exercise due care.

54. That the Plaintiffs justifiably relied on the Defendant Midlands Honda's representations.

55. That the Plaintiffs have been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with the Defendant, and they have paid more for a vehicle than what it is worth.

56. As a direct and proximate result, the Plaintiffs were damaged, thereby entitling the Plaintiffs to actual and punitive damages together with prejudgment interest, together with the costs and disbursements of this action.

FOR A FOURTH CAUSE OF ACTION
(Constructive Fraud)

57. That the Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

58. That the Defendant Midlands Honda's agents and employees failed to disclose material facts regarding the vehicle to the Plaintiffs.

59. That the Defendant's agents and employees made false representations of material

fact to the Plaintiffs.

60. That the Defendants knew or should have known that the representations which were made to the Plaintiffs were false.

61. That the Plaintiffs were unaware of the falsity of the representations and at the time the representations were made, the Plaintiffs were unable to discover the falsity of the representations made by the Defendant's agent and employee.

62. That the Plaintiffs had a right to rely and did rely upon the representations made by the Defendant's agent and employee.

63. That the Defendants had an obligation to inform the Plaintiffs that the car had previously been wrecked and rebuilt.

64. That the Defendants failed to fulfill their obligations to the Plaintiffs.

65. That as a result of the Defendant's constructive fraud, the Plaintiffs have been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with the Defendant, and they have paid more for a vehicle than what it is worth.

66. That as a result of the Defendant's constructive fraud, the Plaintiffs demand their actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

FOR A FIFTH CAUSE OF ACTION
(Fraud)

67. That the Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

68. That the Defendants intended that the Plaintiffs rely upon their misrepresentations of material fact concerning the condition of the vehicle.

69. That the Defendants failure to disclose to the Plaintiffs the condition of the car constitutes affirmative fraud, fraudulent concealment, or nondisclosure of material facts regarding the transaction.

70. That as a result of the Defendants' fraud, the Plaintiffs have been damaged in that they have incurred various repair bills, they have incurred various repair bills, they have lost the benefit of the bargain it made with the Defendant Midlands Honda, and they have paid more for a vehicle than what it is worth.

71. That as a result of the Defendants' fraud, the Plaintiffs demands actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

FOR A SIXTH CAUSE OF ACTION
(Regulation of Motor Vehicle Dealers Act)

72. That the Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

73. That the Plaintiffs were informed and believe that the malicious and deceptive acts and practices of the Defendants constitute a violation of Section 56-15-10 et. seq. of the South Carolina Code of Laws 1976.

74. That as a result of the Defendants' deceptive acts and practices, the Plaintiffs have been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with the Defendant, and they have paid more for a vehicle than what it is worth.

75. That as a result of the Defendants' violation of this State's Statutes dealing with the regulation of motor vehicle dealers, the Plaintiffs demands that the Defendant pay two times his actual damages, together with punitive damages not to exceed three

times the actual damages, together with attorney fees, together with the costs and disbursements of this action.

FOR A SEVENTH CAUSE OF ACTION
(UTPA Violation)

76. That the Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

77. That the aforementioned acts and practices of the Defendants were unfair and deceptive.

78. That the aforementioned acts and practices of the Defendants are against the public interest and that these acts and practices are capable of repetition.

79. That the Defendants' actions were willful and wanton in that the Defendants knew or should have known that their conduct was unfair and deceptive and, therefore, a violation of this State's statutes concerning unfair and deceptive acts and practices.

80. That as a result of the Defendants' violation of the Unfair Trade Practices Act, the Plaintiffs have been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with the Defendant, and they have paid more for a vehicle than what it is worth.

81. That as a result of the Defendants' violation of the Unfair Trade Practices Act, the Plaintiffs is entitled to his actual damages, together with three (3) times his actual damages, together with attorney's fees, together with the costs and disbursements of this action.

WHEREFORE, the Plaintiffs prays for judgment against the Defendants as follows:

a. In the First Cause of Action for his actual damages together with the costs and disbursements of this action.

b. In the Second Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

c. In the Third Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

d. In the Fourth Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

e. In the Fifth Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

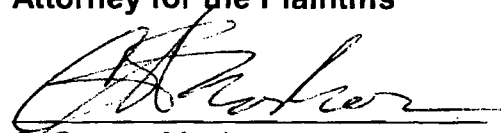
f. In the Sixth Cause of Action for two times the actual damages, together with punitive damages not to exceed three times the actual damages, together with attorney fees, together with the costs and disbursements of this action.

g. In the Seventh Cause of Action for three (3) times his actual damages, together with attorney's fees, together with the costs and disbursements of this action.

h. For an award of reasonable attorney's fees.

i. For such other and further relief as this Court deems just and proper.

C. STEVEN MOSKOS, P.A.
Attorney for the Plaintiffs

BY: 

C. Steven Moskos
535 Stinson Dr
Charleston, SC 29407
Telephone: (843) 763-5297

Charleston, South Carolina
January 14, 2013

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars, *Plaintiffs*, v. PSC Automotive Group d/b/a Midlands Honda, Nationwide Mutual Insurance Company, *Defendants*.	IN THE COURT OF COMMON PLEAS Civil Action No. 2013-CP-40-0319 ANSWER OF THE DEFENDANT PSC AUTOMOTIVE (Jury Trial Requested)

RICHLAND COUNTY
FILED
2013 FEB 27 AM 10:53
JEANETTE W. McBRIDE
C.C.P. & G.S.

Subject to its Motion to Dismiss, the Defendant PSC Automotive Group, answering the Complaint of the Plaintiffs, hereby alleges as follows:

FIRST DEFENSE

1. Each and every allegation of the Complaint which is not hereinafter specifically admitted or denied is denied.

2. Defendant lacks information sufficient to form a belief as to the truth or accuracy of the allegations of ¶¶ 1 through 4 of the Complaint, and therefore denies the same.

3. Defendant denies ¶ 5 of the Complaint.

4. Defendant admits ¶ 6 of the Complaint.

5. Defendant lacks information sufficient to form a belief as to the truth or accuracy of the allegations of ¶¶ 7 through 16 of the Complaint, and therefore denies the same.

6. Defendant admits so much of ¶ 17 of the Complaint as alleges that Nancy Watkins was an owner of the vehicle. Defendant lacks information sufficient to form a belief as to the truth or accuracy of the remaining allegations of ¶ 17.

7. Defendant admits so much of ¶ 18 of the Complaint as alleges it purchased the subject vehicle in 2008.

8. Defendant denies ¶¶ 19 and 20 of the Complaint.

9. Defendant admits so much of ¶¶ 21 and 22 of the Complaint as alleges that it marketed and sold the subject vehicle to Charles Ecklund in August of 2008 for approximately $12,586.00, not including sales tax. Upon information and belief, Defendant was not aware of any prior wreck damage at that time.

10. Defendant lacks information sufficient to form a belief as to the truth or accuracy of the allegations of ¶ 22 of the Complaint, and therefore denies the same.

11. Defendant admits ¶ 23 of the Complaint.

12. Defendant denies ¶ 24 of the Complaint.

13. Defendant admits so much of ¶¶ 25 and 26 of the Complaint as alleges that Defendant marketed and sold the vehicle through the ADESA auction in Charlotte to the Plaintiffs. Defendant affirmatively alleges that the vehicle was not sold under the green light at auction, but under the "red light," which indicates that the vehicle was sold "as is."

14. Defendant admits so much of ¶ 27 as alleges that the title to the vehicle was provided about 20 days after the sale.

15. Defendant lacks information sufficient to form a belief about the truth or accuracy of the allegations of ¶¶ 28 through 34 of the Complaint, and therefore deny the same.

16. Defendant lacks information sufficient to form a belief about the truth or accuracy of the allegations of ¶¶ 35-37 of the Complaint, and therefore denies the same.

17. Upon information and belief, Defendant denies ¶ 38 of the Complaint.

18. Answering ¶ 39 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 17 of this Answer as if stated verbatim herein.

19. Defendant admits so much of ¶ 40 of the Complaint as alleges that Defendant entered into a contract for the sale of the vehicle to Plaintiffs. Defendant affirmatively alleges that the vehicle was not sold under the green light at auction, but under the "red light," which indicates that the vehicle was sold "as is."

20. Defendant denies ¶¶ 41 through 43 of the Complaint.

21. Answering ¶ 44 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 20 of this Answer as if stated verbatim herein.

22. Paragraphs 45 through 48 of the Complaint are not directed at this Defendant. To the extent that they can be construed to make allegations against this Defendant, they are denied.

23. Answering ¶ 49 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 22 of this Answer as if stated verbatim herein.

24. Defendant denies ¶¶ 50 through 56 of the Complaint.

25. Answering ¶ 57 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 24 of this Answer as if stated verbatim herein.

26. Defendant denies ¶¶ 58 through 66 of the Complaint.

27. Answering ¶ 67 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 26 of this Answer as if stated verbatim herein.

28. Defendant denies ¶¶ 68 through 71 of the Complaint.

29. Answering ¶ 72 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 28 of this Answer as if stated verbatim herein.

30. Defendant denies ¶ 73 through 75 of the Complaint.

31. Answering ¶ 76 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 30 of this Answer as if stated verbatim herein.

32. Defendant denies ¶¶ 77 through 81 of the Complaint.

SECOND DEFENSE
(Rule 12(b)(6))

33. Plaintiffs' causes of action, individually and collectively, fail to state facts sufficient to constitute a cause of action.

THIRD DEFENSE
(Mitigation of Damages)

34. Plaintiffs are barred from relief to the extent, if any, that they failed to mitigate their damages.

FOURTH DEFENSE
(Notice of Application of Foreign Law)

35. Defendant hereby gives notice that some or all of Plaintiffs' claims are governed by the laws of North Carolina law or the laws of Indiana.

FIFTH DEFENSE
(Economic Loss Rule)

36. Plaintiffs' tort claims are barred by the economic loss rule.

SIXTH DEFENSE
(Arbitration)

37. Plaintiffs' complaint is subject to mandatory arbitration under applicable rules of the auction.

SEVENTH DEFENSE
(Statute of Limitations)

38. Upon information and belief, Plaintiffs failed to bring their claim within the time limit required by applicable auction rules.

EIGHTH DEFENSE
(Forum Selection Clause/Jurisdiction)

39. Upon information and belief, the forum selection clause in the auction rules and incorporated by reference in the contract between the parties mandates that the courts of the State of Indiana have exclusive jurisdiction over this dispute.

NINTH DEFENSE
(Auction Disclosure Requirements)

40. By conducting the transaction described in the Complaint, Plaintiffs agreed to the auction terms and conditions, which describe which if any disclosures must be made. Because Plaintiffs contractually agreed that only certain types of disclosures, if any, were required, Plaintiffs cannot maintain an action based upon disclosures which were not required by applicable rules.

TENTH DEFENSE TO 2ND AND 3RD CAUSES OF ACTION
(Comparative Negligence)

41. If South Carolina or Indiana law is applicable, Plaintiffs are barred from relief on whole or in part by their own comparative negligence.

ELEVENTH DEFENSE TO 2ND AND 3RD CAUSES OF ACTION
(Comparative Negligence)

42. If North Carolina law is applicable, Plaintiffs are barred from relief by their own contributory negligence.

TENTH DEFENSE TO 6TH CAUSE OF ACTION
(Territorial Application of Statute)

43. The Regulation of Manufacturers, Distributers and Dealers Act does not apply to transactions which occur outside of the State of South Carolina.

ELEVENTH DEFENSE TO 6TH CAUSE OF ACTION
(Choice of Law/Lex Loci Delecti)

44. Because the alleged injury, if any, occurred in North Carolina, where Plaintiffs reside, South Carolina statutes are inapplicable.

TWELFTH DEFENSE TO 6TH CAUSE OF ACTION
(Wholesale Transactions)

45. The Regulation of Manufacturers, Distributers and Dealers Act does not apply to wholesale transactions.

TENTH DEFENSE TO 7TH CAUSE OF ACTION
(Territorial Application of Statute)

46. The South Carolina Unfair Trade Practices Act does not apply to transactions which occur outside of the State of South Carolina.

ELEVENTH DEFENSE TO 7TH CAUSE OF ACTION
(Choice of Law/Lex Loci Delecti)

47. Because the alleged injury, if any, occurred in North Carolina, where Plaintiffs reside, South Carolina statutes are inapplicable. Additionally and alternatively, because Plaintiffs are not residents of South Carolina and were not injured in South Carolina, the Complaint does not allege the requisite impact upon the public interest of this State.

TWELFTH DEFENSE TO 7TH CAUSE OF ACTION
(Section 39-5-40(d))

48. To the extent that the FTC employs a more restrictive definition of unfair and deceptive trade practices than does the State of South Carolina, this action is exempt from the UTPA pursuant to S.C. Code Ann. § 39-5-40(d).

WHEREFORE, having answered the Complaint, Defendant prays that:

a. the Complaint be dismissed with costs assessed against the Plaintiffs; and

b. for such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

H. Clayton Walker, Jr.
Robert L. Reibold
WALKER | REIBOLD
Post Office Box 61140
Columbia, SC 29260
(803) 454-0955

ATTORNEYS FOR DEFENDANT
PSC AUTOMOTIVE

February 15, 2013

CERTIFICATE OF SERVICE
The undersigned hereby certifies that a true copy of the foregoing document has been served upon all Counsel by mailing a copy properly addressed and with sufficient postage affixed thereto this 25th day of February, 2013.

Walker & Reibold, Attorneys at Law

RICHLAND COUNTY
FILED
2013 FEB 27 PM 2:39
JEANETTE W. McBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 13-CP-40-0319
	)	
DANIEL O'SHIELDS AND ROGER W. WHITLEY A PARTNERSHIP D/B/A O&W CARS	)	
	)	
Plaintiffs	)	**AMENDED COMPLAINT**
	)	**(Jury Trial)**
vs.	)	
	)	
PSC AUTOMOTIVE GROUP D/B/A MIDLANDS HONDA, NATIONWIDE MUTUAL INSURANCE COMPANY	)	
	)	
Defendants	)	

JEANETTE W. McBRIDE
C.C.P. & G.S.
2013 MAY -9 PM 1:17
RICHLAND COUNTY
FILED

The Plaintiffs, complaining of the Defendants, allege the following:

1. That the Plaintiffs are a partnership licensed and doing business in North Carolina.
2. That the Plaintiff, Daniel O'Shields is a resident of North Carolina.
3. That the Plaintiff, Roger W. Whitley is a resident of North Carolina.
4. That the Plaintiffs have formed a partnership under the name O&W Cars for the purpose of buying and selling automobiles and truck.
5. That the Defendant, PSC Automotive Group d/b/a Midlands Honda (hereinafter "Midlands Honda") is a corporation organized and licensed under the laws of the State of South Carolina with its principle place of business in the County of Richland, State of South Carolina.
6. That the Defendant Nationwide Mutual Insurance Company is an insurance company doing business in the State of South Carolina.
7. That on or about August 3, 2003, Stokes North, Inc. sold a 2003 Honda Civic VIN:

2HGES1654H577916 to Sandra Jackson Gaskins.

8. On or about July 21, 2004, Mrs. Gaskins daughter was involved in a wreck with the vehicle.

9. As a result of the wreck, the cost of repairing the vehicle was over 75% of the fair market value of the vehicle.

10. That Nationwide Insurance sent its agent and employee to inspect the subject vehicle and to provide and estimate of repairs.

11. That the Defendant Nationwide Insurance declared the vehicle a total loss.

12. That the Defendant Nationwide Insurance knew or should have known that the repair cost of the vehicle was seventy-five percent or more of the value of the vehicle.

13. That the Defendant Nationwide Insurance knew it needed to obtain a "SALVAGE" title for the vehicle.

14. That the Defendant Nationwide Insurance bought the vehicle from Sandra Gaskins for $9,888.10.

15. On or about September 1, 2004 the Defendant Nationwide Insurance had the subject vehicle titled in its name but failed to notify the South Carolina Department of Public Safety, the South Carolina Department of Highways and Public Transportation, the South Carolina Department of Motor Vehicles, or any other State governmental agency that the vehicle was a total loss and needed a "SALVAGE" brand on its title.

16. That the vehicle was placed the back in the stream of commerce by Nationwide selling the subject vehicle through a salvage auction.

17. That the vehicle was purchased, repaired and sold to Nancy Watkins.

18. That on or about June 26, 2008, Defendant Midlands Honda purchased the subject vehicle.

19. That the Defendant Midlands Honda inspected the subject vehicle and discovered the damage previously done to the car.

20. That the Defendant Midlands Honda marketed and sold the 2003 Honda Civic without disclosing the prior wreck damage.

21. That on or about August 20, 2008, Defendant Midlands Honda sold the subject vehicle to Mr. Charles Ecklund for approximately $12,586.00.

22. That upon information and belief, while Mr. Euklund owned the vehicle he was involved in a wreck.

23. That on or about March 27, 2010 Mr. Euklund sold the vehicle back to Defendant Midlands Honda.

24. That the Defendant Midlands Honda again inspected the subject vehicle and again discovered the damage previously done to the car.

25. That the Defendant Midlands Honda marketed and sold the 2003 Honda Civic without disclosing the prior wreck damage.

26. That on or about April 2, 2010, Defendant Midlands Honda sold the subject, by and through the ADESA auto auction in Charlotte to the Plaintiffs.

27. That about 21 days went by before the Plaintiffs was able to secure title to the subject vehicle from the Defendant.

28. That on or about June 28, 2010 the Plaintiffs sold the subject vehicle to M. Kay Gorman and Ms. Kelsey White.

29. That as part of the sale of the vehicle the Plaintiffs agreed to replace the timing belt for Ms. Gorman and Ms. White.

30. That on or about September 9, 2010 the vehicle was taken to Evans Garage to do the promised work to it.

31. That once the vehicle was placed on the lift it was observed that the vehicle was a "clipped car".

32. That the Plaintiffs immediately contacted Ms. Gorman and Ms. White to inform them of the discovery.

33. That because of the liability that the Plaintiffs faced in selling the car to Ms. Gorman and Ms. White the Plaintiffs offered to replace the vehicle with one of equal or better value or a full refund of the money for the purchase of the car.

34. That the owners of the vehicle agreed to sell the vehicle back to the Plaintiffs.

35. That the Plaintiffs contacted the Defendant Midlands Honda's agent and/or employee Brent Farrell concerning the subject vehicle.

36. That Brent Farrell an agent and/or employee of the Defendant Midlands Honda took down the information from the Plaintiffs and promised to call him back about his concerns.

37. That the Plaintiffs have not received a call back from the Defendant Midlands Honda.

38. That the Plaintiffs have had to hire an attorney to represent him in this matter.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

39. That the Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

40. That the Plaintiffs entered into a contract with the Defendant Midlands Honda for the purchase of a vehicle which was in good condition, safe and could be operated and used dependably in the State of South Carolina.

41. That the Defendant Midlands Honda failed to sell to the Plaintiffs a vehicle which was in good condition, safe and could be operated and used dependably in the State of South Carolina.

42. That as a result of the Defendant Midlands Honda's breach of contract, the Plaintiffs have been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with the Defendant, and they have paid more for a vehicle than what it is worth.

43. That as a result of the Defendant Midlands Honda's breach of contract, the Plaintiffs have suffered actual damages, together with the costs and disbursements of this action.

FOR A SECOND CAUSE OF ACTION
(Negligence)

44. That the Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

45. That the Defendants owed a duty to the Plaintiffs in one or more of the following particulars:

a. To research the history of the subject vehicle prior to buying it;

b. To hire appraisers who could properly evaluate damage done to vehicles owned by Nationwide Mutual Insurance Company's insureds;

c. To train properly appraisers to evaluate properly damage done to vehicles owned by Nationwide Mutual Insurance Company's insureds;

d. To inspect the subject vehicle thoroughly prior to sending the title to the State government to have the car titled in Nationwide Mutual Insurance Company's name;

e. To evaluate properly the subject vehicle prior to notifying the State government that the vehicle had only been damaged fifty-nine percent;

f. To repair any defects in the subject vehicle before offering it for sale;

g. To notify the proper government agency responsible for titling the vehicle that the car was a total loss;

h. To notify the Plaintiffs and other consumers of material problems with the vehicle; and

i. To do those things which a reasonable, prudent person or company would do under the circumstances then and there prevailing.

46. That the Defendants failed to perform one or more of the aforementioned duties.

47. That as a result of the Defendants' negligence, carelessness, recklessness, wilfulness, and wantonness, the Plaintiffs have been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with the Defendant Midlands Honda, and they have paid more for a vehicle than what it is worth.

48. That as a result of the Defendants' negligence, carelessness, recklessness, wilfulness, and wantonness, the Plaintiffs demands actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

FOR A THIRD CAUSE OF ACTION
(NEGLIGENT MISREPRESENTATION

49. That the Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

50. That the Defendant Midlands Honda made false representations to the Plaintiffs.

51. That the Defendant Midlands Honda had a pecuniary interest in making the statements.

52. That the Defendant Midlands Honda owed a duty of care to communicate truthful information to the Plaintiffs.

53. That the Defendant Midlands Honda breached that duty by failing to exercise due care.

54. That the Plaintiffs justifiably relied on the Defendant Midlands Honda's representations.

55. That the Plaintiffs have been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with the Defendant, and they have paid more for a vehicle than what it is worth.

56. As a direct and proximate result, the Plaintiffs were damaged, thereby entitling the Plaintiffs to actual and punitive damages together with prejudgment interest, together with the costs and disbursements of this action.

FOR A FOURTH CAUSE OF ACTION
(Constructive Fraud)

57. That the Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

58. That the Defendant Midlands Honda's agents and employees failed to disclose material facts regarding the vehicle to the Plaintiffs.

59. That the Defendant's agents and employees made false representations of material fact to the Plaintiffs.

60. That the Defendants knew or should have known that the representations which were made to the Plaintiffs were false.

61. That the Plaintiffs were unaware of the falsity of the representations and at the time the representations were made, the Plaintiffs were unable to discover the falsity of the representations made by the Defendant's agent and employee.

62. That the Plaintiffs had a right to rely and did rely upon the representations made by the Defendant's agent and employee.

63. That the Defendants had an obligation to inform the Plaintiffs that the car had previously been wrecked and rebuilt.

64. That the Defendants failed to fulfill their obligations to the Plaintiffs.

65. That as a result of the Defendant's constructive fraud, the Plaintiffs have been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with the Defendant, and they have paid more for a vehicle than what it is worth.

66. That as a result of the Defendant's constructive fraud, the Plaintiffs demand their actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

FOR A FIFTH CAUSE OF ACTION
(Fraud)

67. That the Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

68. That the Defendants intended that the Plaintiffs rely upon their misrepresentations

of material fact concerning the condition of the vehicle.

69. That the Defendants failure to disclose to the Plaintiffs the condition of the car constitutes affirmative fraud, fraudulent concealment, or nondisclosure of material facts regarding the transaction.

70. That as a result of the Defendants' fraud, the Plaintiffs have been damaged in that they have incurred various repair bills, they have incurred various repair bills, they have lost the benefit of the bargain it made with the Defendant Midlands Honda, and they have paid more for a vehicle than what it is worth.

71. That as a result of the Defendants' fraud, the Plaintiffs demands actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

FOR A SIXTH CAUSE OF ACTION
(UTPA Violation as to PSC Automotive Group)

72. That the Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

73. That the aforementioned acts and practices of the Defendant PSC Automotive Group were unfair and deceptive.

74. That the aforementioned acts and practices of the Defendant PSC Automotive Group affected trade and/or commerce.

75. That as a result of the Defendant's deceptive acts and practices, the Plaintiffs have been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with the Defendant, and they have paid more for a vehicle than what it is worth.

76. That as a result of the Defendant's violation of the North Carolina Monopolies,

Trusts and Consumer Protection Statute, referred to as the Unfair Trade Practices Act, the Plaintiffs demand that the Defendant PSC Automotive Group pay treble actual damages, together with attorney's fees, together with the costs and disbursements of this action.

FOR A SEVENTH CAUSE OF ACTION
(UTPA Violation as to Defendant Nationwide Mutual Insurance Company)

77. That the Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

78. That the aforementioned acts and practices of the Defendant Nationwide Mutual Insurance Company were unfair and deceptive.

79. That the aforementioned acts and practices of the Defendant Nationwide Mutual Insurance Company are against the public interest and that these acts and practices are capable of repetition.

80. That the Defendant's actions were willful and wanton in that the Defendant knew or should have known that its conduct was unfair and deceptive and, therefore, a violation of this State's statutes concerning unfair and deceptive acts and practices.

81. That as a result of the Defendant's violation of the Unfair Trade Practices Act, the Plaintiffs have been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with the Defendant, and they have paid more for a vehicle than what it is worth.

82. That as a result of the Defendant's violation of the Unfair Trade Practices Act, the Plaintiffs are entitled to their actual damages, together with three (3) times their actual damages, together with attorney's fees, together with the costs and disbursements of this action.

WHEREFORE, the Plaintiffs prays for judgment against the Defendants as follows:

a. In the First Cause of Action for his actual damages together with the costs and disbursements of this action.

b. In the Second Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

c. In the Third Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

d. In the Fourth Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

e. In the Fifth Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

f. In the Sixth Cause of Action for treble the actual damages, together with attorney fees, together with the costs and disbursements of this action.

g. In the Seventh Cause of Action for three (3) times their actual damages, together with attorney's fees, together with the costs and disbursements of this action.

h. For an award of reasonable attorney's fees.

i. For such other and further relief as this Court deems just and proper.

C. STEVEN MOSKOS, P.A.
Attorney for the Plaintiffs

BY: _____

C. Steven Moskos
535 Stinson Dr
Charleston, SC 29407
Telephone: (843) 763-5297

Charleston, South Carolina
May 1, 2013

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	
)	Civil Action No. 2013-CP-40-0319
Daniel O'Shields and Roger W Whitley, A Partnership d/b/a O&W Cars,)	
)	AMENDED ANSWER OF DEFENDANT PSC AUTOMOTIVE GROUP TO PLAINTIFFS' AMENDED COMPLAINT
Plaintiffs,)	
)	
v.)	(Jury Trial Requested)
)	
PSC Automotive Group d/b/a Midlands Honda,)	
)	
Defendants.)	

2015 OCT 21 P 1:55

Defendant PSC Automotive Group, amending its answer to the Amended Complaint of the Plaintiffs, hereby alleges as follows:

FIRST DEFENSE

1. Each and every allegation of the Complaint which is not hereinafter specifically admitted or denied is denied.

2. Defendant lacks information sufficient to form a belief as to the truth or accuracy of the allegations of ¶ 1 through 4 of the Complaint, and therefore denies the same.

3. Defendant denies ¶ *5* of the Complaint.

4. Defendant admits ¶ 6 of the Complaint

5. Defendant lacks information sufficient to form a belief as to the truth or accuracy of the allegations of ¶¶ 7 through 16 of the Complaint, and therefore denies the same.

6. Defendant admits so much of 117 of the Complaint as alleges that Nancy Watkins was an owner of the vehicle. Defendant lacks information sufficient to form a belief as to the truth or accuracy of the remaining allegations of ¶ 17.

7. Defendant admits so much of ¶ 18 of the Complaint as alleges it purchased the subject vehicle in 2008.

8. Defendant denies ¶¶ 19 and 20 of the Complaint.

9. Defendant admits so much of ¶¶ 21 and 22 of the Complaint as alleges that it marketed and sold the subject vehicle to Charles Ecklund in August of 2008 for approximately $12,586.00, not including sales tax. Upon information and belief, Defendant was not aware of any prior wreck damage at that time.

10. Defendant lacks information sufficient to form a belief as to the truth or accuracy of the allegations of ¶ 22 of the Complaint, and therefore denies the same.

11. Defendant admits ¶ 23 of the Complaint.

12. Defendant denies ¶ 24 of the Complaint.

13. Defendant admits so much of ¶¶ 25 and 26 of the Complaint as alleges that Defendant marketed and sold the vehicle through the ADESA auction in Charlotte to the Plaintiffs. Defendant affirmatively alleges that the vehicle was not sold under the green light at auction, but under the "red light," which indicates that the vehicle was sold "as is."

14. Defendant admits so much of ¶ 27 as alleges that the title to the vehicle was provided about 20 days after the sale.

15. Defendant lacks information sufficient to form a belief about the truth or accuracy of the allegations of ¶¶ 28 through 34 of the Complaint, and therefore deny the same.

16. Defendant lacks information sufficient to form a belief about the truth or accuracy of the allegations of ¶¶ 35-37 of the Complaint, and therefore denies the same.

17. Upon information and belief, Defendant denies ¶ 38 of the Complaint.

18. Answering ¶ 39 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 17 of this Answer as if stated verbatim herein.

19. Defendant admits so much of ¶ 40 of the Complaint as alleges that Defendant entered into a contract for the sale of the vehicle to Plaintiffs. Defendant affirmatively alleges that the vehicle was not sold under the green light at auction, but under the "red light," which indicates that the vehicle was sold "as is."

20. Defendant denies ¶¶ 41 through 43 of the Complaint.

21. Answering ¶ 44 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 20 of this Answer as if stated verbatim herein.

22. Paragraphs 45 through 48 of the Complaint are not directed at this Defendant. To the extent that they can be construed to make allegations against this Defendant, they are denied.

23. Answering ¶ 49 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 22 of this Answer as if stated verbatim herein.

24. Defendant denies ¶¶ 50 through 56 of the Complaint.

25. Answering ¶ 57 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ I through 24 of this Answer as if stated verbatim herein.

26. Defendant denies ¶¶ 58 through 66 of the Complaint.

27. Answering ¶ 67 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 26 of this Answer as if stated verbatim herein.

28. Defendant denies ¶¶ 68 through 71 of the Complaint.

29. Answering ¶ 72 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 28 of this Answer as if stated verbatim herein.

30. Defendant denies ¶ 73 through 76 of the Complaint.

31. Answering ¶ 77 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 30 of this Answer as if stated verbatim herein.

32. Paragraphs 77 through 82 of the Complaint are not directed to this Defendant, but the extent that these allegations can be construed to allege facts against Defendant, Defendant denies the same.

SECOND DEFENSE
(Rule 12(b)(6))

33. Plaintiffs' causes of action, individually and collectively, fail to state facts sufficient to constitute a cause of action.

THIRD DEFENSE
(Mitigation of Damages)

34. Plaintiffs are barred from relief to the extent, if any, that they failed to mitigate their damages.

FOURTH DEFENSE
(Notice of Application of Foreign Law)

35. Defendant hereby gives notice that some or all of Plaintiffs' claims are governed by the laws of North Carolina law or the laws of Indiana.

FIFTH DEFENSE
(Economic Loss Rule)

36. Plaintiffs' tort claims are barred by the economic loss rule.

SIXTH DEFENSE
(Arbitration)

37. Plaintiffs' complaint is subject to mandatory arbitration under applicable rules of the auction.

SEVENTH DEFENSE
(Statute of Limitations)

38. Upon information and belief, Plaintiffs failed to bring their claim within the time limit required by applicable auction rules.

EIGHTH DEFENSE
(Forum Selection Clause/Jurisdiction)

39. Upon information and belief, the forum selection clause in the auction rules and incorporated by reference in the contract between the parties mandates that the courts of the State of Indiana have exclusive jurisdiction over this dispute.

NINTH DEFENSE
(Auction Disclosure Requirements)

40. By conducting the transaction described in the Complaint, Plaintiffs agreed to the auction terms and conditions, which describe which if any disclosures must be made. Because Plaintiffs contractually agreed that only certain types of disclosures, if any, were required, Plaintiffs cannot maintain an action based upon disclosures which were not required by applicable rules.

TENTH DEFENSE
(North Carolina U.C.C.)

41. Plaintiffs accepted the vehicle pursuant to N.C.G.S. 25-2-606. Plaintiffs not properly or timely revoke their acceptance of the vehicle pursuant to N.C.G.S. 25-2-608. Finally, Plaintiffs did not notify Defendant of any alleged breach of contract or nonconformity within a reasonable time after they discovered or should have discovered any alleged breach or conformity concerning the vehicle. As a result, they are barred from any remedy.

ELEVENTH DEFENSE
(N.C.G.S. § 1D-15)

42. N.C.G.S. § 1D-15 bars an award of punitive damages in this case.

TWELFTH DEFENSE
(N.C.G.S. § 1D-20)

43. In the event that Plaintiffs should receive a verdict which awards punitive damages and a verdict on a statutory claim carrying multiple damages, N.C.G.S. § 1D-20 requires Plaintiffs to elect between such remedies prior to judgment.

THIRTEENTH DEFENSE
(N.C.G.S. § 1D-25)

44. N.C.G.S. § 1D-25 caps any award of punitive damages which may be rendered in this case.

FOURTEENNTH DEFENSE TO 2 ND AND 3RD CAUSES OF ACTION
(Comparative Negligence)

45. If South Carolina or Indiana law is applicable, Plaintiffs are barred from relief on whole or in part by their own comparative negligence.

FIFTEENTH DEFENSE TO 2ND AND 3 CAUSES OF ACTION
(Contributory Negligence)

46. If North Carolina law is applicable, Plaintiffs are barred from relief by their own contributory negligence.

WHEREFORE, having answered the Complaint, Defendant prays that:

a. the Complaint be dismissed with costs assessed against the Plaintiffs; and

b. for such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

CERTIFICATE OF SERVICE
The undersigned hereby certifies that a true copy of the foregoing document has been served upon all counsel by mailing a copy properly addressed and with sufficient postage affixed thereto this 16th day of October, 2015.
Walker & Reibold, Attorneys at Law

October 16, 2015

H. Clayton Walker, Jr.
WALKER | REIBOLD
Post Office Box 61140
Columbia, SC 29260
(803) 454-0955

ATTORNEYS FOR DEFENDANT

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
Daniel O'Shields and Roger W Whitley, A Partnership d/b/a O&W Cars, *Plaintiffs,* v. Columbia Automotive Company, LLC d/b/a Midlands Honda, *Defendant.*	)	Civil Action No. 2013-CP-40-0319 AMENDED ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT (Jury Trial Requested)

RICHLAND COUNTY FILED
2016 AUG 31 AM 11:12
JEANNETTE W. MORRIDER C.C.P. & G.S.

Defendant Columbia Automotive Company, LLC d/b/a Midlands Honda, answering the Second Amended Complaint ("Complaint") of the Plaintiffs, subject to the motion to dismiss, hereby alleges as follows:

FIRST DEFENSE

1. Each and every allegation of the Complaint which is not hereinafter specifically admitted or denied is denied.

2. Defendant admits ¶¶ 1 through 4 of the Complaint upon information and belief.

3. Defendant admits ¶ 5 of the Complaint.

4. Defendant lacks information sufficient to form a belief as to the truth or accuracy of the allegations of ¶¶ 6 through 11 of the Complaint, and therefore denies the same.

5. Defendant admits so much of ¶ 12 of the Complaint as alleges that Nancy Watkins was an owner of the vehicle. Defendant lacks information sufficient to form a belief as to the truth or accuracy of the remaining allegations of ¶ 12.

6. Defendant admits so much of ¶ 13 of the Complaint as alleges it purchased the subject vehicle in 2008.

7. Defendant admits so much of ¶ 14 of the Complaint as alleges that it inspected the vehicle after purchase in 2008.

8. Defendant admits so much of ¶ 15 of the Complaint as alleges that it sold the Honda Civic.

9. Defendant admits ¶ 16 of the Complaint.

10. Defendant admits ¶ 17 of the Complaint on information and belief.

11. Defendant lacks information sufficient to form a belief as to the truth or accuracy of the allegations of ¶¶ 18 and 19 of the Complaint, and therefore denies the same.

12. Defendant admits ¶¶ 20-22 of the Complaint.

13. Defendant denies as much of ¶ 23 of the Complaint as alleges that it previously discovered the damage, and admits the remaining allegations of ¶ 23.

14. Defendant admits so much of ¶ 24 of the Complaint as alleges that Defendant sent the vehicle to a wholesale auction, the ADESA Auto Auction. Defendant denies that it failed to disclose wreck damage. It listed the vehicle for sale under a red warning light, and damage to the right door of the vehicle was apparent at all times. Further answering ¶ 24 of the Complaint, Defendant admits that it failed to disclose that the vehicle was a clipped vehicle; however, the auction rules which were incorporated into the parties' contract had recently changed, and Defendant was not aware the contract called for this disclosure.

15. Defendant admits so much of ¶ 25 of the Complaint as alleges that on or about April 2, 2010, Defendant sold the subject vehicle to the Plaintiffs with the assistance of the ADESA Auto Auction. Defendant alleges that the vehicle did not sell and was not purchased on the block during an auction.

16. Defendant admits so much of ¶ 26 of the Complaint as alleges that a North Carolina damage disclosure form completed by the ADESA Auction without Defendant's knowledge and weeks after the sale occurred did not disclose that the vehicle was a reconstructed vehicle.

17. Defendant admits so much of ¶ 27 of the Complaint as alleges that a North Carolina damage disclosure form completed by the ADESA Auction without Defendant's knowledge and weeks after the sale occurred did not disclose that the vehicle had been damaged in excess of 25% of its value. Furthering answering ¶ 27 of the Complaint, Defendant states that it has learned North Carolina law does not require a disclosure of such damage with respect to the vehicle in question. Defendant also denies that it made any affirmative statements of any kind to Plaintiffs regarding the vehicle. It had no direct communications with Plaintiff, and it did not complete the North Carolina form described in the Complaint.

18. Defendant lacks information sufficient to form a belief as to the truth or accuracy of the allegations of ¶¶ 28 through 32 of the Complaint, and therefore denies the same.

19. Defendant admits so much of ¶ 33 of the Complaint as alleges that Plaintiffs sold the vehicle to Ms. Gorman and Ms. White apparently without conducting an inspection of the vehicle and without disclosing the vehicle's prior damage. Defendant lacks information sufficient to form a belief as to the truth or accuracy of the remaining allegations of ¶ 33 of the Complaint, and therefore denies the same.

20. Defendant lacks information sufficient to form a belief about the truth or accuracy of the allegations of ¶ 34 of the Complaint, and therefore denies the same.

21. Defendant denies ¶ 35 and ¶ 36 of the Complaint upon information and belief.

22. Defendant lacks information sufficient to form a belief about the truth or accuracy of the allegations of ¶ 37 of the Complaint, and therefore denies the same.

23. Defendant admits so much of ¶ 38 of the Complaint as alleges that Plaintiffs hired an attorney. Defendant denies that Plaintiffs were required to do so.

24. Answering ¶ 39 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 23 of this Answer as if stated verbatim herein.

25. Defendant admits so much of ¶ 40 of the Complaint as alleges that it entered into a contract for the purchase of the vehicle. Defendant denies the remaining allegations of ¶ 40 of the Complaint as alleges that the contract called for the sale of safe vehicle, a vehicle in good condition, or even a vehicle which could be operated. In contrast, the vehicle was sold at a wholesale auction under a red light, which indicates that the vehicle had prior concerns, and that the vehicle was sold as is. Safety, good condition, and operability were not terms of the contract of sale. Further answering ¶ 40 of the Complaint, Defendant states that the contract speaks for itself and denies the allegations of ¶ 40 of the Complaint to the extent inconsistent therewith.

26. Defendant denies ¶ 41 of the Complaint; however, Defendant does admit that the auction rules changed shortly before the sale of the vehicle, and, although Defendant was unaware of the change, the rules in effect on the date of sale and incorporated by reference into the parties' contract required a disclosure that the vehicle had been reconstructed. Defendant did not make this disclosure as required by the new auction rules.

27. Defendant admits so much ¶ 42 of the Complaint as alleges that Plaintiffs have suffered damages as a result of the alleged breach of contract in that they have lost the benefit of the bargain and paid more than the vehicle was worth.

28. Answering ¶ 44 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 27 of this Answer as if stated verbatim herein.

29. Defendant denies ¶¶ 45 through 48 of the Complaint.

30. Answering ¶ 49 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 29 of this Answer as if stated verbatim herein.

31. Defendant denies ¶¶ 50 through 57 of the Complaint.

32. Answering ¶ 58 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 31 of this Answer as if stated verbatim herein.

33. Defendant denies ¶¶ 59 through 69 of the Complaint.

34. Answering ¶ 70 of the Complaint, Defendant incorporates by reference the allegations of ¶¶ 1 through 33 of this Answer as if stated verbatim herein.

35. Defendant denies ¶ 71 through 74 of the Complaint.

SECOND DEFENSE
(Rule 12(b)(6))

36. Plaintiffs' causes of action, individually and collectively, fail to state facts sufficient to constitute a cause of action.

THIRD DEFENSE
(Mitigation of Damages)

37. Plaintiffs are barred from relief to the extent, if any, that they failed to mitigate their damages.

FOURTH DEFENSE
(Notice of Application of Foreign Law)

38. Defendant hereby gives notice that some or all of Plaintiffs' claims are governed by the laws of North Carolina law or the laws of Indiana.

FIFTH DEFENSE
(Economic Loss Rule)

39. Plaintiffs' tort claims are barred by the economic loss rule.

SIXTH DEFENSE
(Arbitration)

40. Plaintiffs' complaint is subject to mandatory arbitration under applicable rules of the auction.

SEVENTH DEFENSE
(Statute of Limitations)

41. Upon information and belief, Plaintiffs failed to bring their claim within the time limit required by applicable auction rules.

EIGHTH DEFENSE
(Forum Selection Clause/Jurisdiction)

42. Upon information and belief, the forum selection clause in the auction rules and incorporated by reference in the contract between the parties mandates that the courts of the State of Indiana have exclusive jurisdiction over this dispute.

NINTH DEFENSE
(North Carolina U.C.C.)

43. Plaintiffs accepted the vehicle pursuant to N.C.G.S. 25-2-606. Plaintiffs did not properly or timely revoke their acceptance of the vehicle pursuant to N.C.G.S. 25-2-608. Finally, Plaintiffs did not notify Defendant of any alleged breach of contract or nonconformity within a reasonable time after they discovered or should have discovered any alleged breach or conformity concerning the vehicle. As a result, they are barred from any remedy.

TENTH DEFENSE
(N.C.G.S. § 1D-15)

44. N.C.G.S. § 1D-15 bars an award of punitive damages in this case.

ELEVENTH DEFENSE
(N.C.G.S. § 1D-20)

45. In the event that Plaintiffs should receive a verdict which awards punitive damages and a verdict on a statutory claim carrying multiple damages, N.C.G.S. § 1D-20 requires Plaintiffs to elect between such remedies prior to judgment.

TWELFTH DEFENSE
(N.C.G.S. § 1D-25)

45. N.C.G.S. § 1D-25 caps any award of punitive damages which may be rendered in this case.

THIRTEENTH DEFENSE TO 2 ND AND 3RD CAUSES OF ACTION
(Comparative Negligence)

46. If South Carolina or Indiana law is applicable, Plaintiffs are barred from relief on whole or in part by their own comparative negligence.

FOURTEENTH DEFENSE TO 2ND AND 3 CAUSES OF ACTION
(Contributory Negligence)

47. If North Carolina law is applicable, Plaintiffs are barred from relief by their own contributory negligence.

FIFTEENTH DEFENSE
(Unconstitutionality of Punitive Damages – Procedural Due Process)

48. To the extent that Plaintiffs seek punitive or exemplary damages, such claims may violate the right of the Defendant to procedural due process under the Fourteenth Amendment of the United States Constitution and the Constitution of the State of South Carolina.

SIXTEENTH DEFENSE
(Unconstitutionality of Punitive Damages – Substantive Due Process)

49. To the extent that Plaintiffs seek punitive and exemplary damages, such claims may violate the right of the Defendant to substantive due process as provided in the Fifth and

Fourteenth Amendments of the United States Constitution and the Constitution of the State of South Carolina.

WHEREFORE, having answered the Complaint, Defendant prays that:

a. the Complaint be dismissed with costs assessed against the Plaintiffs; and

b. for such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

H. Clayton Walker, Jr.
WALKER | REIBOLD
Post Office Box 61140
Columbia, SC 29260
(803) 454-0955

April 19, 2016

ATTORNEY FOR DEFENDANT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 13-CP-40-0319
	)	
DANIEL O'SHIELDS AND ROGER W. WHITLEY A PARTNERSHIP D/B/A O&W CARS	)	
	)	**SECOND AMENDED COMPLAINT**
Plaintiffs	)	**(Jury Trial)**
	)	
vs.	)	
	)	
COLUMBIA AUTOMOTIVE COMPANY, LLC D/B/A MIDLANDS HONDA	)	
	)	
Defendant	)	

RICHLAND COUNTY
FILED
2016 SEP 13 AM 8:44
JEANETTE W. WALDRIDE
C.C.P. & G.S.

Plaintiffs, complaining of Defendant, allege the following:

1. That Plaintiffs are a partnership licensed and doing business in North Carolina.

2. That Plaintiff, Daniel O'Shields is a resident of North Carolina.

3. That Plaintiff, Roger W. Whitley is a resident of North Carolina.

4. That Plaintiffs have formed a partnership under the name O&W Cars for the purpose of buying and selling automobiles and trucks.

5. That the Defendant, Columbia Automotive Company, LLC d/b/a Midlands Honda (hereinafter "Midlands Honda") is a corporation organized and licensed under the laws of the State of South Carolina with its principle place of business in the County of Richland, State of South Carolina.

6. That on or about August 3, 2003, Stokes North, Inc. sold a 2003 Honda Civic VIN: 2HGES16543H577916 to Sandra Jackson Gaskins.

7. On or about July 21, 2004, Mrs. Gaskins daughter was involved in a wreck with the

vehicle.

8. That Nationwide Insurance sent its agent and employee to inspect the subject vehicle and to provide an estimate of repairs.

9. That Nationwide Insurance declared the vehicle a total loss.

10. That Nationwide Insurance paid Sandra Gaskins $13,833.00 for the damage to the Civic.

11. That the vehicle was placed the back in the stream of commerce by Nationwide selling the subject vehicle through a salvage auction.

12. That the vehicle was purchased, repaired and then sold to Nancy Watkins.

13. That on or about June 26, 2008, Defendant Midlands Honda purchased the Civic.

14. That Defendant Midlands Honda inspected the subject vehicle and discovered the damage previously done to the car.

15. That the Defendant Midlands Honda marketed and sold the 2003 Honda Civic without disclosing the prior wreck damage.

16. That on or about August 20, 2008, Defendant Midlands Honda sold the Civic as a certified preowned vehicle to Mr. Charles Ecklund for approximately $12,586.00.

17. That upon information and belief, while Mr. Ecklund owned the vehicle he was involved in an accident.

18. That Mr. Ecklund then first learned of the prior damage to the vehicle.

19. That Mr. Ecklund learned the his Civic was actually two cars, the front end of one Civic and the back end of a different Civic.

20. That in the automobile industry a car that is made up of parts of two different cars is known as a "clipped" car.

21. That Mr. Ecklund complained to Defendant which agreed to accept return of the vehicle.

22. That on or about March 27, 2010 Mr. Ecklund sold the vehicle back to Defendant Midlands Honda.

23. That Defendant Midlands Honda again inspected the Civic and again discovered the damage previously done to the car.

24. That Defendant Midlands Honda marketed and sold the 2003 Honda Civic at auction without disclosing the prior wreck damage to the buyers at the ADESA Auto Auction in Charlotte.

25. That on or about April 2, 2010, Defendant Midlands Honda sold the subject Civic, by and through the ADESA Auto Auction, to Plaintiffs.

26. That Defendant failed to disclose properly on the North Carolina mandated damage disclosure form that the Civic had been reconstructed.

27. That Defendant further affirmatively represented that the vehicle had not been damaged more than 25% of the value of the vehicle.

28. That on or about June 28, 2010 Plaintiffs sold the subject vehicle to M. Kay Gorman and Ms. Kelsey White.

29. That as part of the sale of the vehicle, Plaintiffs agreed to replace the timing belt for Ms. Gorman and Ms. White.

30. That on or about September 9, 2010, the vehicle was taken to Evans Garage to do the promised work to it.

31. That once the vehicle was placed on the lift it was observed that the vehicle was a "clipped" car.

32. That Plaintiffs immediately contacted Ms. Gorman and Ms. White to inform them of the discovery of the prior wreck damage.

33. That because of the liability that Plaintiffs faced in selling the car to Ms. Gorman and Ms. White, Plaintiffs offered to replace the vehicle with one of equal or better value or a full refund of the money for the purchase of the car.

34. That the owners of the vehicle agreed to sell the vehicle back to Plaintiffs.

35. That Plaintiffs contacted Defendant Midlands Honda's agent and/or employee Brent Farrell concerning the subject vehicle.

36. That Brent Farrell an agent and/or employee of Defendant Midlands Honda took down the information from Plaintiffs and promised to call him back about Plaintiffs' concerns.

37. That Plaintiffs have not received a call back from Defendant Midlands Honda.

38. That Plaintiffs have had to hire an attorney to represent him in this matter.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

39. That Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

40. That Plaintiffs entered into a contract with Defendant Midlands Honda for the purchase of a vehicle which was in good condition, safe and could be operated and used dependably in North Carolina or South Carolina.

41. That Defendant Midlands Honda failed to sell to Plaintiffs a vehicle which was in good condition, safe and could be operated and used dependably in North Carolina or South Carolina.

42. That as a result of Defendant Midlands Honda's breach of contract, Plaintiffs have

been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with Defendant, and they have paid more for a vehicle than what it is worth.

43. That as a result of Defendant Midlands Honda's breach of contract, Plaintiffs have suffered actual damages, together with the costs and disbursements of this action.

FOR A SECOND CAUSE OF ACTION
(Negligence)

44. That Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

45. That Defendant owed a duty to Plaintiffs in one or more of the following particulars:

a. To research the history of the subject vehicle prior to buying it;

b. To repair any defects in the subject vehicle before offering it for sale;

c. To inspect properly the subject vehicle;

d. To notify Plaintiffs and other consumers of material problems with the vehicle;

e. To disclose truthfully the condition of the subject vehicle;

f. To complete properly the North Carolina mandated damage disclosure form; and

g. To do those things which a reasonable, prudent person or company would do under the circumstances then and there prevailing.

46. That Defendant failed to perform one or more of the aforementioned duties.

47. That as a result of Defendant's negligence, carelessness, recklessness, wilfulness, and wantonness, Plaintiffs have been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with Defendant

Midlands Honda, and they have paid more for a vehicle than what it is worth.

48. That as a result of Defendant's negligence, carelessness, recklessness, wilfulness, and wantonness, Plaintiffs demands actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

FOR A THIRD CAUSE OF ACTION
(NEGLIGENT MISREPRESENTATION

49. That Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

50. That Defendant Midlands Honda made false representations to Plaintiffs.

51. That Defendant Midlands Honda had a pecuniary interest in making the statements.

52. That Defendant Midlands Honda owed a duty of care to communicate truthful information to Plaintiffs.

53. That Defendant Midlands Honda owed a duty to disclose the prior wreck damage present in the Civic.

54. That Defendant Midlands Honda breached that duty by failing to exercise due care.

55. That Plaintiffs justifiably relied on Defendant Midlands Honda's representations.

56. That Plaintiffs have been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with Defendant, and they have paid more for a vehicle than what it is worth.

57. As a direct and proximate result, Plaintiffs were damaged, thereby entitling Plaintiffs to actual and punitive damages together with prejudgment interest, together with the costs and disbursements of this action.

FOR A FOURTH CAUSE OF ACTION
(Fraud)

58. That Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

59. That Defendant Midlands Honda's agents and employees failed to disclose material facts regarding the vehicle to Plaintiffs.

60. That Defendant's agents and employees made false representations of material fact to Plaintiffs.

61. That Defendant knew or should have known that the representations which were made to Plaintiffs were false.

62. That Defendant intended for the Plaintiffs to rely upon its misrepresentations of material fact concerning the condition of the vehicle.

63. That Plaintiffs were unaware of the falsity of the representations and at the time the representations were made, Plaintiffs were unable to discover the falsity of the representations made by Defendant's agent and employee.

64. That Plaintiffs had a right to rely and did rely upon the representations made by Defendant's agent and employee.

65. That Defendant had an obligation to inform Plaintiffs that the car had previously been wrecked and rebuilt.

66. That Defendant failed to fulfill their obligations to Plaintiffs.

67. That Defendant failure to disclose to Plaintiffs the condition of the car constitutes affirmative fraud, fraudulent concealment, or nondisclosure of material facts regarding the transaction.

68. That as a result of Defendant's fraud, Plaintiffs have been damaged in that they

have incurred various repair bills, they have incurred various repair bills, they have lost the benefit of the bargain it made with Defendant Midlands Honda, and they have paid more for a vehicle than what it is worth.

69. That as a result of Defendant's fraud, Plaintiffs demand actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

FOR A FIFTH CAUSE OF ACTION
(UTPA Violation)

70. That Plaintiffs repeat all previous paragraphs as if repeated herein verbatim.

71. That the aforementioned acts and practices of Defendant Midlands Honda were unfair and deceptive.

72. That the aforementioned acts and practices of Defendant Midlands Honda affected trade and/or commerce.

73. That as a result of Defendant's deceptive acts and practices, Plaintiffs have been damaged in that they have incurred various repair bills, they have lost the benefit of the bargain they made with Defendant, and they have paid more for a vehicle than what it is worth.

74. That as a result of Defendant's violation of the North Carolina Monopolies, Trusts and Consumer Protection Statute, referred to as the Unfair Trade Practices Act, Plaintiffs demand that Defendant Columbia Automotive Company, LLC pay treble actual damages, together with attorney's fees, together with the costs and disbursements of this action.

WHEREFORE, Plaintiffs pray for judgment against Defendant as follows:

a. In the First Cause of Action for actual damages together with the costs and disbursements of this action.

b. In the Second Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

c. In the Third Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

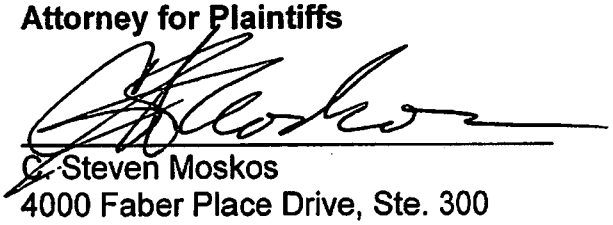
d. In the Fourth Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

e. In the Fifth Cause of Action for treble the actual damages, together with attorney fees, together with the costs and disbursements of this action.

f. For an award of reasonable attorney's fees.

g. For such other and further relief as this Court deems just and proper.

C. STEVEN MOSKOS, P.A.
Attorney for Plaintiffs

BY: 

C. Steven Moskos
4000 Faber Place Drive, Ste. 300
North Charleston, SC 29405
Telephone: (843) 763-5297
Email: csmoskos@earthlink.net

Charleston, South Carolina
September 6, 2016

C Steven Moskos

From: Clay Walker <cwalker@walkerreibold.net>
Sent: Tuesday, August 30, 2016 2:20 PM
To: 'C Steven Moskos'; 'Rob Reibold'
Subject: RE: Whitley et al v Midlands

I will execute and mail the consent. The rule permits you to act with written consent, and I offer this email as my written consent to the filing of the amended complaint.

Clay Walker

From: C Steven Moskos [mailto:csmoskos@earthlink.net]
Sent: Tuesday, August 30, 2016 1:55 PM
To: Clay Walker <cwalker@walkerreibold.net>; Rob Reibold <rreibold@walkerreibold.net>
Cc: Brooks Fudenberg <brooks.r.fudenberg@fudenberglaw.com>
Subject: Whitley et al v Midlands

Clay,
I wrote to you yesterday about whether you would consent to my formal motion to amend the complaint. I sent a copy of the motion and a copy of the Second Amended Complaint which you previously consented to. Please let me know if you sign the Consent Order so I may send that to Judge Cothran as soon as possible.

Rob, usually Clay is responsive to my emails unless he is tied up in trial or out of town. Please let me know if he is around. Thank you.
Steve

C. Steven Moskos
4000 Faber Place Dr., Suite 300
North Charleston, SC 29405
843-763-5297 Office

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL
	)	CIRCUIT
DANIEL O'SHIELDS AND	)	CASE NO. 13-CP-40-0319
ROGER W. WHITLEY, A	)	
PARTNERSHIP D/B/A O&W	)	
CARS,	)	
Plaintiffs,	)	
vs.	)	
PSC AUTOMOTIVE GROUP	)	
d/b/a MIDLANDS HONDA	)	
AND NATIONWIDE MUTUAL	)	
INSURANCE COMPANY,	)	
Defendants.	)	

The discovery deposition of CHARLES ECKLUND, taken in the above-entitled cause, before Marlo Rodriguez, a notary public of Cook County, Illinois, on July 3, 2015 at 2175 East Touhy Avenue, Des Plaines, Illinois, pursuant to Notice.

Reported by: MARLO RODRIGUEZ, CSR, RPR

License No.: 084-004254

waived the notice for a sign or the requirement of an actual sign as the caption of the case; is that agreed?

MR. WALKER: Agreed.

MR. MOSKOS: Very good.

(Witness sworn.)

CHARLES ECKLUND,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOSKOS:

Q. Mr. Ecklund, you go by Chuck?

A. Yes, I do.

Q. Do you mind if I call you Chuck today?

A. No, I don't.

Q. Very good.

Chuck, where do you live?

A. I currently live in Hillside, Illinois.

Q. Where do you work?

A. I work at the Veteran's Health Administration.

Q. Doing what?

A. I'm a healthcare compliance officer.

Q. Right now, we are in Des Plaines, Illinois?

A. Yes.

Q. Des Plaines?

A. Des Plaines.

Q. That's outside of Chicago?

A. Yes, it is.

Q. Did you ever live in Columbia, South Carolina?

A. Yes, I did.

Q. When was that?

A. That was from December 2005 to probably about I guess it would have been October of 2008.

Q. Now, we are currently in Chicago -- well, Des Plaines, Illinois. Are you planning on coming to South Carolina for the trial of this matter?

A. No, I am not.

Q. Do you understand the deposition today is being taken for use at the trial in this matter?

A. Yes, I do.

Q. Have you ever purchased any cars from Midlands Honda?

A. Yes, I did. My wife and I purchased a new 20 -- I think that would have been a 2006 Honda Accord. We then purchased a new 2009 Honda Accord.

Q. Did you purchase any other cars from --

A. Yes. We purchased a used 2003 Honda Civic.

Q. During the times that you were buying these three cars, did you deal with any particular salesperson?

A. Nancy Dodge was our salesperson for all three vehicles.

Q. Tell us about your purchase of the -- well, the Honda Accord, the 2006 and the 2009 vehicles that you purchased, any problems with those?

A. No. Those are brand new, no problems at all.

Q. So tell us about buying the Civic from Midlands Honda. Why were you buying another car?

A. I was in the active duty reserve. So I accepted a mission to go to Huntsville, Alabama, and I needed a car that would be safe to drive back and forth, good gas mileage. So that was

the purpose of buying that car.

Q. Back and forth from --

A. Back and forth from Huntsville, Alabama. At the time my wife, she was on active duty and she was at Fort Gordon, Georgia, so I was driving quite a bit back and forth.

Q. You just needed a safe, dependable vehicle?

A. I needed a safe, dependable, good gas mileage car.

Q. When you were at Midlands Honda, did you let Ms. Dodge know your requirements?

A. Yes, I did. She knew pretty much what I was looking for. I wanted something that was safe, reliable, and again, good gas mileage.

Q. When you went to the dealership, tell us what happened.

A. So went to the dealership and we looked around at several cars and discussed several -- whether I wanted to go new or used. And we looked at several different cars and I came down to two of them at the very last. And I wanted -- there was a gold Saturn that I had my eye on. My wife, and Nancy, they liked the Hondas. They're

reliable, good gas mileage, so we went with the Honda over the Saturn.

Q. Were there any selling points that Ms. Dodge was pointing out about this vehicle?

A. Yes. She said it was, you know, 100 percent Honda certified. I test drove it. It was fine. She said that it came with the warranty. The car was fantastic and a really good buy.

Q. When she said the car was 100 percent Honda certified, what did that mean to you?

A. I had asked her that. She said that it went through multi-point inspection. As I recall, it was 100-point inspection from top to bottom, front to back. Everything was good on the car. It had all of the original parts. It was 100 percent Honda certified. They said that they went through their rigorous inspection and it was a great car.

Q. Did she point out any problems with the vehicle to you?

A. She didn't point anything out any problems to me, but we found a couple few little minor things that I asked them to fix before I

bought the car, and they fixed them fairly quickly.

Q. At the time that you were looking at the vehicle, at the 2003 Honda Civic, did you notice any kind of prior damage that might have been done to that car?

A. No, I didn't notice any prior damage.

Q. So while you are sitting there looking at it trying to make a decision between the Saturn and Honda, how are you feeling about this Honda?

A. I feel good. I test drove it. It drove well. And like I said, I saw a few little things like the air bag light was on. I asked them to fix that, and they did. So the car seemed to -- the car seemed to be fine to me at the time. That's why we bought it.

Q. How about take a look, I have placed some documents in front of you. Take a look at Plaintiff's Exhibit No. 12.

A. Okay.

Q. Okay. Now, does that relate to the vehicle that we are talking about?

A. Yes, it does.

Q. And what does that indicate? What does this document indicate?

A. This document indicates it was a 2003 Honda Civic. It is a certified Honda car, used car. Everything is correct on it.

Q. It deals with the car you purchased?

A. Yes. This is the car I purchased.

MR. MOSKOS: At this point I would move to introduce Plaintiff's Exhibit No. 12 into evidence. Any objection?

MR. WALKER: Two things. This is a deposition notice for all purposes. We are proceeding pursuant to the Rules of Civil Procedures. All objections are reserved except as to the form of the question. And I have stipulated that the document is authentic.

BY MR. MOSKOS:

Q. Plaintiff's Exhibit No. 13?

A. Yes.

Q. So at some point, you agreed to buy this vehicle; is that correct?

A. That's correct.

Q. The 2003 Honda Civic?

A. Yes.

Q. Did you negotiate the price with Ms. Dodge?

A. Yes, I did.

Q. Did you go inside and sit down and start doing the paperwork?

A. Yes. Per week, we went back and forth and came to some common ground. And I had a trade-in, so we talked about that as well.

Q. So take a look at Plaintiff's Exhibit No. 13. Is this the document that you worked out with Ms. Dodge as far as purchase of the vehicle?

A. Yes. This is the one.

Q. Is that your signature at the bottom of the page?

A. Yes, that is my signature.

MR. MOSKOS: Now, take a look -- and I would move to introduce Plaintiff's Exhibit No. 13 into evidence.

BY MR. MOSKOS:

Q. Take a look at Plaintiff's Exhibit No. 14. Now, this is a typed version of the buyer's order is this? Is it typed?

A. Yes, it is typed.

Q. Does that deal with your transaction

regarding the Civic?

A. Yes, it is.

Q. Is that your signature down at the bottom?

A. That is my signature, yes.

Q. The date that you were buying this vehicle was what?

A. August 2nd, 2008.

Q. Now, take a look at Plaintiff's Exhibit No. 15. What is that?

A. That's a document stating that the vehicle is certified.

Q. Is that your signature on the page?

A. Yes, that is my signature. Yes.

Q. Was the fact that it was a certified vehicle a selling point for you?

A. Absolutely. When Nancy told us that it was 100 percent Honda certified and discussed what that meant, it did. It made me feel good. It made me feel like the car was a good value.

MR. MOSKOS: Let's go to the Plaintiff's Exhibit No. 16. Well, I move to introduce Plaintiff's Exhibit No. 15 into evidence.

BY MR. MOSKOS:

Q. Going to Plaintiff's Exhibit No. 16, what is that document?

A. This is the document that when my wife and I went through the car with our eyes, these are some of the things we saw that we wanted them to fix before we were committing to buying the car and --

Q. What did you want fixed?

A. The key from what I remember, yeah, the key to open the driver's side door, the key didn't work in that door. The down by the emergency brake, the cover was missing at the back of the emergency brake. We wanted that repaired. There was a small I think crack in the windshield, so we asked them to repair that. They did that. And the air bag light was on. I noticed that when I was test driving it. That was on. We asked them to fix that and they fixed it fairly quickly.

Q. Was there anything that occurred during the test drive that alerted you that this vehicle had been previously wrecked and repaired?

A. No. No. The car drove. It drove fine.

There was -- not to my knowledge. I mean, I didn't -- I wouldn't have known. It drove fine.

MR. MOSKOS: I move to introduce Plaintiff's Exhibit No. 16 into evidence.

BY MR. MOSKOS:

Q. Plaintiff's Exhibit No. 17 -- I jumped one. Let's take a look at this, the buyer's -- what number is that?

A. 19.

Q. This document, did you sign the backside of this buyer's guide? Is that your signature?

A. Yes, that is my signature.

MR. MOSKOS: Now, I move to introduce Exhibit No. 19 into evidence.

BY MR. MOSKOS:

Q. So you had listed on Plaintiff's Exhibit No. 16 some items that needed to be repaired. Did the dealership work on those problems?

A. Yes, they did.

Q. Take a look at Plaintiff's, I believe, it's 17.

A. 17.

Q. Is that -- looking up here where there's a circle 8-4-08?

A. Yes, it is.
Q. Did they work on the lock and the air bag?
A. Yes. Yes, they did that. They did fix those, yes.
Q. Now, there's -- on the second page, it says total invoice, $385.54?
A. Yes, it does.
Q. Did you pay that?
A. I did not pay that, no.
Q. Did you pay anything for these repairs?
A. No, I did not.
Q. After these repairs were made, did anybody tell you that there were -- that the vehicle had been damaged or wrecked or needed other repairs or anything of that nature?
A. No. No. After these repairs, the car was fantastic.
Q. Now, you bought this car on August the 2nd and the repairs were made on August the 4th. Did you take the car home or what?
A. No. I lived -- at the time I lived fairly close to the dealership. So I told them to just keep the car and work on it and call me

when it's done. My wife would simply drop me off and I would pick it up.

Q. And that's what they did is they called you and you went and got it?

A. Correct.

MR. MOSKOS: I would move to introduce Plaintiff's Exhibit No. 17 into evidence.

BY MR. MOSKOS:

Q. All right. Then Plaintiff's Exhibit No. 18, these are some more repairs done by the dealership. What can you tell us about this? It's two pages.

A. So this looks like these were the wiper blades. They were not any good, so I asked them to replace the wiper blades. I'm trying to figure out what else was done here. It looks like the -- there was a problem with the seat buckle, and they fixed that as well.

Q. Why were you taking it in at this point in time?

A. It was a week after this when I had active duty orders in the military, and I was traveling over to Huntsville, Alabama. Before I went there, I wanted these items taken care of

so, you know, I wouldn't have to deal with it over there. You know, I bought the car from them. I wanted them to go ahead and fix it before I took off on that long journey.

Q. Do you recall paying 245.81?

A. I do not recall that -- I do not recall that, no.

Q. Now, when you took it in on -- when you noticed that the air bag light was on, did that cause you any concern?

A. It didn't at the time. I just thought that maybe it was a sensor or maybe something was just bad and took it back to Nancy, told her my concerns. And she said, oh, it wasn't a problem. We could get it to the repair shop and it would be taken care of quickly and it was.

Q. Now, you had a little bit of an accident. You had an accident in this car, right?

A. Yes.

Q. Tell us about that.

A. I was leaving my apartment complex in Huntsville, Alabama one morning going to work. And as I was going out of the apartment complex,

a lady backed straight out of a parking spot and right into the -- so it would be the passenger rear door. And she just kind of T-boned me.

Q. So what did you do?

A. So got out, took my seatbelt off, got out, walked around the car, saw the car. You know, at that point she had pulled back into the parking spot. So I went up to her and asked her if she was okay and she said she was. And she was sorry. She said it's all my fault, I'm sorry, I didn't even see you. So then we both inspected what had happened. We called the police and made a report.

Q. How bad was the damage in the back?

A. It was bad. The car was still drivable, but it was bad.

Q. Did it include anything -- did the damage -- was the damage just to the door or did it include the quarter panel too?

A. It included the -- it did include the door and the quarter panel, yes.

Q. So what are you doing with your car after you finished with the police?

A. After the police report was drawn up, of

course, I called work and told them what had happened. I went back -- it was drivable. So I went back to the apartment, told me wife what had happened.

And we since we were, you know, fairly new there, we didn't know any body shop, so we asked some of our friends of who they thought we should go to, and they recommended a really nice professional body shop just down the road. So I took it there.

Q. Now, at this point in time when you were looking at the car with the damage to it, could you tell that it had been previously wrecked?

A. I could not. I do not have that trained eye.

Q. So who did you take it to?

A. I don't recall the body shop's name. I do recall it was just down the road from me, but they were well known throughout the community as being very professional.

Q. So you dropped it off and what happened then?

A. I pulled up there. I told them what had happened. I said that I was not in any rush. My

wife could take me to work. It was not a problem. I said just inspect the car, let me know what happened to it, and take your time, call me whatever you want.

Q. So when did you hear from them?

A. So I heard from them later on that day and they said you have to --

MR. WALKER: I'm going to object to any testimony about statements by third parties as hearsay.

MR. MOSKOS: Okay. And my response would be it's not being offered to prove the truth of the matter asserted, so it would be admissible.

BY MR. MOSKOS:

Q. Go ahead and tell us what happened.

A. Okay. So they called me up and said you have to come down here to see the car. I said could you just let me know what happened. They said, no, you just have to come see this. I said okay. I will be there after work. So after work, I was dropped off. And the gentleman came out and said we have your car.

Q. Well, let me ask you this, when he said you have to come down and take a look at it, what

white and he showed me where it was welded underneath together.

BY MR. MOSKOS:

Q. Now, you have some pictures in front of you?

A. Yes.

Q. I think they're Exhibits 20 through 42, I believe?

A. 20 through 42.

Q. Who took these photographs?

A. I did.

Q. All right. Do they accurately reflect the vehicle as you saw it on that day?

A. Yes, it does.

Q. I move to introduce Plaintiff's Exhibit Nos. 20 through 42 into evidence.

So let's go through these. Which ones were you looking at -- where -- what picture would you have seen first?

A. Well, at first what I would saw was this is the tire. This is the back of car.

Q. Let's start with this. You are looking at -- when you went out into the garage with this fellow, was the vehicle on the ground or was it

up in the air?

A. It was up in the air on the rack.

Q. Is this the first picture you took?

A. I'm not sure if it's the first picture I took because I took so many of them.

Q. So well, let's go through these by number then. Plaintiff's Exhibit No. 20, what does that show you?

A. That shows you that the car was why you could see underneath the gray paint is the white paint. So from here back is where the car is white, but it's been painted gray so you could see the difference.

Q. Can you tell which side of the car that's on? I see a tire, but could you tell what side of the car that's on, the driver's side or the passenger's side?

A. Well, it would -- it would be the passenger side because the wheel well goes down like this.

Q. So let's take a look at the next one, Exhibit 21. What is that?

A. Once again, that's the same picture as you could see the wheel well goes here and the

tires here on the passenger's backside. And you could see the -- here is even more chipped paint that you could see the white underneath the gray.

Q. So that's 21. Let's talk about 22. What is that showing us?

A. This is showing that -- this is the inside of the car where they pulled the headliner back. And you could see -- the reason he wanted me to see this was you could see the welds on the inside. So not only do you have the weld underneath, but you have the welds on the inside where they welded the car together.

Q. Can you show the jury a little -- you are holding it in a funny way. I'm not sure if the jury can see it. Can you point to where the weld is?

A. Yeah. So the weld is right -- starts right here and goes right across there.

Q. What part of the car is this on?

A. This would be --

Q. Is it a driver's side or passenger's side?

A. I think this is the passenger's side.

Q. Is it the front of the car or the back

of the car?

A. This would be the back of the car, driver's side or passenger's side back of the car.

Q. And on the side where the exhibit sticker is, is that the -- what window is that?

A. That's the back window. This would be the door, the back-door. This would be the back window.

Q. When you were -- before your accident, could you see that weld?

A. I could not see this weld because this is the headliner of the car, so you could not see that at all.

Q. So what did you think when you saw that weld?

A. I was in disbelief. I have never seen -- honestly, I never seen up underneath a hood liner -- you know, a headliner before. I have never seen up underneath there. So I couldn't believe that there would be weld up underneath there. It didn't make any sense to me.

Q. Let's look at Plaintiff's Exhibit No. 23.

What does this show us?

A. This shows where the weld comes underneath the car. You could see it's rusted. It's very spotty. And it goes, of course, along the back of the car this way.

Q. Let's look at Plaintiff's Exhibit No. 24.

A. Once again, you have very bubbly, spotty welds. You have a lot of rust in certain areas. The weld just seems to be -- it's not a continuous weld. It's very spotty in places.

Q. All right. Let's look at Plaintiff's Exhibit No. 25, and I'm going to ask you to turn so you could talk to the jury while you are doing it if possible.

A. Okay. Okay.

Q. This is Exhibit No. 25. What are we looking at?

A. This looks to be on the -- it looks to be on the underside of car. You could see the weld. Once again, there's very spotty welds. And then when you come across here, all of a sudden, the weld stops. There is no weld -- I can't tell what distance that is, but the weld starts and then it just stops. There is no weld

on the later portion of that metal.

Q. All right. Let's take a look at Plaintiff's Exhibit No. 26.

A. Okay. Once again, it just shows like two just like bubbles of weld. It doesn't -- right here seems to be a gap. It doesn't have a continuous solid weld all the way across. And as you could see, you see you have your whites and your grays as well.

Q. How about Exhibit No. 27?

A. 27 once again, it just shows the inconsistencies of the weld as it comes down across here. And then once again, you have your gray over here and your white over here, where the weld is coming down, gray, white.

Q. Exhibit 28, not a great picture?

A. Exhibit 28, it is a very dark picture. You could see over here is the white and you could see over here is more gray and the weld the weld comes right down -- right down the center there.

Q. Exhibit 29?

A. 29, once again this is a really good picture because you could see the weld right in

the middle. And you could see where the white is over here and the gray is over here. The weld comes right down the center.

Q. What is exhibit -- Plaintiff's Exhibit No. 30?

A. No. 30 is on the -- once again here is the passenger side, the back, the wheel coming down. And this is, of course, the fender weld. And as you could see, paint has been scratched off here and so you could see it's white underneath the gray.

Q. Exhibits 31 and 32 look like they're basically the same?

A. Yeah. They're very similar.

Q. Is that a more pictures of the one you took previously?

A. Yeah. There is one -- exactly the one I took previously. It just shows up underneath the headliner where the weld is coming across and going across the top of the car.

Q. How about Exhibit 33?

A. Exhibit 33 shows -- it's hard to tell.

Q. Where is this 33 in relation to 32?

A. That's what I'm trying to figure out.

Q. Take a look at Plaintiff's Exhibit 32 for me.

A. So this is an up-close shot of that underneath the headliner. And as you could see where the weld comes across, there's a hole in it, which is a very inconsistent weak weld.

Q. Is that taken like in the door jam?

A. Yes, it is. Yes, I think it's -- yes.

Q. So let's take a look at Plaintiff's Exhibit No. I think 34?

A. 34, yes.

Q. Now, what part of the car is this?

A. This is the underside of the car. You could seep --

Q. Was the car up in the air at this point or was it on the ground?

A. Yeah. The car was up in the air at this point. You could see the weld coming across here. It's very inconsistent. It bubbles and it stops and it gets real curvy. And it actually comes it comes up and then down and around and back up, very inconsistent weld.

Q. Plaintiff's Exhibit 35?

A. Yes. This is the same thing. It's up

underneath the car. You could see not only is it very inconsistent, but there's a lot of weld missing. You will have holes -- as you go across the car, you have holes, potholes that are in the weld. To me, that's an unsafe, very inconsistent weld.

Q. Anything about the color underneath the car?

A. Yes. As you could see, you do have your gray and then your white here. So you could see how the weld right there, white and gray, so you could see the separation of the colors.

Q. How about Plaintiff's Exhibit 36?

A. 36 is even more -- the weld is the same, but what you really get here is the appreciation of the colors. You have your solid gray here and then you have your white underneath showing the difference. But you could still see the weld. But this is more the color difference that I took.

Q. 37, Plaintiff's Exhibit 37?

A. 37 is blurry. It doesn't show much, just the weld. It looks like the weld that goes across the bottom. It is blurry.

Q. All right. How about Plaintiff's Exhibit 38?

A. 38 is more clear. And as you could see, you could see the weld goes across here and then you could see at the top right of the picture, you could see the white mixed -- you know, that comes into the gray which is where the cars were welded together.

Q. All right. Let's talk about Plaintiff's Exhibit No. 39.

A. 39, once again, up underneath the car, this one -- it really doesn't have anything to do with the welds. What it does, it's more the color scheme again. You would have the gray coming back and then you have the white. So you know, somewhere around right here is where the cars were welded together. But there's the color difference.

Q. Tell us about Plaintiff's Exhibit No. 40, please.

A. 40 once again, you don't see -- you don't see much of the weld, but as you could see, this would be the front of car. And you are coming back here. And all of a sudden, the car

goes white and it goes white back here. So you could see the color difference there as well.

Q. Tell us about Exhibit No. 41.

A. 41 is more of the weld you see. It's very spotty in places. It's not -- it doesn't seem to appear to be very good weld. It's very shotty work if you will.

Q. And Plaintiff's Exhibit No. 42?

A. 42, once again, you could see this is part of that weld. You could see where it's flaking up. And where it's flaking up, it starting to rest really bad underneath. So it's -- the weld actually is cracking from here to here and down into here further showing a bad weld job.

Q. So as the repairman is showing you all of these problems, what are you thinking?

MR. WALKER: Object to the form of the question.

BY MR. MOSKOS:

Q. What are you thinking as you are looking at all of these -- the various parts of the car?

A. I'm frustrated. I'm upset. I'm mad. He told me that the weld across the back of the

the car had ever been wrecked before, I certainly didn't want to take the chance again.

Q. All right. So you find out about the prior wreck damage, what are you going to do about it?

A. So I called the dealership and informed them about it. And I spoke with the manager and Mr. Randy.

Q. Are you aware that your wife called?

A. Yes. Yes. She called. I called and she called as well. And he understood the problem.

Q. What are you telling him about the problem?

A. I said that, you know, the car is two cars welded together. And of course, he had a little bit of reservation. That's his word versus my word. He didn't know anything about it. So he said that he would need to get it back to the dealership to take a look at it.

Q. Are you telling him anything about the safety of the vehicle?

A. Yes. I told him that the vehicle is not safe to drive and I told him why. And he said he

understood, that he would have it put on a truck and trucked back to Columbia, South Carolina. And he would rent me a car and so I would have a way back to Columbia.

Q. And what did he tell him about the safety issues with this vehicle?

A. I told him that because of the weld in the back, that anybody who were to hit you in the rear end, whether it be from the sides or the back, the car would just -- you know, probably the back end would come off and it was not safe.

Q. All right. So did somebody come and pick up the car?

A. Yes. A truck did come pick up the car just like he said. And he told me where to go to get the rental car and sure enough, a rental car was good. And I came back to Columbia, South Carolina.

Q. And about how much time passed between you calling and you coming back to Columbia, do you recall?

A. No, I don't recall.

Q. Well, you did come back to Columbia?

A. I did, yes.

Q. So what are you doing when you get back to Columbia?

A. So I pretty much went there and said I need to speak with Randy and Randy came out. And he said that, you know, we want to get you into a new car. And I said, you know, well, no, I really would just like to have my money back and we will just part ways. And he said, well, that's not going to happen. You need to buy another car from us. And so we went back and forth and back and forth. And he just said let me get you a salesman and just let him talk to you and see what we have and you can work with him.

Q. How were you feeling about that?

A. I was not feeling good at all. I was very upset because, you know, the trust was not there anymore. I mean, you know, you have already sold me a car, you know, that was wrecked. It was 100 percent certified. The trust wasn't there. So I really didn't want to have anything to do with this.

Q. Did you meet with a salesman?

A. I did. I think his name was Scott. I

MR. WALKER: I'm going to object to the testimony from third persons as hearsay.

BY MR. MOSKOS:

Q. Well, you talked to the JAG folks about your legal rights?

A. Yes, I did.

Q. Based on your conversation with the JAG folks, what conclusions did you make about what to do?

A. I was advised because --

MR. WALKER: I'm going to object to you testifying about what other people told you as hearsay.

BY MR. MOSKOS:

Q. What did you decide -- what was the basis for your decision -- without talking about what they were telling you, what was the decision that you made in regards to what to do in regards to your Civic?

A. I decided that because of the distance and the time and the back and forth over that distance that it just -- I just need to cut my losses and go my own way.

Q. So what did you decide to do?

A. So talked it over with my wife again, and we decided that we would try to find a car that would best fit our needs and just part ways.

Q. So what are you doing now?

A. So I went back to the dealership, looked at a whole bunch different more cars, test drove more cars, finally found one that I thought would work for the budget, for the value, and I say we worked out a deal. There was really no deal.

We went back and forth. I said, you know, you have caused me a lot of grief here. You know, you need to work with me. And I don't think he worked that much at all with me. So we finally settled on a car and that was the end of it.

Q. What car did you finally settle on?

A. It was a 20 -- it was 2000 Honda Accord.

Q. Take a look, I think, that's Plaintiff's Exhibit No. 43.

A. 43.

Q. Is that -- what is that document?

A. This is an affidavit of notification of sale of motor vehicle. So this is the car, the 2003 Honda Civic, with the miles stated that I

had put on it.

Q. You sold the car back to Midlands Honda on what date?

A. Let's see here. That would have been the 27th of March, 2010.

Q. Exhibit No. 43, what is that, the next document?

A. And it's 44 is the next document.

Q. Excuse me, Plaintiff's Exhibit 44.

A. 44, this is the power of attorney, the odometer disclosure form.

Q. Is this for the Accord, the 2000 Honda Accord?

A. No. This is for the 20000 Honda Accord, yeah, 2000 Honda Accord, yes.

Q. How many miles were on that car when you bought it?

A. 126,403.

Q. That's your signature on the page?

A. Yes, it is.

Q. When you went back -- during this second day that you were at the dealership, did you still tell Mr. Austin or Scott Austin that you wanted -- just simply wanted your money back?

MR. WALKER: Object to the form.

BY MR. MOSKOS:

Q. What did you tell Mr. Austin when you were at the dealership the second day about this transaction?

A. I told him that I wasn't -- I still was not happy with this whole situation. I was still very upset. I told him that, yes, the 2000 Honda Accord was okay. It was probably the best that we could have done with what we were given. But no, I was still very unhappy about this whole situation.

Q. Take a look at what's been marked as Plaintiff's Exhibit No. 11. First of all, I would move to introduce Plaintiff's Exhibits 43 and 44 into evidence. Take a look at Plaintiff's Exhibit No. 11. This is the estimate of repair for the vehicle, for the Honda Civic, back in looks like 2004.

Had you known that it was going to cost -- that the cost of the repairs were going to be over $10,000 -- let me ask the question even better.

Going back to August 2, 2008, the date

that you were looking at this car, what would you have done had you known that the 2003 Civic had had over $10,000 worth of damage done to it?

A. I would have never bought this car, ever.

MR. MOSKOS: I would move to introduce Plaintiff's Exhibit No. 11 into this evidence.

No further questions. Thank you.

CROSS-EXAMINATION

BY MR. WALKER:

Q. Mr. Ecklund, I understand from what you said and looking at the documents, you bought this car in August of 2008, right?

A. Yes.

Q. And I'm assuming you were driving back and forth between Augusta and Huntsville in 2008 in this car?

A. Yes.

Q. Did you have any trouble with it when you were driving it in 2008?

A. No.

Q. I'm assuming you kept driving it back and forth in 2009?

A. Yes.

discussed that.

Q. Those contacts go back to January of this year?

A. Yes. Yes, because we talked about -- yeah, it was around that time that we had a lengthy phone conversation about that, yes.

MR. WALKER: I don't have anymore questions. Thank you very much.

MR. MOSKOS: Just one more, Mr. Ecklund.

REDIRECT EXAMINATION

BY MR. MOSKOS:

Q. Other than the accident that you talked about today, did you have any other accidents with this Honda Civic?

A. No, I did not.

MR. MOSKOS: Thank you. No further questions. Thank you.

THE VIDEOGRAPHER: Mr. Ecklund, you have the right to review your video testimony once this deposition is over. Would you like to review the video or do you waive this right?

THE WITNESS: I waive that right.

THE VIDEOGRAPHER: Thank you. This marks the end of DVD one and the deposition of Mr. Ecklund,

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CASE NO. 13-CP-40-0319

DANIEL O'SHIELDS AND ROGER W. WHITLEY
A PARTNERSHIP D/B/A O&W CARS,

Plaintiffs,

vs.

PSC AUTOMOTIVE GROUP D/B/A MIDLANDS HONDA,
NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendants.

30(b)(6) VIDEOTAPE DEPOSITION

OF

ADESA CHARLOTTE, LLC

CORPORATE DESIGNEE: JOSEPH RICHARD GUYER

* * * * *

Taken by Plaintiffs

Charlotte, North Carolina

July 28, 2015

* * * * *

Reported by: Mary L. Labonte, RPR

Deposition Services of Chicago, Illinois.

At this time, would counsel please introduce yourselves and your affiliations including the name and address of your firm.

MR. MOSKOS: My name is Steve Moskos. I represent the plaintiffs. My firm is C. Steven Moskos, P.A. I am in Charleston, South Carolina. Address is 4000 Faber Place Drive, Suite 300, North Charleston, South Carolina 29405.

MR. GRADY: My name is a Jeff Grady. I'm monitoring on behalf of ADESA Charlotte, LLC, and ADESA, Inc. with the law firm of Katten Muchin Rosenman. Our address is 550 South Tryon Street, suite 2900, Charlotte, North Carolina 28202.

MR. WALKER: My name is Clay Walker. I represent Midlands Honda. My firm is Walker and Reibold. I'm at 3321 Forest Drive in Columbia, South Carolina.

THE VIDEOGRAPHER: Madam Court Reporter.

P R O C E E D I N G S

Whereupon, JOSEPH RICHARD GUYER, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. MOSKOS:

Q. Mr. Guyer, my name is Steve Moskos, as you heard, and I represent the plaintiffs in a case that's been brought against Midlands Honda. Are you familiar with some of the facts of the case?

A. Yes.

Q. Okay. Where do you work, sir?

A. I work for ADESA Charlotte, LLC.

Q. And where is ADESA -- I'm sorry. Say the name again.

A. ADESA Charlotte.

Q. ADESA Charlotte. Where is that?

A. South side of Charlotte at 11600 Fruehauf Drive.

Q. Is that a North Carolina --

A. Yes.

Q. -- corporation?

A. Yes.

Q. And what do you do for -- is it commonly called the ADESA Auto Auction?

A. Locally, yes.

Q. Okay. And what do you do for the ADESA Auto Auction here in Charlotte?

A. I'm the general manager.

Q. What are your responsibilities?

A. I'm -- I oversee the operations, the

marketing, the administration of the transactions that occur at the auction.

Q. Does that include various contracts between the auction and dealers?

A. Not necessarily.

Q. Okay. Are you familiar or do you know that there are contracts between ADESA and the dealers that use the auction?

A. I'm unaware of contracts between ADESA Charlotte and dealers.

Q. Okay. Well, let's do it -- let me do it this way: I have asked ADESA to provide testimony for a trial in Richmond County, South Carolina. ADESA has sent you. Is that correct?

A. Yes.

Q. All right. And you're here today to speak on behalf of ADESA?

A. Yes.

Q. And are you here to give testimony regarding a 2003 Honda Civic that was sold at the auction on April 2, 2010?

A. Yes.

Q. Now, I have placed before you a number of documents. I believe they start with 45 --

A. Uh-huh.

Q. -- and go to 56. Have you reviewed those?

A. I believe I have.

Q. Okay.

A. Yes.

Q. And are those -- okay. Well, let me ask you this: Who at -- let's start with this: Who attends the ADESA Auto Auction?

A. Licensed dealers only.

Q. Can a member of the public show up and buy a car?

A. No.

Q. And where do these dealers come from?

A. They can come from any of the 50 states and actually overseas if they are properly registered.

Q. Now, when you say registered, do you mean registered with the company or the State of North Carolina or what?

A. Registered with the company.

Q. All right. So let's take a look at the exhibits that I've placed in front of you, starting with exhibit -- well, do you recognize them?

A. Yes.

Q. And are you familiar with them?

A. Yes.

Q. And are the exhibits, 45 -- I believe the last one is 56. Are those used -- or, excuse me, 55. Are those documents that are commonly used at the ADESA Auto Auction?

A. At the time of this sale, yes.

Q. And are they contracts that are regularly used at the auction, like the power of attorney and other stuff?

A. Oh, these, yes, these are.

Q. Okay. And who completes these documents?

A. The registration documents will be filled out by the dealerships themselves. A lot of -- a lot of the paperwork in here are actually the terms of the association of the company. But the -- what you're calling a contract is filled out by the customers when they apply.

Q. And the customer is a dealer?

A. Yes.

Q. All right. And you're familiar with the forms that are -- that are in this --

A. Yes.

Q. -- in these exhibits? All right.

MR. MOSKOS: And at this time, I would move to introduce Exhibits 45 through 55 into

evidence. Any objection?

MR. WALKER: Well, once again, this deposition's been noticed for trial and all other purposes under Rule 26. Under the rule, all objections are reserved except as to the form of the question.

MR. MOSKOS: Well --

MR. WALKER: This was not noticed as a de bene esse deposition.

MR. MOSKOS: But it was noticed for use at trial.

MR. WALKER: Correct.

MR. MOSKOS: So what I'm asking you is do you have any objections at this time.

MR. WALKER: And pursuant to the rule, my objections are reserved.

MR. MOSKOS: Okay.

Q. Mr. Guyer, take a look at Exhibit 45. Would you tell us what that is, please.

A. This is the power of attorney form that a dealer would fill out in order to do business with ADESA Charlotte.

Q. All right. Can you read the first paragraph for us. This is -- it looks like a fax of maybe a photocopy of something so it didn't come

out very well. Would you please read that first paragraph for us.

A. The undersigned and its subsidiaries hereby duly appoint ADESA Corporation located at 13085 Hamilton Crossing Boulevard, Carmel, Indiana 46032 or any of its subsidiaries, ADESA, through its authorized employees and agents to act as our attorney in fact to sign all papers and documents that may be necessary pertaining to the sale and subsequent transfer of the vehicle consigned by the undersigned to ADESA for its auction of the vehicles or permitting to the purchase of vehicles by the undersigned including, without limitation, any title, title transfer document, reassignment of odometer disclosure statements as required by federal law.

Q. And the Exhibit Number 45, who signed that?

A. It appears to be the signature of Randall Threatt.

Q. And he was representing Midlands Honda at the time?

A. That's my understanding.

Q. Take a look at the next document, which is Exhibit 47, an indemnity and hold harmless

agreement.

A. Is that 46?

Q. Excuse me, 46, you're right. Can you read that for us.

A. Midlands Honda, hereinafter called dealer, whose principal place of business is at 124 Killian Commons Parkway, Columbia South Carolina 29203, hereby appoints ADESA, Inc., 13085 Hamilton Crossing Boulevard, suite 500, Carmel, Indiana 46332 and its subsidiaries and their designees, hereinafter called ADESA as dealer's agent with full and complete authority to sign odometer disclosure statements, title documents, auction invoices or any other documents as required in ADESA's discretion on dealer's behalf with regard to services provided by ADESA to dealer, including but not limited to, services relating to any and all motor vehicle owner sold, purchased, stored inspected, serviced or conditioned by or for dealer at ADESA.

Q. Okay. And who signed that document?

A. That appears to be Randall Threatt also.

Q. And that was on behalf of Midlands Honda?

A. I would assume, yes.

Q. Okay. Let's talk about Exhibit 47.

What is that?

A. This is a required form whereas a personal guaranty is signed for any purchases that would be made on behalf of a dealership.

Q. Now, were you able to get a copy that was signed by Midlands?

A. I have not attempted to.

Q. Okay. Is this a form that has to be signed by every dealer --

A. Yes.

Q. -- in order to do business --

A. Yes.

Q. -- at ADESA?

A. Yes.

Q. Would you please read the first paragraph for us.

A. The undersigned, whether one or more, personally guarantees dealer's payment and performance of the auction terms and conditions on all transactions by dealer taken pursuant thereto.

Q. Take a look at Exhibit 48. And what is this document, dealer acknowledgment form?

A. This is the document that a dealer signs verifying that they have received the terms and conditions and policies from the auction prior to

doing business.

Q. And did Midlands Honda have to sign a copy of this document?

A. I would assume. All dealers have to sign this to get registered.

Q. And did you look to see if Midlands had signed a copy?

A. I have not looked.

Q. Okay. Could Midlands have done business at ADESA without having signed this form?

A. Very doubtful.

Q. All right. Let's take a look at Exhibit 49, the auction terms and conditions. These were in place at the -- in April of 2010?

A. Yes, sir.

Q. Would you please read for us section two, the first line up to section A and then read section C for us.

A. Dealer eligibility and applicable rules. By participating as purchaser or seller in any sale at the auction, dealer represents that it is -- and you said read A?

Q. C.

A. C. That's B. C, subject to the terms and conditions contained herein and other

applicable auction rules, including but not limited to, any local auction rules as a condition of doing business at the auction.

Q. Now, section four deals with the sale procedure and it talks about an "if" sale. Can you tell us what an "if" sale is please?

A. An "if" sale is a conditional sale whereas a bid price is established by a bidder, a potential buyer, however the deal is not done or consummated at that time. The "if" applies while the seller finds out or makes a decision if that bid is acceptable.

Q. So is that done while the car is going across the block?

A. After the fact.

Q. After the fact. Somebody bids, somebody from the auction I guess talks to the dealer who's selling the car and says do you want to sell it or not?

MR. WALKER: Object --

Q. Is that how it works?

MR. WALKER: Object to the form.

Q. Can you explain to us how that works?

A. May I give an example?

Q. Sure.

A. A dealership may have a minimum floor price of $5,000 on a vehicle. They send a representative to sell the vehicle and the high bid may be $4,600. The representative, even though it's below what they've been told is the minimum, they may think that's a fair price. And if they sell the vehicle with an "if," they may then contact their superiors at the dealership to say will we accept $4,600 instead of 5,000 and if the answer is yes, then the deal goes through; if it's not, it does not.

Q. Are the representatives of a dealership always at the sales?

A. No.

Q. Assume the following facts: Mr. Whitley comes to a red-light sale, a car goes through the auction, no -- either nobody bids on it -- well, nobody bids on it and the car is taken off the block.

A. Uh-huh.

Q. If -- then Mr. Whitley goes to the office and says he wants to offer money on the sale -- on the car, excuse me, to buy this car. The people in the office pick up the phone, call Midlands Honda and talk to somebody there about selling the car

for the price that Mr. Whitley wants to pay. They agree on the price and the car is sold to Mr. Whitley. Is that an "if" sale?

A. No.

Q. All right. Is that an in-lot sale? Am I using the right word?

A. That's not a terminology we would use.

Q. Okay.

A. That would be what we call an off-the-block sale or SOS.

Q. SOS. What does SOS say -- mean?

A. Short for Sold Outside Sale.

Q. Okay. And do the terms and conditions that we're talking about today apply to SOS sales?

A. Not necessarily.

Q. Okay. When would they apply?

A. If communication is facilitated between the buyer and the seller, the auction is not party to any information exchanged, therefore we won't get involved in any disputes after the fact. That is a true off-the-block sale, whatever the agreements are between those two parties and we're not aware. If it's a deal that is completed in an office with auction personnel right there, a seller can offer in writing a guaranty on a vehicle still,

otherwise the auction won't get involved in a dispute.

Q. Okay. Going back to the example that I used a minute ago, Mr. Whitley waiting until the car went off the block, going to office personnel, assume that someone from Midlands Honda is not present, that they're back in Columbia, South Carolina, somebody in the auction picks up the phone and calls and there is an arrangement, a deal is worked out --

A. Uh-huh.

Q. -- and the car is sold to Mr. Whitley. Is that -- do -- does that transaction fall under the terms and conditions of the sale?

A. If it happened exactly like that, it would not necessarily fall as an SOS. It would fall as to how it was represented on the block.

Q. Okay. So would the terms and conditions that we're talking about today apply to --

A. Yes.

Q. -- this transaction?

A. Yes.

Q. Okay. All right. Let's take a look at Exhibit, I believe it's 50, which is the arbitration rules, national arbitration policy,

in-lane and online NAAA, version 2.0, January 2010. These would have applied to the dealership -- excuse me, to any sales in April of 2010 --

A. Yes.

Q. -- at your auction? All right. Would you please read for us the first sentence under fair and ethical sale.

A. The sales made at an auction are intended to promote fair and ethical treatment to both the buyer and seller.

Q. And would you read the third sentence, starts with federal.

A. Federal, state and local laws supercede these policies where applicable.

Q. Now, how about go down to section two, auction role in sale, section B, would you read the first sentence for us, please.

A. Auction is not a party to the contract of the sale.

Q. And go to the next page where it talks about section six, auction exclusions. Would you read that for us, please.

A. The entire thing?

Q. Sure.

A. A, auction is not bound by information

listed in electronic data vehicle histories, i.e., CarFax, AutoCheck, et cetera, and any vehicle may not be arbitrated solely on EDVH data. Auction may investigate vehicle history based on information found in EDVH for information that may impact arbitration.

Q. And what does that section mean?

A. That means that just because an issue may be noted on CarFax or AutoCheck, that does not necessarily make it an arbitrable issue.

Q. When you talk about arbitrable issue, what are we talking about?

A. Oh, arbitration at the auction is the tool used to settle disputes between buyers and sellers per the agreed-upon policies of the auction.

Q. And who makes the final decision in those arbitrations?

A. The arbitrator who works for the auction.

Q. And so this section is basically saying they're not going to just look at CarFax and make a decision?

A. Correct. They would investigate what CarFax is reporting to make the determination.

Q. Why is that there?

A. There are many times we will encounter errors that are discovered through investigation, something may not necessarily be what it appears on either of those, AutoCheck or CarFax.

Q. Are CarFax and AutoCheck 100 percent?

A. 100 percent?

Q. Accurate. Excuse me.

A. No.

Q. Take a look at section nine down below, buyer responsibilities. Please read that for us.

A. The buyer is responsible for listening to announcements related to each vehicle made by the auctioneer or selling representative prior to the start of the sale. The buyer is also responsible for observing and understanding the sale lights, green, yellow, red, blue, which identify various sale conditions for the vehicle.

Q. And section 10 dealing with seller responsibilities.

A. All guarantees as stated by the seller are those of the seller only. The seller understands that the sale light/video display is a binding arbitration representation of vehicle condition and is therefore responsible for ensuring that their vehicles sell under the correct light in

the lane.

Q. Now, let's turn the page. The next section is titled sale light video display systems in-lane and online simulcast only. Can you explain to us how the auction works? Well, let me -- let me -- before we get into this, let me show you a couple pictures because this may help us a little bit. I have presented to you Exhibits 56 through 63. Have you had an opportunity to look at them?

A. Yes.

Q. All right. I will represent to you that I printed these off of Google Maps.

A. I could tell.

Q. And my question to you is: Do these exhibits accurately depict the auto auction as it exists?

A. From these points of view, yes, this is the facility.

Q. All right. And Exhibit Number 56, this is an overhead view?

A. Uh-huh.

Q. Can you show the jury, by holding up the picture and showing it to the camera, where exactly is the auction premises? Because there's a lot of space in here.

THE WITNESS: Are you zoomed in?
THE VIDEOGRAPHER: Yes.
A. This parcel here is the auction.
Q. Okay. And all those little spots around the building, what are they?
A. These are all automobiles.
Q. Now, where are the cars sold?
A. On this?
Q. Sure.
A. The auction is in this bottom left-hand corner --
Q. All right.
A. -- the facility.
Q. And how do the cars get into and out of this building?
A. They are driven.
Q. Well, is there a door? Is it just a big open space? What is it?
A. There are a series of garage doors around the northwest corner and the -- well, the northwest corner where the vehicles enter, drive through and then exit.
Q. Okay. And inside the auction -- well, let me -- let me ask you this: Take a look at Exhibit 61, which is this one.

A. Uh-huh.

Q. Okay. Can you hold that up? Does that show the doors that you were just talking about?

A. Some of them, yes. These here, these are doors into the auction sale arena.

Q. All right. So cars are driven into the building and what happens then?

A. Each lane has an auction block with an auctioneer on that. That is where the transaction occurs in each lane.

Q. Are the auctioneers on the floor?

A. No. They're on an elevated block.

Q. And where are the people who are bidding on this vehicle, the dealers, where are they?

A. They can be in any area in front of the vehicle or in front of the auctioneer, across from the vehicle, in front of the vehicle, between the auctioneer and the vehicle.

Q. In your experience, do dealers walk around the car while it's being auctioned?

A. Yes.

Q. Are there any auction employees on the floor while a vehicle is being auctioned?

A. There are employees stationed throughout the sale, not -- there is a ground man or a ring

man that is helping the auctioneer, working with the auctioneer, looking for bids in the vicinity of the vehicle.

Q. And so if he sees somebody bidding in the back, what is he supposed to do?

A. He points it out to the auctioneer.

Q. All right. And during the auction process, if the representative from the dealer -- well, where -- a car is being sold. Where is -- if the person selling the car, if the dealership has a representative there that is selling a car, where is he supposed to be while the car is being sold?

A. He would step up onto the auction block next to the auctioneer to represent the vehicle and communicate with the auctioneer.

Q. And what is he supposed to tell the auctioneer?

A. He would, at that time, make the auctioneer aware of what condition he was going to sell the vehicle under and any pertinent announcements that were relevant to this sale.

Q. And what kind of pertinent announcements are we talking about?

A. Things that are required and there are lists in your exhibits, but for example a history

of flood damage; on certain model years, a lemon law buyback; at that time, an odometer that was over 100,000 miles; an odometer issue such as a rolled-back odometer or inoperable odometer. Those are all examples of disclosures that would need to be announced.

Q. What about prior wreck damage?

A. Prior wreck damage is not required unless it's resulted in the frame or unibody damage that is outlined in the NAAA's rules --

Q. Okay. And --

A. -- which is in the exhibit.

Q. All right. So if a car fits the triple -- the NAAA auction requirements, a dealer is supposed to tell the auctioneer, hey, this vehicle's been in a wreck resulting in this damage and that would be announced to the folks --

A. Yes.

Q. -- who are bidding?

A. Yes.

Q. All right. Now, there is a -- well, let's do it this way: What happens if a representative from the dealer that's selling this car is not present? Who takes his place?

A. A representative more than likely would

contact someone at the auction and give them the information, the selling conditions, the minimum prices, pertinent disclosures, anything like that, for them to get up and represent the vehicle.

Q. And then a representative from ADESA would stand there while the car is being sold and tell the auctioneer what needs to be told?

A. Correct. And in some cases, it may be that the information is given to the auctioneer directly.

Q. What do you mean directly?

A. The information is recorded on a report or a note and rather than standing up there and actually being present for it, they may leave that with the auctioneer while they attend to something else.

Q. Okay.

MR. MOSKOS: At this time, I'd move to introduce Exhibits 56 through 63. Any objection?

MR. WALKER: Again my position is all that's reserved.

MR. MOSKOS: Okay.

Q. Just so we're clear, do Exhibits 56 through 63 accurately depict the auction from the point of view that it's being taken?

A. Yes.
Q. Let me to ask you to take a look at Exhibit No. 1. Do you recognize the form?
A. Yes.
Q. And how do you recognize this form?
A. This is an MVR-181. It's a North Carolina required damage disclosure form.
Q. Can any vehicles -- well, in 2010 could any vehicles be sold at the ADESA Auto Auction without a damage disclosure form being completed?
A. No.
Q. All right. So going back to what you were saying, assuming for a second that the -- well, when is this document supposed to be completed at the auction?
A. If a vehicle successfully sells, the office is notified to begin transferring the title and the title clerks are required to look for any announcements that are pertinent to the MVR-181 and note them as such and then this is attached per law to the title and wait for the buyer to pick up the title.
Q. When -- if a dealer is not present at the auction, he just sends a -- do dealers send cars to the auction and not show up?

A. Yes.

Q. Assuming a dealer sends a car, a 2003 Honda Civic, to the auction and does not show up, how does the dealer communicate announcements and the information that has to be put on this damage disclosure form to the auction? How is that done?

A. There's not a specific -- I mean they would use a telephone call, a fax, an e-mail, a text, could have been in person earlier in the week, they may have handed the information to a representative.

Q. Do all the dealers that deal with the ADESA Auto Auction know that they have to provide the information that's required on the damage disclosure statement?

A. Yes.

Q. Okay. So if a dealer doesn't show up but is selling a car at the auction, they either -- they might send the information on a sheet of paper or an e-mail or something like that to the auction. Is that correct?

A. Yes.

Q. If they don't send that information to the auction, car just shows up, what does ADESA do to make sure that the damage disclosure statement

is completed?

A. Well, we -- without information, we won't be able to sell the car to get to that point because we won't have a floor price. So we can't -- we can't start this process until the vehicle is sold by that communication.

Q. All right. Well, let's -- let me do this then, let me -- because this is kind of important to talk about in relation to this transaction.

A. Okay.

Q. Let's talk about the auction system itself. Okay. You talked about the car coming through on the auction block. Section one, dealing with the auction system, talks about lights. What do we mean by lights? Are there actually lights at the auction?

A. Yes. The light system exists at the auctions so that a buyer -- or excuse me, a bidder in attendance can look and visually see what conditions the vehicle is being sold under as outlined in the exhibit, green, yellow, red and blue. Therefore, if someone were to walk up midway during bidding, they're able to look at the lights and understand the vehicle is being sold with a green light or with a red light.

Q. Well, now, what does a green light mean?
A. Would you like me to read what it says or --
Q. Sure.
A. -- do you want me just to tell you?
Q. Well, read it and then I want you to explain.
A. Green light ride and drive. The green light signals that this vehicle is guaranteed under the conditions outlined in the disclosure/discovery arbitration section except for specific announcements made prior to the sale. The green light is the -- what you might call the best guaranty that a seller could offer on a vehicle and in a nutshell, it states that there is not a single mechanical defect that would cost in excess of $500 to repair.
Q. When you -- you emphasized the word "mechanical." Does that include body work?
A. No.
Q. Okay. So a car -- all this is talking about is the mechanical condition of the vehicle?
A. Correct.
Q. Is that what the light system deals with, just simply the mechanical condition of the

vehicles?

A. No.

Q. Okay. But under the green light, it's just saying all the components are --

A. Right.

Q. -- working perfect?

A. Well, close to perfect.

Q. Okay. But it might have some sort of accident -- prior accident damage that may have been repaired?

A. Yeah. Accident damage would not necessarily have anything to do with a green light.

Q. Okay. All right. So what about a yellow light?

A. A yellow night -- excuse me. A yellow light is an announcement light. That's alerting a buyer to the fact that an announcement has been made and it is their responsibility to find out from the auctioneer what that announcement was before bidding.

Q. What kind of announcements are we talking about?

A. An announcement example could be flood damage, frame, unibody or structural damage, lemon law buyback, odometer does not work, warranty

cancelled, could be -- could be anything.

Q. So if a car has -- all -- excuse me. The yellow light just simply says, hey, there's a problem with this car, you need to find out what it is from the auctioneer?

A. Basically, yes.

Q. All right. How about the red light?

A. The red light is stating the vehicle is being sold as-is.

Q. What does that mean?

A. May I read?

Q. Sure, sure.

A. Vehicles selling under the red light will only qualify for arbitration under the rules outlined in the disclosure/discovery section. As-is dollar amount, model years and mileage is subject to local auction policy. As-is means that the seller is not guaranteeing anything mechanical on the car at all. It -- you buy it, it may not move again.

Q. Transmission may go?

A. Engine may go out, transmission, windows may stick.

Q. Does the red light deal with prior wreck damage?

A. No.
Q. Okay. So just because a vehicle is being sold under a red light doesn't mean that it's been wrecked before, does it?
A. No, not necessarily.
Q. Is a car being sold under a red light synonymous with prior wreck damage?
A. Not necessarily, no.
Q. All right. Now, when a car is sold under a red light -- assume for a second a car is sold under a red light and it has had prior wreck damage. Is that an announcement that the auctioneer is supposed to make if he's told about it?
A. If he is told by a seller, the auctioneer will announce anything a seller tells him to announce whether it is required or not. They will simply repeat over the microphone, so it's part of the transaction, anything that the seller wants announced.
Q. Well --
A. But wreck damage itself is not a disclosure.
Q. To determine -- okay. So does a seller have to announce to the auctioneer to tell the

other folks, the bidders, that the vehicle being sold under a red light has been previously wrecked?

A. No.

Q. If -- well, let's go to the blue light. Let's deal with the blue light.

A. Okay.

Q. Tell us about that. What does that mean?

A. Again may I?

Q. Sure.

A. Blue light, title attached/title unavailable/title absent. This light is used to announce that the title is not present at the time of sale. For auction rules regarding titles, please refer to the title arbitration policy section. If, quote, title attached, unavailable, absent, unquote, is the not announced, a vehicle could be arbitrated for misrepresentation.

What that is notifying to the potential buyer or the bidders is that the seller does not have the title with them at the moment to completely consummate the transaction, whereas a buyer could leave with the title and vehicle that day so the title is coming.

Q. Is that common --

A. Yes.

Q. -- for a vehicle not to have the title with it?

A. Yes.

Q. Okay. Let me go back to the red light for a second. Assume for a second that a car has been previously wrecked --

A. Okay.

Q. -- cut in half, and the -- another part -- another car has been welded to it.

A. Okay.

Q. Do you know what that's called?

A. Yes.

Q. What is that called?

A. That's referred to as a clipped car.

Q. Okay. Assume a clipped car comes across the auction block. Under a red light sale, is there any requirement that a seller announce that the car has been clipped?

A. Not necessarily that it has been clipped. But where you're talking about a clipped car, that means it has frame, unibody or structural damage. That is required to be disclosed by a seller.

Q. Okay. So if a clipped car or a vehicle that has frame or unibody damage has been wrecked, then -- and the seller knows it, he's supposed to

tell the auctioneer who can then tell the bidders?

A. That's correct.

MR. WALKER: Object to the form.

Q. How about do this for me, tell me the process that's supposed to occur if a seller knows that a vehicle has frame, unibody damage or is a clipped car. What's the processes that the seller is supposed to go through to make sure the bidders know about this damage?

A. The seller would make the auctioneer aware to make the disclosure at time of offering.

Q. And then what does the auctioneer do?

A. The auctioneer would announce that into the microphone and it's recorded as a part of the transaction.

Q. All right. Let's talk about the next section, which deals with discover -- excuse me, disclosure discovery requirements. The arbitration guidelines, we were talking about arbitration previously, if a car is sold under a red-light sale, does the buyer have any rights to seek arbitration through the auction?

A. Not for anything mechanical.

Q. All right.

A. But as per outlined in the matrix that's

in here, there are a few items that are still arbitrable.

Q. All right. And what are those?

A. Can I refer to it?

Q. Absolutely.

A. Arbitrable items under the red light are logo or decal misrepresentation, a biohazard vehicle; frame or unibody damage existing, altered or repaired per the NAAA policy; flood damage, by auction inspection; state-issued VIN plates including kit vehicles; taxis, livery vehicles, police cars, government vehicles that are calendar year and up to four years old; previous Canadian vehicles that are calendar year and up to four years old. Shall I continue or --

Q. No. I'm going to get to that --

A. Okay.

Q. -- to that matrix in just a few minutes.

A. Okay.

Q. All right. Now, if Mr. Whitley buys this vehicle after it's left the auction block, does he still have the same rights for arbitration as outlined in this matrix?

A. Yes, if it was put together the way I understand.

Q. All right. Let's talk about this damage disclosure statement. This is -- this is a form that you-all use all the time. Right?

A. Yes. This is a North Carolina form.

Q. All right. And you're familiar with how it's completed and --

A. Yes.

Q. -- it's used at the auction?

A. Yes.

Q. Is that correct?

MR. MOSKOS: And if I haven't done so already, I'd move to introduce this as --

Q. Well, let me ask you this: Would you read the make and model of the car that's at the top?

A. Honda 2S 2003.

Q. All right.

A. 2 --

Q. You don't have to read the VIN number.

A. Thank you.

Q. And it says signature of seller. Do you know who that is?

A. I believe that's the signature of Delores Haney.

Q. And who is Delores Haney?

A. She was an employee of the auction in 2010. She was a title clerk.

Q. And why would she have signed this document?

A. As one of the title clerks, she is who handles the transfer of successful sales in the office.

Q. And if a representative of Midlands Honda had been there, would they have been required to sign this?

A. No.

Q. Okay. And why did Ms. Haney sign this? What authority did she have to sign this?

A. We would have had power of attorney from the seller to affix their signature to transfer title.

Q. And how did she know what information to put on Exhibit No. 1?

A. The title clerks refer to what were the announcements of the vehicle and that is what tells them what is required to be checked on the MVR-181.

Q. And the -- here's -- here's what I'm struggling with. I am trying to figure out the process whereby Midlands Honda had to provide you or ADESA with the information that is contained on

Exhibit 1. Can you tell us how that occurred, how they submitted this information to the dealer -- to the auction?

A. No, I cannot speak to how the representative from Midlands Honda communicated this specific vehicle's information to the auction.

Q. Okay. Do you know if the information was submitted? I mean, did it have to be submitted?

A. It would have to -- if it was not submitted, they would have called us to say you sold a car you weren't allowed to sell and you sold it for a price that was never discussed. And that doesn't happen.

Q. Okay. So -- well, how about this, do you have a record of Midlands Honda submitting the information to ADESA?

A. No.

Q. Could this sale have happened without that information being transmitted to ADESA by Midlands Honda?

A. No.

Q. Based on your understanding of how the auction works, how do you think the information that is on Exhibit No. 1 was transmitted from Midlands Honda to ADESA?

A. I would assume via a phone call or an e-mail.

Q. Okay. And Midlands Honda would have told somebody at ADESA or responded to these questions that are on the form so that it could be completed by the ADESA Auto Auction employee?

A. No. There's --

MR. WALKER: Object to the form.

Q. Okay. How would it have worked?

A. There's not a survey given when they offer -- the typical communication would be I'm not able to attend this week, I'm sending you five cars, there are two 2005 Accords that I want to sell with a green light, they're good cars, they each need to bring $10,000 minimum, I'm sending you an '03 Civic that I'm going to sell as-is. Those are the communications you would see.

Now, if something -- if there's going to be an announcement, they're going to tell you I'm bringing you a piece that's a salvage, make sure you note salvage damage, or I've got a flood car I've got to bring, make sure to announce flood, so that's how it would be communicated to someone if they were not going to attend themselves.

Q. Does a dealer have to actually say to you

this vehicle has not been damage -- and I say you as in ADESA, whoever they're talking to at ADESA, this vehicle has not been damaged more than 25 percent?

A. No.

Q. So if the -- if the dealer -- if a dealer contacts ADESA, talks about the cars being sold, talks about the minimum price and does not say anything about prior wreck damage or flood damage or salvage damage, does the auction just simply assume that there aren't any disclosures and fills out the paperwork?

A. Correct.

Q. Are dealers who are selling vehicles at the auction aware that they have to provide this information when they're -- that's on Exhibit No. 1 --

MR. WALKER: Object --

A. Yes.

Q. -- when they're selling the car?

MR. WALKER: Object to the form.

Q. Does ADESA -- does the ADESA Auto Auction inform dealers that they have to provide the information that's on the damage disclosure statement before a car can be sold at the auction?

A. Indirectly. It's required by North Carolina DMV and dealers understand we will do whatever DMV's rules are. So yes, they're aware.

Q. Does ADESA trust that the dealer selling cars at its auctions are following the applicable laws that apply to car sales?

A. Yes.

Q. And is it fair for buyers to assume that the sellers are following the applicable laws that apply to car sales?

MR. WALKER: Object to the form.

MR. MOSKOS: Okay.

Q. Does the auction do anything to verify the information that's placed on the damage disclosure form by a dealer?

A. No.

Q. Now, on Exhibit No. 1, it's -- it asks has this vehicle been damaged by collision or other occurrence to the extent the damages exceed 25 of its value at the time of the collision or occurrence. Correct?

A. Yes.

Q. And that is marked no on this particular form?

A. That's correct.

Q. Number two asks if the vehicle was a salvage motor vehicle and that's marked no also?
A. Correct.
Q. What is a -- never mind. And then question number three is whether the vehicle is a flood vehicle. Correct?
A. Yes, sir.
Q. And four is, is this vehicle a recovered theft vehicle?
A. Correct.
Q. And then number five is has this vehicle been reconstructed?
A. Correct.
Q. And all of those were marked no?
A. Correct.
Q. When is this form completed -- or when would Mrs. Haney have completed this form?
A. I would estimate within an hour of the transaction being put into the system.
Q. Okay. And who receives the damage disclosure statement?
A. The buyer.
Q. If a car is sold under a red-light sale or in this case, as Mr. Whitley did, off the block and he is -- he agrees to buy the car, then he's

handed this damage disclosure statement and it shows the vehicle has got frame damage, salvage damage, flood damage, any of -- any of these are marked yes, what are his options?

A. If a buyer were to get an MVR-181 with one of these marked yes and subsequently that announcement was made at the time of purchase, there's no recourse for the buyer because he was made aware at the time of his bidding. If it was marked on here yes but was not announced, he can take the vehicle to our arbitration department to complain and possibly get out of the vehicle.

Q. Is the seller responsible for providing this information prior to the car going through the auction so that it can be announced during the auction in a red-light sale?

A. The seller is required to announce any disclosure that is required per the NAAA rules, which I believe included these issues that are on the MVR-181.

Q. Now, just so we're clear, the second page, which says damage disclosure definitions of Exhibit No. 1 --

A. Yes, sir.

Q. -- that's really just the back side of

the --

A. Yes.

Q. -- document. Right?

A. Yes.

Q. So it's all attached. It's on the same page. I want you to take a look at Exhibits 2 through 10.

A. Here?

Q. Yes, sir.

A. Is that the whole stack?

Q. Yes, sir. And I'm going to represent to you that that's the car that we're talking about, the 2003 Honda Civic.

A. Yes.

Q. And I'm going to show you what has been previously marked as Exhibit 32.

A. Give me a second.

Q. Okay.

A. All right.

Q. If Midlands Honda had known about the damage as shown in Exhibits 2 through 10 and 32, how should Exhibit No. 1 have been filled out?

A. If they were aware of it?

Q. Yes, sir.

A. Well, that's pertaining to the

25 percent. I can't speak to what the math involved was on it.

Q. Okay. If -- assume for a second that -- let me hold these, please. Assume that the vehicle was worth approximately $13,000 and the estimated damage was 10,000, a little over $10,000.

A. That would be greater than 25.

Q. Okay. How should this damage disclosure statement have been different?

A. If they were aware that the extent of damage exceeded 25 percent, they would have said yes.

Q. How about number five, has this vehicle been reconstructed?

A. Reconstructed? It states on the back that it's been materially altered from the original construction. That doesn't necessarily mean what I believe you're saying there. It would be under the 25-percent damage. Rebuilt would be if it was customized or something like that so no.

Q. Would you consider a clipped car reconstructed?

A. I would consider it -- yes, I would.

Q. Okay. So if this 2003 Honda Civic is a clipped car, should number five on Exhibit No. 1

be -- have a different answer?

A. It's possible.

Q. Depends on what?

A. The nomenclature that the dealers would use. There are some states that actually use the term "reconstructed" in branding.

Q. Do you know how North Carolina uses it in application to the question number five?

A. I believe the way they have it documented on the back -- but it does say addition or substitution of new or used essential parts including kits and custom-assembled vehicles. It could be -- it could be checked that way, yes.

Q. Checked which way?

A. From a repaired -- rather than an altered, from a repair standpoint, it could be checked yes.

Q. Indicating damage --

A. Yes.

Q. -- or reconstruction?

A. Yes.

Q. If a dealer came to the auction and was selling a 2003 Honda Civic under a red-light sale and knew that the vehicle had been clipped, two cars cut in half or some part of it cut and

attached to -- two different cars put together, is he supposed to announce that to the auctioneer?

A. As per the rules and disclosures, he would announce that it has structural damage --

Q. And --

A. -- or at the time --

Q. -- is that something that the auctioneer would announce to the bidders?

A. Yes.

Q. Under a red-light sale?

A. Under any sale.

Q. How -- under section nine, can you read section A for me, please.

A. Under assignment title time?

Q. I'm sorry, buyer responsibilities and liabilities, section A, section nine.

A. I've not kept up here. A, it is the buyer's responsibility to watch lights and listen to announced conditions before placing bids. Once the vehicle is sold, the buyer should check the auction sales receipt to confirm the vehicle price and announcements are correct before legibly printing and signing their name or electronically signing the auction sales receipt.

Q. Okay. Now, if this vehicle is sold off

the block, what is the sales receipt that he would be looking at to confirm the sales price and the announcements are correct?

A. He would not be seeing something beforehand if it's off the block.

Q. Now, you've used the term "unibody damage." Can you tell us what that is?

A. Many manufacturers construct their vehicles out of a unibody frame as opposed to the typical, an older ladder frame. The terms "frame damage," "unibody damage" became synonymous in the automotive -- used automobile and auction industry in the '90s as many people would still call a unibody vehicle frame damaged though technically there's not frame on it.

Q. Is the body the actual frame of the car in a unibody situation?

A. Yes.

Q. All right. You had appendix A out just a moment ago -- or excuse me, appendix one.

A. Is it this?

Q. Yes, sir. If the Honda Civic that we've been talking about has unibody damage that has been repaired and the car is being sold under red light, does the selling dealer still have to tell buyers

that it's -- that the vehicle has frame unibody damage, existing, altered or repaired, per the NAAA policy?

A. Yes.

MR. WALKER: Object to the form.

Q. Where on appendix one is -- does it show that a seller is required to announce frame or unibody damage at an auction?

A. Do I need to show the camera?

Q. Yes, please.

A. This column is the as-is transactions.

Q. Where it says red light?

A. Yes, red light as-is. Frame/unibody damage, existing, altered or repaired per NAAA policy, yes, it requires disclosure.

Q. And would you please read the very top box there above that.

A. This up here?

Q. No. Right here.

A. Disclosure required.

Q. Okay. And then it has red light?

A. Correct.

Q. And that's -- and this vehicle was sold under a red light so this is the column we have to look at. Right?

A. Correct.

Q. Okay. It says arbitration period just to the right of that?

A. Correct.

Q. Under a red-light sale it says B/C. What is that?

A. B/C is the arbitration period, which is outlined down below. One is for an in-lane purchaser as in this case. The other is for an online purchaser who would not be present at the time of sale.

Q. Now, if Mr. -- if the vehicle came off the block without being sold --

A. Uh-huh.

Q. -- and Mr. Whitley then went to the office and asked to buy it --

A. Uh-huh.

Q. -- is that still an in-line --

A. In-lane.

Q. -- in-lane sale?

A. Yes.

Q. Look down below the frame, unibody damage and there's a line dealing with salvage or reconstructed, theft recovery, stolen vehicles including history?

A. Uh-huh.
Q. Under a red-light sale, does that require disclosure?
A. Yes.
Q. And then how about further down on that list, any state-required damage disclosure, under red-light sale is disclosure required?
A. Yes.
Q. Now, this is a little bit different. It says seven days after receipt of title under the arbitration period red light.
A. Yes. That is -- it is listed that way because those are issues that may be discovered upon receipt of the title.
Q. How so?
A. That it might be on the -- branded on a title. If the title is not present, the buyer wouldn't be aware of what brands on it until he takes possession of the title.
Q. Now, let's take a look at the next page, which has a diagram of a car and some other stuff. On -- there's a box there with a number of sections.
A. Yes.
Q. One side has component, the other says

disclosure requirement.

A. Yes.

Q. Is that correct?

A. Yes.

Q. Take a look under component, section nine, support pillars, A, B, C, or D pillars. Do you know what a pillar is?

A. Yes.

Q. What is a pillar?

A. The pillars are the uprights on a vehicle, generally what separate windows. Your A pillar is between your windshield and your driver glass. This would be the A pillar. B pillar is between the driver glass and the rearview -- or the rear passenger glass.

Q. And what is a C pillar? Where is that?

A. C pillar would be located between -- in a sedan or a coupe, between the furthest rear glass and the rear windshield.

Q. Does the C pillar go from basically the quarter panel up to the roof? Is it that piece of metal?

A. Yes.

Q. Okay. And if that is damaged, the C pillar is damaged, is a dealer required to disclose

that damage?

A. Yes.

Q. Turn the page for me. Take a look at item number ten. Would you read that for us please.

A. The seller represents his/her cars, not the auction. The auction acts only as an agent between buyer and seller.

Q. Look at number 13 for us. Would you read that, please.

A. It is the seller's responsibility to ensure that all declarations and representations such as odometer reading are properly made and that the vehicle is properly represented through the auction. Errors and omissions are the seller's responsibility.

Q. Now, do dealers have to be honest in making their representations at the dealer -- at the auction?

A. Yes.

Q. Why is that?

A. If they're not, the vehicles can be arbitrated back to them.

Q. Yeah. But why do they have to tell -- why do they have to be honest about what they're

selling to other people?

A. Beyond the rules?

Q. Yeah.

A. I would assume they would worry about reputation, which would hamper prices for them. But it's -- it's the policy and the rule first and foremost.

Q. Do you know why that's a policy and a rule that they have to be honest?

A. Well, by being a member of the NAAA, we have a code of ethics that we agree on fair practices for buyers and sellers and our job, as the auction, is to be a neutral party in the middle to hold an honest transaction for both parties.

Q. When a car is being sold through the auction, and let's assume it has problems, are all the problems with a car visible or apparent when the car goes through the auction?

A. No.

Q. What kind of things might not be visible or apparent to the buyers?

A. History reports of course won't be visible, title defects, title brands, mechanical defects, a sunroof not working. There -- there are many things. Damage to the undercarriage,

structural damage, flood damage. Those are all examples.

Q. Let me ask you to look at the next exhibit. I'm not sure what the number is.

A. 51 --

Q. Okay.

A. -- maybe.

Q. What is that document?

A. This is a screen shot from the auction's auction management system where we keep track of transactions, facilitate tractions.

Q. All right. And what does it show us about this -- the sale of this Honda Civic?

A. It shows, across the top, the vehicle's identification number, description of the vehicle, the miles at the time on the vehicle, the current owner. Then down below is information, on this particular one, showing Midlands running it through as seller and not selling it on April 1, 2010.

MOSKOS: I'm going to stop right now so that she can switch the tape out.

THE VIDEOGRAPHER: Going off the record. The time is 11:20 a.m.

(A recess was taken.)

THE VIDEOGRAPHER: And we're back on

record. This is tape two in the deposition of Joseph Guyer. The time is 11:28 a.m.

Q. Mr. Guyer, I think we're looking at Exhibit 51. I just want to go through a couple of these things. This is a computer screen shot for ADESA?

A. Yes, sir.

Q. Or ADESA's computer?

A. Yes.

Q. When it says, at the top part of the page, about a third of the way down, a quarter of the way down, it says announcements, commercial, what does that mean?

A. Announcements -- those are two separate tabs.

Q. Oh, okay. All right.

A. Just like options above activity, those are each separate tabs.

Q. Okay. So the copy isn't very good. So those are those various tabs --

A. Yes.

Q. -- you click on and provides a different screen?

A. Yes.

Q. Can you tell us, looking at this, which

tab has been clicked?

A. It would appear, from looking at this, that there are no announcements. It looks -- appears to be grayed out.

Q. I'm sorry. What -- what are you talking about?

A. Were you talking about announcements and commercial?

Q. Well, what I'm asking for, first of all, is the screen shot with the information on it --

A. Uh-huh.

Q. -- can you tell us what tab it is under?

A. Oh, it's under activity.

Q. All right. And you said -- let's talk about announcements. If there had been announcements, would that tab look different?

A. Yes. It's easier to see on yours. If there's information in there, the tab is a black font and if it's empty, it's a gray font.

Q. Okay. So it would be a little lighter?

A. Yes.

Q. So based on your experience with the computer system, is announcements gray or the black?

A. Gray.

Q. Now, looking at this, on the left-hand side where it says sale date, the first date says 4 -- or excuse me, the lowest one says 4-1-2010.

A. Uh-huh.

Q. Can you tell me what the C means, if anything?

A. The C, consignment sale.

Q. And then next to it, it says not sold 4-1-2010, 10:25 a.m. Does that mean it actually went across the block and there were no bidders?

A. That means across the block and did not sell, doesn't mean there weren't any bidders.

Q. Why else would it not have sold?

A. The bids may not have gotten to the minimum price the seller was requiring.

Q. Can we tell what the minimum price was?

A. No.

Q. And then going up one, under sale date, still April 1st, it again says not sold 4-1-2010, but now it says, instead of 10:25 a.m., it says 12:18 p.m.

A. Yes.

Q. Did it go back through the auction?

A. From this, I would assume yes.

Q. And then 4-1-2010, SOS sale 4-22-2010

(sic), 12:22 p.m., What does that mean?

A. That's meaning that the next day, on April 2nd, at 12:22, the deal was put into the system between the two parties listed above.

Q. Now, still on I believe Exhibit 51, on the right-hand side of the page, it's -- who is listed as the selling representative for Midlands Honda?

A. It says Brent Ferrell.

Q. And are there any -- can you tell, from this, what light this vehicle was being offered for sale on April 1st?

A. Not on this -- not on this page, no.

Q. But it was being sold under a blue light?

A. Right.

Q. And that means the title was not at the auction?

A. That's correct. If -- yes.

Q. If what?

A. Below where it says guaranty, that fills in when a deal is actually sold.

Q. So let's look at Exhibit 52. Is this under the activity tab also?

A. Yes.

Q. And is announcements, the tab -- is the

announcements tab grayed or is it blackened now?

A. No. It appears to still be gray.

Q. And does this reflect the actual sale of the vehicle to Mr. Whitley?

A. Yes, I believe so.

Q. And if any announcements had been made during the red-light sale, that tab would have been darker?

A. Yes.

Q. The announcements tab?

A. Yes.

Q. So on the right-hand side of the computer screen, it still has the selling representative as Brent Ferrell?

A. Yes.

Q. And then it has Mr. Whitley as the buyer's representative?

A. Yes.

Q. Can you tell from this transaction whether his bid of $5,200 met the minimum price?

A. No. You can tell it sold, but you can't tell if it hit the price they actually wanted.

Q. And now we have guaranty red light as-is.

A. Correct.

Q. And that is again just dealing with the

mechanical aspects of the vehicle?

A. Correct.

MR. WALKER: Object to the form.

Q. Is the guaranty red-light sale as-is dealing with anything other than the mechanical aspects of the vehicle?

A. Only the policy -- only outlined -- as outlined in the policies from the NAAA.

Q. Now, take a look at Exhibits 53 and 54. Have you seen those documents before? I mean the forms and that kind of thing --

A. Yes.

Q. -- are you familiar with them?

A. Yes.

Q. All right. What is Exhibit -- what are Exhibits 53 and 54?

A. These are the sale contracts that the system generates for the buyer and then for the seller.

Q. And is there any way to distinguish who gets which document?

A. Yes. The associated fees that are charged are -- a buyer fee would go to the buyer and the seller fee would go to the seller.

Q. And on one document, there's an S and

another document has a B at the top?
A. Yes.
Q. Does that indicate seller and buyer?
A. Yes.
Q. Now, Mr. Whitley appears to have signed these documents?
A. They're digitally signed.
Q. What about Mr. Ferrell, why isn't his signature on here?
A. It must -- they omitted at the time.
Q. Would Midlands Honda have gotten a copy --
A. Yes.
Q. -- of this document?
A. Yes.
Q. Are you aware of any complaints from Midlands Honda about selling this vehicle to Mr. Whitley?
A. No.
Q. How fast are cars sold when they're going across the block?
A. They vary. A vehicle may be on the block and under the auction's hammer from -- anywhere from 30 seconds to 3 or 4 minutes.
Q. Is there any -- while it's being sold on

the block, is there any opportunity to lift the car up, take a look underneath, check out the underside of the car and --

A. No.

Q. When a car is out in the parking lot waiting to be sold, is there any opportunity -- is there any way for a dealer to lift the car up and check underneath it and --

A. To lift it up, no.

Q. Do you have any documentation regarding ADESA's contact with Midlands in dealing with the sale of this vehicle to Mr. Whitley?

A. No.

Q. And when would Exhibit 1, the damage disclosure statement, have been given to him?

A. To the buyer?

Q. To Mr. Whitley, yes.

A. At the time that they would have paid for the vehicle, that's when the title is then released, with this attached to it, to the buyer.

Q. Okay. You didn't have the title. Is that correct?

A. Correct. It was sold TA.

Q. Title attached?

A. Correct.

Q. Would he have gotten the disclosure form when he received the receipt that is, I believe, Exhibit 54?

A. No.

Q. It would have come later?

A. It would have come when he got the title. This would be attached to the title.

Q. When a vehicle is being sold on -- or through the auction and there are no announcements about prior wreck damage, repair damage -- repairs, body work to the vehicle, reconstruction, the 25-percent -- more than 25-percent damage to the vehicle, when those are not made at the auction, is that a representation by the seller that those items do not exist?

MR. WALKER: Object to the form.

A. Do I answer that or --

Q. Yes.

A. Yes and no. Some of the items you listed are not required to be disclosed, some are.

Q. Okay. Which ones would be required to be disclosed?

A. Anything that is in the NAAA policy such as frame, unibody or structure damage. Body work, accident history, those are not requirements.

vehicle has been damaged more than 25 percent of its value, is a salvage vehicle, is a flood vehicle, is a recovered theft vehicle or has been reconstructed, is it -- is that a representation that those items do not exist?

MR. WALKER: Object to the form.

A. Again I would assume yes.

Q. Take a look at Exhibit 55.

A. Okay.

Q. Well, let me -- let me back up just a second and deal with 53 and 54 real quick. On the left-hand side of the page, it says auction lights?

A. Yes.

Q. And you have red light, as-is, and blue light, title attached, checked?

A. Correct.

Q. Underneath it, it says announcements.

A. Yes.

Q. Is there anything listed there?

A. No.

Q. If the vehicle had frame or unibody damage, been salvaged or reconstructed or was required to be disclosed pursuant to the damage disclosure statement, would that information have been under announcement?

A. Yes.
Q. And so with that section being blank, what does that indicate to you?
A. There were no announcements.
Q. And having looked at Plaintiff's Exhibits 2 through 10 and knowing what you know today, should there have been announcements listed?
A. Again I would have to see the repair bills to actually calculate the math, but there appears to be some serious damage on that vehicle.
Q. Should there be announcements on 50 -- I don't know the numbers, 53, 54?
A. Again I'd have to see the actual math.
Q. Okay. Let me show you what's been marked as Exhibit No. 11, which is the estimate for the repairs to the 2003 Honda Civic that we've been talking about.
A. Were these the actual repairs or the estimate for it?
Q. That's the estimate.
A. Okay. It states 10,388. From that, I would assume this is more than 25-percent of the value of the vehicle at the time of sale.
Q. So should there have been announcements on 53 and 54, Exhibits 53 and 54?

A. From that information, yes.

Q. Do -- well, let me finish up with 55. And this is apparently another screen shot from your computer?

A. Yes.

Q. And tell us what that shows us.

A. This is the title information tab has been clicked. And it will list the title number of the title turned in by the seller, the issue date that was on the title, the state from where the title's from. And then below it tracks our employees who have verified that it's a negotiable title, who actually transferred the title after the sale and then who released the title. And on here, it's noted the means by which it was released.

Q. Okay. So just so we're clear, on 4-23-2010. So the car was sold on April 2, 2010.

A. Uh-huh.

Q. And on April 23, 2010, what is Ms. Haney doing?

A. From this, it would appear that the title was received at the facility that day and that she checked the title into the computer.

Q. What does it mean, not checked?

A. Not checked is the initial status where

any employee can take a title in, meaning we have received the title but we're not saying it's negotiable at this time.

Q. Okay. And then, 4-23, about three minutes later, Ms. Haney did what based on this document?

A. From this, she would have reviewed the title to make sure it was a negotiable title and then transferred it to the new owner.

Q. Mr. Whitley?

A. Yes.

Q. Okay.

A. Which, in that time, is when the 181 would be completed with the title.

Q. And when you say transferred to Mr. Whitley, does that mean she signed it, the back of the title --

A. The ownership transfer.

Q. -- so that it could go over --

A. Yes.

Q. And then 4-26, Dorothy Roddey --

A. Uh-huh.

Q. -- what is she doing based on this?

A. She is mailing it out, according to this release, to USPS to the buyer.

Q. So she put it in the mail to Mr. Whitley?
A. Yes.
Q. Anything else go with the title other than the damage disclosure form?
A. Some customers ask for another sale contract specific to them. I wasn't familiar with Mr. Whitley's requests.
Q. Are you aware that Mr. Whitley later found out about the condition of this vehicle and complained to ADESA?
A. I was not aware of that, no.
Q. Okay. So you don't know what he said or what happened?
A. No.
Q. And as a result of this transaction, has ADESA told Midlands Honda that it can't sell cars at the ADESA Auto Auction anymore?
A. Not that I'm aware of, no.
Q. Has ADESA punished Midlands Honda in any way for not completing the damage disclosure statement properly?
A. No.
Q. Has ADESA been punished -- or excuse me, has ADESA punished Midlands Honda in any way for not telling potential buyers about prior wreck

damage to the Honda Civic or any other vehicle that it sold at the auction?

A. No.

Q. Does ADESA intend to punish Midlands Honda for not properly completing the damage disclosure statement or notifying potential bidders about damage to this -- in this sale?

A. ADESA doesn't punish the customers.

Q. Okay.

A. That's -- we don't do that.

Q. Well, you could keep them from selling cars at your auction, couldn't you?

A. Yes, could do that and that has not been done.

Q. Okay. Is there any intent to prevent Midlands Honda from selling cars at the auction?

A. No.

MR. MOSKOS: Excuse me. Can I get this turned off for a second?

THE VIDEOGRAPHER: It's off.

(A conference was held off the record.)

MR. MOSKOS: Again I'd move to introduce Exhibits 1, 45 through 55 and 56 through 63 into evidence. No further questions. Thank you.

EXAMINATION

an auctioneer and recording devices.

Q. Well, I'm just -- and I may have asked a really bad question. After the vehicle's gone through the lane and, for example here, didn't sell, is it parked outside the building?

A. Yes.

Q. While it's parked outside the building and didn't sell, can buyers come look at it?

A. Yes.

Q. And since it's not running through the lane there every 30 seconds to 3 minutes, a buyer can take all the time he or she wants to look at the car. Right?

A. I would assume so.

Q. I want to briefly talk about the arbitration system itself. This Exhibit 50, this is like more than ten pages. Right?

A. Yes.

Q. Single-spaced. So the auction's put a lot of thought into the arbitration policy. Right?

A. The association for the industry has, yes.

Q. Okay. And the rules are set up so that if the dealers have a dispute, the auction solves the problem. Right?

A. That is the intent.
Q. And it's up to whoever the aggrieved party is to come to the auction and say we want to arbitrate. Correct?
A. Yes.
Q. Are you aware of any request to arbitrate the sale of this vehicle through ADESA?
A. I'm not.
Q. We read the language about inspecting vehicles carefully. Does ADESA expect buyers to promptly examine the cars after they take possession?
A. It's a fair assumption that a buyer is going to look at what they just purchased.
Q. And if a buyer comes to ADESA and says I want to arbitrate, does ADESA conduct an arbitration?
A. ADESA will see if the issue presented is arbitrable per the policy.
Q. If it's arbitrable, does ADESA make arrangements to have an arbitration held?
A. That is the arbitration. It's not arbitration in the sense of Webster's definition. It's dispute resolution between the buyer and seller per the agreed policies.

Q. And whatever the resolution is that ADESA concludes is proper, that ends the dispute between the parties?

A. That is correct.

Q. And as a part of arbitration, could ADESA require that a seller repurchase a vehicle?

A. Yes.

Q. That's actually common, isn't it?

A. Yes.

Q. So it's not -- it's not rare for ADESA to have to conduct an arbitration between a buyer and a seller?

A. Correct.

Q. Is that done on a weekly basis?

A. Yes.

Q. Are you aware of the buyers in this case making any effort to take advantage of the arbitration process in a timely way at ADESA?

A. I'm not aware.

Q. The -- all the rules and terms that we've looked at here from ADESA, are they only intended to create and govern the right to arbitrate?

A. They are designed to protect both buyer and seller and ensure ethical practices.

Q. But the way they ensure that is creating

this arbitration process?

A. Correct.

Q. And that's why we have these rules, regulations, terms and conditions that you've looked at in this proceeding today?

A. Yes.

Q. The next thing I want to talk about is, for lack of a better word, what my Midlands Honda people did and did not know. You looked at Exhibit 48, a dealer acknowledgment form?

A. Uh-huh.

Q. And --

A. Yeah.

Q. You know, you're familiar with that form, aren't you?

A. Yes.

Q. We've looked at lots and lots of documents today. But Exhibit 48 is not signed by anybody from Midlands Honda, is it?

A. No, not this -- not this one.

Q. Okay. Well, you don't have one of these dealer acknowledgment forms signed by Midlands Honda here today, do you?

A. No, not here today.

Q. And if you had it or could have located

A. Yes. It says here 11-9-05.
Q. Okay.
A. These were the ADESA -- the ADESA rules, not the NAAA rules.
Q. So ADESA has its own rules in 2005?
A. It would appear from this, yes.
Q. Did ADESA, at some -- well, let's say in 2010, adopt the new rules?
A. ADESA did adopt the NAAA rules at a point somewhere between this date and this date, yes.
Q. Do you know when that was?
A. No.
Q. Do you know Defendant's Exhibit 1, how those rules were distributed to buyers and sellers?
A. They were available -- they were issued at registration and then all rules are always available on the dealer registration counter at the sale, at the auction.
Q. And that's a two-page --
A. Yes.
Q. -- set of rules? And this Exhibit 50, this is way more than ten pages. Right?
A. Absolutely.
Q. The sales contract we looked at, these Exhibits 53 and 54, neither of those are signed by

there are chronic problems, they're brought to your attention, aren't they?

A. Yes.

MR. WALKER: I don't have any more questions right now. Thanks.

MR. MOSKOS: I have a couple more for you please.

EXAMINATION

BY MR. MOSKOS:

Q. Mr. Walker talked to you about the auction rules, Exhibit 50 --

A. Yes, sir.

Q. -- dealing with the first page, item three, it says lot sales, outside sales. What is a lot sale?

A. A lot sale or an outside sale is a sale that is not conducted by the auctioneer and thus recorded at the block. It's a sale that's put together off the block.

Q. Okay. And in item D, if there aren't any announced conditions, there's nothing to verify, is there?

A. Under the policy, no.

Q. How many cars are sold in an average auction?

A. Anywhere from 600 to 1,000.

Q. And if a buyer of a car foresees the car that he might be interested in when it's on the block, you know, he may not have even been considering that car, but it comes up on the block and he says, hey, I might want to bid on that, is there really any opportunity for him to go over the vehicle before he starts bidding on the car?

A. You mean other than when it's available prior to the sale or when do you mean?

Q. Assume for a second a buyer comes to the auction and he says I'm looking for Toyotas and he goes around the lot like they do and checks out various cars.

A. Uh-huh.

Q. Okay. Is it true that the buyers have a list of cars that they can look at and try to figure out whether they want to buy before the auction starts?

A. Yes.

Q. So the auction starts and the cars start coming through anywhere from, like you said, 30 seconds to a couple of minutes on the block.

A. Yes.

Q. Assume for a second that a car comes up,

a buyer hadn't considered this particular car before the sale --

A. Okay.

Q. -- but he says, hey, the car looks pretty good, I want to bid on it. Is there any opportunity for that bidder to really go around this car and inspect it like he would before the sale? Is there that kind of time?

A. No. And it would depend at what point in the process the buyer discovered this vehicle he was curious about. So it would depend at what point in the process was it noticed as to how much time he had to look at it.

Q. If a buyer gets a car from the auction and discovers a problem with the car and it's outside the arbitration period, will ADESA arbitrate that case, that matter?

A. No.

Q. I'm sorry?

A. No.

Q. If a buyer comes to ADESA and says, hey, I bought this vehicle from the auction and I've got a problem with it but it's outside the arbitration time period, does ADESA keep anything in writing about the buyer complaining about the car?

A. No.

Q. So if Mr. Whitley came back to the auction after the arbitration period and complained, would there be any sort of writing for you to go back to, any sort of computer screen for you to look at to know whether he complained?

A. No.

Q. The rules that we've been dealing with here today, the arbitration rules, which are Exhibit 50, those -- do those supercede the terms, conditions, whatever it is that's Exhibit No. 1 that -- Defendants' Exhibit No. 1 that Mr. Clay Walker showed you just a minute ago?

A. They would have superceded a previous rule set, yes.

Q. Okay. Exhibit 50 supercedes any -- the rules --

A. From previous years, yes.

Q. Okay. Whose responsibility is it to get the information on the damage disclosure statement, is it the dealer's or the auction's?

A. Well, it's the auction's agent who is going to be recording it as provided by the selling representative.

Q. And who is supposed to provide the

information that goes -- who is responsible for providing the information that goes on Exhibit 1, is it the dealer or the auction?

A. The dealer.

Q. And if a dealer who's selling a car knows about prior damage and withholds that information from the auction or even worse misrepresents it to the auction, does ADESA consider that a mistake?

MR. WALKER: Object to the form.

A. We won't delve into that level of assigning blame I guess. We simply will look at was the complaint inside or outside policy. That would be the extent to which we would look at it.

MR. MOSKOS: No further questions. Thank you very much.

MR. WALKER: Thanks for your time. I don't have any other questions.

THE VIDEOGRAPHER: This concludes the deposition of ADESA Charlotte designee Joseph Guyer. The total number of tapes is two. The time on the monitor is 12:12 p.m. We're now off the record.

MR. MOSKOS: Well, not quite yet. Does he want to read and sign or look at the videotape or what does he want to do?

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CASE NO. 13-CP-40-0319

DANIEL O'SHIELDS AND ROGER W. WHITLEY
A PARTNERSHIP D/B/A O&W CARS,

Plaintiffs,

vs.

PSC AUTOMOTIVE GROUP D/B/A MIDLANDS HONDA,
NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendants.
_____/

30(b)(6) VIDEOTAPE DEPOSITION

OF

ADESA CHARLOTTE, LLC

CORPORATE DESIGNEE: JOSEPH RICHARD GUYER

* * * * *

Taken by Plaintiffs

Charlotte, North Carolina

July 28, 2015

* * * * *

Reported by: Mary L. Labonte, RPR

it, you would have it here today. Right?

A. I did not make an attempt to get it.

Q. Okay. But sitting here today, we don't have it?

A. Correct.

Q. And Exhibit 47, this personal guaranty, also do not have a signed one of those?

A. Not here.

Q. Do you know if you have a signed personal guaranty, Exhibit 47?

A. I believe so, yes.

Q. Well, I understand you think so. For example, we've got a sales contract we just looked at, not signed by the seller. Is it possible you do not have a personal guaranty from Midlands Honda?

A. It's extremely unlikely we don't have one.

Q. What if they refuse to sign one?

A. Then per our policies, they would not be allowed to conduct business.

Q. Okay. The -- these arbitration rules, Exhibit 50, that we looked at, at the very top it says January 2010. Right?

A. Uh-huh.

Q. Is that when these arbitration rules took effect?
A. Yes.
Q. And this is four months before the sale of this vehicle in April. Right?
A. Yes.
Q. So these were a new set of rules. Right?
A. Four months' worth, yes.
Q. And this appendix one that you discussed with Mr. Moskos, the chart, that didn't exist before January, did it?
A. I believe the matrix did exist in the previous rules.
Q. We don't have the previous rules here today, do we?
A. No, I do not.
MR. WALKER: Would you mark 1.
(Defendant Exhibit Number 1 was marked for identification.)
Q. I'm going to hand you what's been marked as Defendant's Exhibit 1. Do you recognize that document?
A. Yes.
Q. Are those the rules from about five years earlier?

State of South Carolina.,)) County of Richland.)	In the Court of Common Pleas of Columbia Case No.: 2013-CP-40-00319

Daniel O'Shields.,
et al.,

Plaintiff.,

-vs-

PSC Automotive.,
et al.,

Defendant.

Partial Transcript
Of Record

April 18-22, 2016
Columbia, South Carolina

B E F O R E:

The Honorable R. Ferrell Cothran, Judge, and a jury.

A P P E A R A N C E S:

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Wanda Nelson, CVR-M
Official Court Reporter
Sixteenth Judicial Circuit
To The Honorable John C. Hayes, III

I-N-D-E-X

E-X-A-M-I-N-A-T-I-O-N

WITNESS	BY:	PAGE NO.
Opening Statements		
	Mr. Moskos	P.58-70
	Mr. Walker	P.70-75
Kevin Ivey	Mr. Moskos	P.76-79
Charles Ecklund	Video/Audio Depo. . .	P.89
Joe Guyer	Video/Audio Depo. . .	P.114
Brent Ferrell	Mr. Moskos	P.120-175
	. . . . .	P.190-192
	Mr. Walker	P.182-190
Randy Threatt	Mr. Moskos	P.193-225
	. . . . .	P.229
	Mr. Walker	P.226-228
Brian Allen	Mr. Moskos	P.252-292
	. . . . .	P.297-298
	Mr. Walker	P.292-296
Greg Nalewaja	Mr. Moskos	P.299-332
	. . . . .	P.341-352
	. . . . .	P.662-681
	. . . . .	P.685-689
	Mr. Walker	P.332-341
	. . . . .	P.681-685
Roger Whitley	Mr. Moskos	P.360-402

I-N-D-E-X - CONTINUED

E-X-A-M-I-N-A-T-I-O-N

WITNESS	BY:	PAGE NO.
Roger Whitley	Mr. Moskos	P.431-432
	Mr. Walker	P.402-431
Closing Argument	Mr. Moskos	P.517-545
	. . . . .	P.560-567
	. . . . .	P.689-701
	Mr. Walker	P.545-560
	. . . . .	P.702-705
Charge to the jury		P.601-624
Recharge on Fraud/Unfair Trade Practices . . .		P.631-638
Recharge six points Fraud		P.653-654
Charge to the Jury		P.706-708
Verdicts		P.657-658
. . . . .		P.711-712
Court Reporter's Certificate Page		P.714

I-N-D-E-X - CONTINUED

E-X-H-I-B-I-T-S

NO.	DESCRIPTION	ID.	EVD.
Pl.1	Damage Disclosure Form . . .	P.52 . .	P.53
Pl.2-10	Photos	P.52 . .	P.53
Pl.11	Estimate	P.52 . .	P.53
Pl.12	Midland Honda '03 Civic Advertisement.		P.94
Pl.13	Midland Honda Buyer's Order (8-2-08) $12,901.00.		P.94
Pl.14	Midland Honda Buyer's Order (8-2-08) $15,031.00		P.94
Pl.15	Certified Pre-owned Vehicle Customer Info. (Ecklund)		P.94
Pl.16	WE OWE (Ecklund)		P.94
Pl.17	8-6-08 Ecklund Invoice		P.94
Pl.18	9-30-08 Ecklund Invoice.		P. 94
Pl.19	Buyer's Guide		P.94
Pl.20-21	Photos		P.94
Pl.22-42	20 8X10 Colored Photos		P.94
Pl.43	Affidavit & Notification of Sale of Vehicle		P.65
Pl.44	Power of Attorney.		P.65
Pl.45	ADESA Corp. Personal Guaranty.		P.626
Pl.46	ADESA Inc. POA		P.626

I-N-D-E-X - CONTINUED

E-X-H-I-B-I-T-S

NO.	DESCRIPTION	ID.	EVD.
Pl.47	ADESA Indemnity and Hold Harmless Agreement		P.626
Pl.48	None entered		
Pl.49	None entered		
Pl.50	ADESA Acknowledgment Form		P.626
Pl.51	ADESA Auction Terms and Conditions		P.626
Pl.52	'10 Arbitrated Rules		P.626
Pl.53	Vehicle Info '03 Honda Civic		P.626
Pl.54	Vehicle Info '03 Honda Civic		P.626
Pl.55	ADESA Sales Contract (S)		P.626
Pl.56	ADESA Sales Contract (B)		P.626
Pl.57	Vehicle Info printed 12/10/13 @ 09:55 am.		P.626
Pl.58	Google Map - ADESA Compound		P.626
Pl.59	Street view ADESA @ Gate 3		P.626
Pl.60-61	Photo/Street view		P.626
Pl.62	Google Map - Westinghouse Blvd		P.626
Pl.63	Google Map - Street view WHB		P.626
Pl.64	Google - Aerial View ADESA		P.626
Pl.65	Google - Aerial View ADESA		P.626
Pl.66	Midland Honda Repair Report		P.626

I-N-D-E-X - CONTINUED

E-X-H-I-B-I-T-S

NO.	DESCRIPTION	ID.	EVD.
Pl.67	'08 Car Fax		P.626
Pl.68	3/11/0 Car Fax		P.150
Pl.69	ADESA Corporation Acknow. Form		P.182
Pl.70	3/11/10 Handwritten Message		p.204
Pl.71	Photo		P.268
Pl.72	Photo		P.275
Pl.73-76	Photos		P.276
Pl.77-83	Photos		P.270
Pl.84-89	Photos		P.286
Pl.90	4/2/10 Ck. $6,960.00.		P.380
Pl.91	$550.00 Repair Bill	P.387	P.625
Pl.92	Bill of Sale	P.389	P.625
Pl.93	$10.00 Bill for Relay Switch.	P.391	P.625
Pl.94	Deal Recap		P.670
Pl.95	Deal Recap		P.670
Pl.96	Midland Honda '15 Financial	P.678	
Ct.1	Jury note @ 03:45 pm.		P.627
Ct.2	Jury note @ 05:20 pm.		P.645
Ct.3	Jury note @ 05:55 pm.		P.653
Ct.4	Jury note @ 11:15 am.		P.656

Court Reporter's Note: All Exhibits were filed with the Richland County Clerk of Court's Office

(COURT IN SESSION AT 11:49 AM/JURY VOIR DIRE/JURY STRUCK AT 12:38 PM.)

(COURT IN LUNCH RECESS AT 12:51 PM.)

(COURT BACK IN SESSION AT 02:20 PM.)

THE COURT: Okay. Who wants to go first?

MR. MOSKOS: At the Court's pleasure, your Honor.

THE COURT: Okay.

MR. MOSKOS: Or we'll do it whichever way you want.

THE COURT: It doesn't -- Whatever is easiest for you all. It doesn't matter to me.

MR. MOSKOS: Well, let me start with this, your Honor. I do have -- First of all, it's my understanding that Mr. Walker has provided you with some -- a transcripts of ---

THE COURT: Yes.

MR. MOSKOS: --- the transcript of Mr. Eckland's testimony.

THE COURT: Correct.

MR. MOSKOS: And I don't know -- He didn't provide me with a copy of it, so I'm not sure, exactly, which provisions he's talking about. I do have a copy of my trial. Provisions or designations that I wanted, they're done by page and line numbers of the deposition, as well as the positions on the videotape. There are actually three, and it's my understanding from the gentleman who has put the video together, dealing with the ADESA Auto Auction.

Well, I shouldn't say that. Basically, I told him what I wanted in, based on the video time that I had, and my secretary went back to confirm that all was in there, and there were a couple of seconds that were off. So, I just prepared an amended one that includes those exact times. But the page and line numbers of the deposition don't change.

THE COURT: Okay. And what -- I was provided this copy, at least -- and I may have missed it -- but everything that you wanted in was in yellow.

MR. WALKER: Your Honor, I -- what we did, my office, took his designations by line and page, and last -- middle of last week, we served our objections on him, and I'll just hand the Court.

THE COURT: Okay.

MR. WALKER: This has been served and filed. We start at the bottom of the page. These are the portions of the testimony we objected to, and what's not -- and what you got are the reasons.

THE COURT: Okay. And so, the first one I come on is on page twenty-one, lines fifteen through -- I'm sorry, twenty-two. And basically, those are the testimony of the mechanic in Chicago, and he's objecting that they're hearsay. And so --

MR. MOSKOS: Well, it -- I -- Technically, yes, I

would have to say it is hearsay. However, it is not being offered to show that the defendant knew that this car was wrecked. It's offering to -- it's being offered to show what Mr. Eckland's state of mind was, what he learned, why that he called these folks. He gets up under there. We're not offering the mechanic as any kind of expert.

First of all, it's not a Chicago mechanic, it's a -- we learned this in Alabama. Not that it makes any difference, but for accuracy purposes. And it just, you know, fills out what he learned, and it doesn't necessarily prove that the defendant knew anything. It just shows what he learned, and -- and explains his state of mind when he calls the defendant and wants his money back.

THE COURT: And I, you know, I understand that. I hesitate, his state of mind, necessarily, is an issue in this case. I mean, how that's relevant. It's clearly hearsay, and I don't think saying it is not offered to prove the truth of the matter asserted.

MR. WALKER: Your Honor --

THE COURT: It certainly is and it's gonna ring a bell, and how are you gonna un-ring it?

MR. WALKER: The first four sections of testimony all have the same problems. They're all hearsay. They are unfairly prejudicial. And the second line of the non-party is beyond irrelevant in this courtroom.

THE COURT: Right. And I agree, I think they are hearsay, and I can't find them coming in under any of the exceptions - you know.

MR. MOSKOS: So, your Honor is excluding -- I'm just trying to make sure I have the provisions right.

THE COURT: Okay. I'm excluding page twenty-one, line fifteen. And he's showing -- Page twenty-two, line eleven. Now, if you -- and clearly, any conversation I think he had or anything the mechanic told him is hearsay. Now, if you think there is something in there that is not told by the mechanic, and it does not -- is not hearsay, I'd be glad to listen.

So, basically, his objections run to the top of page twenty-three, line one and two.

MR. MOSKOS: Well, part of the dilemma, your Honor, is, you know, he gets a call, and he's supposed to go down there. That doesn't necessarily is in no way prejudicial.

MR. WALKER: Your Honor, it just doesn't prove the fact in this case, or make anything more or less -- That's the standard of proof of admissibility.

THE COURT: But he doesn't have any --

MR. MOSKOS: And like I said in chambers, your Honor, you know, we've had -- And I have a copy of my deposition notice. We noticed the deposition for trial, and the defendant did not make those -- well, he made some

objections, but then didn't continue to object throughout the testimony to allow us to correct it and we would say that those objection are waived.

THE COURT: Well, under *Rule 32(b)*, you don't think it applies? And it says, "Subject to the provisions of *Rule 28(b)* and *subdivision (d)(3)* of this rule, objection may be made at the trial or a hearing ... receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying."

You don't think *Rule 32(B)* applies here?

MR. WALKER: Your Honor --

THE COURT: Yeah.

MR. MOSKOS: I don't think it applies, your Honor, because this talks about a witness being actually present and testifying. If Mr. Eckland is currently in Illinois, or at least as far as I know, that's where the deposition was taken, and he is not going to be here to testify, I -- there's no -- we'd have no subpoena power over him. And that's the only reason that we were able to -- the only reason we have him by video is because we can't get him here.

He works for the VA, and, you know, he's subject to being at the whims of the military. And as your Honor knows, they don't allow people just to leave.

THE COURT: I understand that that qualifies getting to use a deposition, but you don't think it, you know, *Rule 32 is* dealing with using a deposition in court. That's what *32* deals with and it doesn't have anything to do with the availability of the witness does it? That -- that goes to whether you can take a deposition. He's not challenging using the deposition. I mean, he -- he's clearly out of state and you don't have subpoena power. You got a right to go to depose him. But my understanding of *Rule 32*, once you depose him, he can either object there, or he can object in court. You know, if you know something different, or know a rule different than that, I'll be glad to listen.

MR. MOSKOS: I don't, your Honor.

THE COURT: Okay. So, I think we can do it. Now. So, and you all, the next thing that I have that he's objected to is on page thirty-three.

MR. MOSKOS: I'm sorry, your Honor. I just want to be clear. Your talking about his first entry? Twenty-one, fifteen; through twenty-two, eleven?

THE COURT: Right.

MR. MOSKOS:. And twenty-two, sixteen through twenty-three, two?

THE COURT: And we can -- and if you want to go back to twenty-two, sixteen, but that's the same hearsay, isn't

it? "So, I went back to the car that was up on the rack", and he said what we have here, that's one of the mechanics explaining to him what he sees, and that's clearly hearsay, isn't it?

MR. MOSKOS: I just want to make sure that that's what we're ---

THE COURT: Right.

MR. MOSKOS: --- that that's out.

THE COURT: Right. And then, we pick back up on line three of the next page, and he's -- and that's fine. He has no objections to question four and the answer on six. And that -- and the rest of it -- if --

MR. MOSKOS: Yes, sir. Well, my next -- the object -- the next objection I have is on page thirty-three.

THE COURT: Right. And so, I'll go to Thirty-three and deal with that. Where do you want to -- you want to deal with page thirty-three, sixteen? You want to argue? Technically, he's not -- that's not -- I mean, he's not saying what the mechanic told him at that point, is he?

MR. MOSKOS: I don't think so, your Honor.

THE COURT: But then, he -- "*the repairman is showing you all of these problems, what are you thinking?*

Objection to the form of the question

What are you thinking as you are looking at all of the -- these various parts of the car?

I'm frustrated, I'm upset, I'm mad. He told me that" -- and what he told me is clearly hearsay. Okay. And so, line twenty-four is hearsay.

MR. WALKER: Your Honor, our problem with this larger section is, once again, the state of mind of somebody in Alabama, looking at this car, who is not a party, doesn't prove anything, and is nothing but prejudicial to us. And the prejudice grossly outweighs any probative value, because the probative value is zero.

MR. MOSKOS: There's no prejudice here. What's the prejudice?

MR. WALKER: You asked --

MR. MOSKOS: Just exactly as you said -- I mean, they already say they -- what Mr. Walker was saying in the -- in chambers was, we already knew it was wrecked. So, you know, exclude everything. Well, if he's -- if he's saying that they already knew it, what's the prejudice in Mr. Eckland saying that he found out that the car was wrecked? Had been wrecked and welded together.

THE COURT: Not -- I understand. But him finding out the car was wrecked is different than what he's saying the mechanic told him, and how he felt.

MR. WALKER: How he felt --

THE COURT: And how he felt, how is that relevant, or I mean, if this was a situation where it was a *Tort* and you

know, his mental state was an issue, and pain and suffering, or --

MR. MOSKOS: One of the defenses that Mr. Walker is now raising is that his client did the right thing. My expectation is that their witness will testify that, based on his review of the file, the prior general manager did the right thing. He found out that the car was wrecked. He went out and he got this car back, and put this guy -- put Mr. Eckland in another car. Mr. Eckland was happy. Mr. Eckland was so happy that he got a good, decent car, and -- and we did the right thing. And then, we sold it at the auction, and we just simply didn't know what the rules were. It was an accident.

THE COURT: But Mr. Eckland is not a party.

MR. MOSKOS: No, sir.

THE COURT: And now, but I mean at this point thought it doesn't appear to be relevant. It may become relevant if that door gets opened in trial. I mean, you're asking me to rule on something at this point -- if they take the stand and claim exactly what you said and everybody was happy, then it may become relevant. If they claim that Mr. Eckland was happy when he left, and they did the right thing by him, then they may open the door, and this may become relevant. But short of that, at this point, he's not a party; and whether he was happy or unhappy doesn't

seem to be relevant in this issue.

MR. MOSKOS: Yes, sir.

THE COURT: Okay.

MR. MOSKOS: And that's thirty-three, sixteen?

THE COURT: Right. And you've got -- Thirty-two, Sixteen is what I just dealt with.

MR. MOSKOS: Yes, sir.

THE COURT: Now, we're on thirty-three, nine.

MR. MOSKOS: Thirty-four, nine, your Honor.

THE COURT: I'm sorry. Yeah, I'm sorry, you're right. How is that not saying the hearsay issue. Is that different than anything else we've been dealing with?

MR. MOSKOS: Well, it just simply goes to the -- to the knowledge that he had so that he could transfer that to Mr. Threatt, the General Manager.

THE COURT: Well, what he trans -- okay. What he transfers to Threatt may be different than this. I mean, I don't know that -- he says "somebody". I mean, it's still hearsay. I mean, that's -- that's --

MR. MOSKOS: Yes, sir.

THE COURT: Okay. So, now we're at thirty-five, thirteen.

MR. MOSKOS: Again, it goes to his concerns about this car, and you know, he's -- he's not happy about the car, and he's got to get it -- get rid of it, somehow. That's

--

THE COURT: I understand, but that's not relevant. And since he's not a party unless -- and it may become relevant, but it's -- his, you know, at this point, it doesn't seem to be relevant. But having said that, you know, it's hard to rule on relevancy in a box.

MR. MOSKOS: Yes, sir.

THE COURT: You know, at the trial proceeding but at least at this point, it doesn't -- his feelings or what his concerns were weren't necessarily relevant since he's not a party and he's not claiming any damages as a result of this.

MR. MOSKOS: Yes, sir.

THE COURT: If he was claiming damages, then -- then his state of mind may be important. Okay.

Now, we're at thirty-eight.

MR. MOSKOS: Again, your Honor, I think this is very important because my expectation, as I've stated, is that the defendants -- Defense is, you know, we're good -- we're a good, upstanding company; we work hard to make, you know, have satisfied customers; we would never do this intentionally, and we came in and when we found out about this problem, it was a mistake and so, therefore, we fixed the mistake by taking care of this client, and he was happy, and he left with a car; and you know, we've never

heard anything back from him. And this refutes that defense.

MR. WALKER: Your Honor, our -- the interaction between Mr. Eckland and us doesn't prove anything, and we'll, I suspect, never mention it. Unless you let it in now. Now, I think his feelings about safety and everything else, completely irrelevant.

THE COURT: And how is that -- how is it relevant in this -- in a cause of action, when he wasn't a party? I mean.

MR. MOSKOS: Well, the way I see thirty-eight, twenty -- okay. So, this -- the one we're talking about now is at thirty-eight, twenty-one.

THE COURT: Right.

MR. MOSKOS: I'm assuming that's, "so, I really didn't want to have anything to do with this." That's -- that needs to be excluded, that's what we're talking about?

THE COURT: That's my understanding. Is that yours, Mr. Walker?

MR. WALKER: Your Honor, you have my sole copy of the transcript, so I'm --

THE COURT: I'm sorry. Here.

MR. WALKER: I apologize for being defenseless.

THE COURT: Not a problem. You want to look at -- come look at this, because what it appears is what you want

to block out so, I really -- you want to start right there. So, the first part of that paragraph you don't have a problem with?

MR. WALKER: Well, I would have to say, that was an error on the part of my office to not also move to exclude someone testifying about how he's upset and doesn't trust us, because that's irrelevant.

MR. MOSKOS: It goes -- it goes to -- well.

MR. WALKER: And this is going to continue on, where it starts talking with the salesman.

THE COURT: I understand but you've blocked all that out. It's just that first paragraph here.

MR. WALKER: I can only assume that was a typographical error in our place and it should have been line sixteen and not line twenty-one where it started. I apologize, your Honor.

THE COURT: Okay. Well, in -- you know, the fact that you've taken this deposition and in fact that he bought the vehicle and it wasn't wrecked, and he obviously wasn't satisfied, and he didn't trust them any more. I mean, when you go buy a car from a dealership and it's been wrecked, and you didn't know about it, it's obvious you didn't trust them any more, are you concerned but dealt with another one?

MR. MOSKOS: Well, and it also goes to -- as I said

before, it goes to the pattern of behavior of the defendant. It shows that, you know, their -- they do the same thing. They misrepresent a car, they sell it. When they get caught, they say, oh, come on in, we'll take care of it, and they make some deal that's beneficial to themselves, and -- But it's not beneficial to the buyer. They've -- They did that with Mr. Ecklund, and they just totally ignored Mr. Whitley. So, you know, I believe that it just shows that pattern and practice of how they're dealing with wrecked cars.

THE COURT: Okay. And -- Of course I haven't read off the pleadings, but at this point, I think you've got him at least in part that he was dissatisfied in the fact that he bought a car, but I don't think the rest is relevant. It may become, and that door may be open. And during the trial, if it comes out some pattern and they claim there is none, then you may go back and open that door.

MR. MOSKOS: Yes, sir.

THE COURT: So, but the rest of this I don't think it's relevant in this case, his interaction. So, that carries us down to page forty?

MR. MOSKOS: Your Honor, just to be clear, because the document that I received says thirty-eight. Page thirty-eight, line thirty-one. Is that where that exclusion starts?

THE COURT: Yes.

MR. WALKER: And your Honor --

THE COURT: Thirty-nine --

MR. WALKER: May I approach the Court about amending it to start at line sixteen? That was a scribbler's error on our part, and that would exclude this, I don't trust 'em, yada, yada.

THE COURT: You know the fact that this whole -- If you go back up to the top part of that page, he's got a wrecked car and he's meeting the salesman trying to correct it out there and he's saying, you know, I don't trust them any more and I don't -- Because they sold me a wrecked car without telling me about it. I'll -- because -- I'll let that in, because it basically deals with the top part. It's the same, and it's just an expression of how he feels about it, so. We'll start sixteen, seventeen, eighteen, nineteen, twenty, are fine. Let's just start there with twenty-one. Okay? All right.

And so, and in the Jag situation, that's hearsay, on page forty, right?

MR. WALKER: That's our position, your Honor.

MR. MOSKOS: So, is that whole section dealing with, or starting with thirty-nine, line four?

THE COURT: Yes.

MR. MOSKOS: Or is it some portion thereof?

THE COURT: Well, he's got the whole thing struck out here.

MR. MOSKOS: Yes, sir.

THE COURT: I'm going to -- I don't know if any interaction is irrelevant in this case. You've got in the part of the trust -- It's a trust issue in selling a wrecked car. Now he's horse trading with them, I don't know how it's relevant in this issue. Okay. And I --

MR. MOSKOS: Again, your Honor, part of the defense is going to be, they did the right thing. He was happy, he was satisfied. I understand about the part, I was advised, I get that line.

THE COURT: And the answer.

MR. MOSKOS: Yes, sir.

THE COURT: Now, number fifteen, what did you decide? Why isn't fifteen -- Okay. Line -- On page forty, line fifteen, the question and answer, what's your objection to that, Mr. Walker?

MR. WALKER: Once again, I apologize.

THE COURT: I'm sorry. Why isn't this okay? I understand the top part about their conversation with Jag and advice. That doesn't come in. But the fact that he decides to cut his ties and move on.

MR. WALKER: I don't see how he can consult a lawyer is relevant to anything.

THE COURT: It is, but that -- what I'm asking about is limited about lawyers. None of line fifteen and below doesn't have anything about lawyers or did I miss that?

MR. WALKER: Only by referring to, without talking about what they were telling you, what was your decision. So, but for referring to a discussion he had ---

THE COURT: Yeah.

MR. WALKER: --- with people is fairly innocuous.

MR. MOSKOS: Well, it's only innocuous because you got to cut out something else but if that's his decision. What did you decide to do?

MR. WALKER: And once again, your Honor, what's that relevant to in this case?

THE COURT: I know and -- I don't know.

MR. WALKER: And for the jury to hear some other consumer moaning about dealing with a car dealer about something that's completely irrelevant, hurts my case. So, you've got something that's not probative of anything but prejudicial to me.

MR. MOSKOS: Is --

MR. WALKER: If you do that balance, there -- it's --

THE COURT: It does. The answer is okay, in my opinion. The question's got the problem. 'They are telling you' that refers back to Jag on fifteen.

MR. MOSKOS: Okay. Well, I can start at line

seventeen, "what was the decision that you made in regards in what to do in regards to your Civic? Just leave it out?

MR. WALKER: And your Honor, the first thing we say to object is irrelevant.

THE COURT: The fact that his whole testimony is -- I understand, but the argument is his whole testimony could be irrelevant. We've let all the rest of this in. It just simply said, well I decided because of this. I cut my losses. That's probably okay, based on -- you know, I understand the argument that maybe his whole testimony should be irrelevant, but if you start the question, what was the decision that you made in regard to what to do in regard to your Civic, start on line seventeen at the comma, that's probably okay. You'll have his answer. Okay.

MR. MOSKOS: Yes, sir.

THE COURT: And line -- page forty-three is the next objection. And you want -- how is that -- I understand. How is that relevant to this situation?

MR. MOSKOS: Well, your Honor, one of the things my client has to do is show damages, and it shows that, you know, it's an additional part of what's in the marketplace. He says he went and bought it, it's basically worthless. I think that he is -- the prior owner of the vehicle could testify to its value, and whether or not he would -- he would purchase this vehicle. It's, you know, based on what

he knew. It was dangerous. It was, you know, he'd have to disclose it, nobody would want to buy it, and it just goes to the --

THE COURT: I may -- A 2000 Honda Accord, is he telling about the replacement car there, or the car that was cut in half? I took that as that was the replacement car.

MR. MOSKOS: No. The 2003 -- Well, first of all, I'm talking about on page forty-four.

THE COURT: All right. I was talking about on page forty-three.

MR. MOSKOS: Okay. Oh, you're talking about up through line twelve. I'm sorry.

THE COURT: Yeah. I was really all the way up there on line three, it says objection. He starts --

MR. MOSKOS: What did you tell Mr. Ross?

THE COURT: Yeah.

MR. MOSKOS: It's the same --

THE COURT: Yeah.

MR. MOSKOS: It's the same conversation that we're talking about, your Honor.

THE COURT: So --

MR. MOSKOS: The same issues.

THE COURT: Right. But he's talking about another car besides the one you're suing over, right?

MR. MOSKOS: Yes, sir. They would not given back his money. They forced him into trading ---

THE COURT: Right.

MR. MOSKOS: --- and they traded him into a 2000 Accord.

THE COURT: Right. So, in fact, what his opinion is about a 2000 Accord doesn't have anything to do with this case because it's not your car, right?

MR. MOSKOS: Correct.

THE COURT: So, --

MR. MOSKOS: Bu it just -- it simply goes -- It goes to dealing with the dealership.

THE COURT: I understand. So, how does that prove damages on your end of it?

MR. MOSKOS: Well, that doesn't.

THE COURT: Okay.

MR. MOSKOS: On forty-three, I guess three through twelve, that's not what I was referencing. If you take a look at the rest of that objection, Mr. Walker has also objected to forty-three, line thirteen through forty-eight, line eight. And this is where he looks at the estimate from the insurance company and says, if I'd known that, I wouldn't have bought the car. That goes to the damages section.

MR. WALKER: Your Honor, this is a fight between car

dealers who value cars all the time. And the notion that some consumer's spilling of his upset with the car dealer is going to be proof of damages, I would say, is at most tangential. You know, the fellow who is sitting over here, Mr. Whitley, he's bought and sold cars, and he's testified in his deposition he appraises them day in and day out, and he's testified what he thinks it's worth.

MR. MOSKOS: And we could, you know, we could trot people in here all day and say, you know, it's not worth anything. What we have here -- First of all, Mr. Ecklund is not talking about upset here. He's talking about, in essence, the value of the vehicle, and that, to a retail consumer, this car doesn't have any value. And that obviously plays into a car dealer's consideration of whether or not to buy this vehicle. If nobody's going to buy it, why should a dealer buy it and try to sell something that you can't sell? And it goes -- it plays into the damages portion of our case.

THE COURT: Let me -- what is -- I don't think I've got it attached -- what is Exhibit, on line fifteen, what is Exhibit Forty-three and Forty-four? Are they exhibits that both sides agreed will come into evidence, or is there an objection to those exhibits coming in? Because it --

MR. MOSKOS: Well no. I'm not -- I'm not sure if Mr. Walker is going to object. I'm not --

THE COURT: And Exhibit Eleven. Because if those exhibits don't come in, the question's not going to make any sense..

MR. MOSKOS: Wait a minute.

THE COURT: Now I know I have -- Mr. Walker, I have your document. Are they attached to this?

MR. WALKER: No, sir.

THE COURT: Okay. Are you going to have any objection to Exhibits Forty-three, Forty-four, and 11?

MR. WALKER: I need to see what they are, your Honor.

THE COURT: Okay.

MR. MOSKOS: I'm getting --

THE COURT: Okay. I'm sorry, I'll give y'all a minute.

MR. MOSKOS: Forty-three, your Honor, is an affidavit, a Notification of Sale of Motor Vehicle from Charles Ecklund to Midlands Honda, wherein he sells the Civic back to Midlands Honda. So, this is the documentation and the power of attorney signed by Mr. Ecklund to transfer the vehicle back to Midlands Honda.

THE COURT: Do you have any objection to that, Mr. Walker?

MR. WALKER: I -- They sold the car. I don't see the relevance of these documents.

THE COURT: So, your only objection though is the

relevant part?

MR. WALKER: Yes, sir.

THE COURT: What about Forty-four? What's Forty-four?

MR. MOSKOS: Forty-four is the Power of Attorney used by the dealership.

THE COURT: Okay.

MR. MOSKOS: To transfer the vehicle.

THE COURT: And what Eleven?

MR. MOSKOS: Eleven is the Nationwide estimate for the repairs from the initial wreck in 2004, showing the extent of the damage.

THE COURT: Okay. Do you have any objection to that?

MR. WALKER: Your Honor, I think it's cumulative, and we had -- we had ad -- we admit that this car had been in a bad wreck. It's two cars welded together.

MR. MOSKOS: The jury should have a right to know how badly this car was damaged, your Honor.

THE COURT: Okay.

MR. MOSKOS: I --

THE COURT: I agree. I'll let it in. So --

MR. MOSKOS: So, he takes a look at the -- he looks at the repair estimate prepared on behalf of Nationwide, and says, if I'd known that, ten thousand dollars' worth of damage, I wouldn't have bought it.

THE COURT: Okay. All right. I'll let that in.

So, the next issue is --

MR. MOSKOS: I have an objection to Mr. Walker's counter-designations, your Honor. The expectation is -- this starts on page forty-four, line eleven, through forty-five, line twenty-two.

THE COURT: Okay. Now, tell me about yours.

MR. MOSKOS: Mr. Walker then, at this point, asks if the car ran well, if it was good, if he had any problems with it. Basically, it's a roundabout way of trying to get out expert testimony on the quality of this car and how good it was, and it's really not a dangerous car. Nobody ever had any problems with it, so it would never cause anybody any concern. And I just think that that's improper and should not be allowed.

MR. WALKER: And he just stood here and wanted to argue about the value of the vehicle; if it ran well. I think at some point in his deposition, the guys says it was a fabulous car. And what's good for the goose is good for the gander.

THE COURT: And he's giving an opinion is that he knew what was wrong with it, but he also, when you asked him the whole time he had it, how did it run and how did it act, I think is gonna be relevant.

MR. MOSKOS: Yes, sir.

THE COURT: In light of, you know, if it's not --

unless he's alluded to it in his own deposition. Okay?

MR. MOSKOS: Yes, sir.

THE COURT: All right. What's next? Any others?

MR. WALKER: With that deposition, we're done.

THE COURT: Okay.

MR. MOSKOS: Yes, sir.

THE COURT: All right. So, now, --

MR. WALKER: Thank you, Judge.

THE COURT: Thank you. What is the next issue we need to deal with? I got the jury coming back at three thirty.

MR. WALKER: I know Mr. Moskos had filed a motion in limine of some sort.

MR. MOSKOS: Well, I do have a motion in limine, and there's also -- I don't think we're going to get to it today, but there's also the videotaped deposition of Mr. Guyer, and Mr. Walker has made a number of objections to that, also.

THE COURT: Okay.

MR. MOSKOS: So, depending on whether you want to go through that now, or --

THE COURT: I would much rather engage in some more substantive matters, if we can.

THE COURT: Okay.

THE COURT: And then get teed up.

THE COURT: Okay. There's enough that we really are

facing today that we gonna deal with. Now the jury is coming back in twenty-five minutes I'd like to deal with but we can start at three thirty and then we'll deal with it.

MR. WALKER: Your Honor, some of the issues we discussed in chambers, the issue of safety, it's our position on a motion in limine that the issue of the safety of the vehicle isn't relevant, shouldn't be mentioned. There's a breach of contract claim. There are auction rules that supposedly are the terms of this agreement. They don't mention safety of this vehicle at all. This vehicle was sold on a red light. The personnel at O and W, the plaintiff, they never communicated directly at all with us. There is no, that SOB told me on the telephone it was a safe car. We can -- There's no allegation we made a representation like that. This is an issue that is quite inflammatory, quite prejudicial.

More importantly, your Honor, the U.S. Supreme Court has said on issues like punitive damages, in a situation like this, that evidence is not admissible. They can only recover punitive damages for harm done to them. They don't have any personal injuries. They didn't have a wreck in the car and suffer enhanced damages because of the condition of this vehicle. This is a red herring that is designed to hurt my client but hurt them unfairly. No

question we botched knowing the auction rules, but this issue of safety is quite inflammatory and totally irrelevant on punitive damages, and not an element of any of their claims. There is no contract term in any of these rules that says a car sold under a red light, as-is, is represented by the seller to be safe.

THE COURT: Okay. Yes, sir.

MR. MOSKOS: Mr. Walker is trying to get in the economic loss rule without actually saying it. And as I said before, Judge Gee has already ruled on that issue. That we're not talking about trying to get -- We're not saying that there was a breach in the contract, and therefore we should be able to get exemplary damages.

What we're saying is, the defendant had a duty, and I am more than happy to provide you with a copy of the auction rules, and I have them for you, already. And frankly, there's a matrix, an arbitration matrix, that says -- it says "disclosure required red light." Okay? So, I don't know if your Honor has ever been to an auction, but they've got these various lights standing up behind an auctioneer, green light, yellow light, red light, and what Mr. Walker is saying is, all you got to do is have the red light on, and you can sell whatever, and you don't make -- you don't have to make any representations. That's not true. The auction specifically says if there's any frame

or unibody damage, and this car was cut in half, that's -- and this is a unibody car.

MR. WALKER: It doesn't say safety.

THE COURT: And I understand that. Go ahead.

MR. MOSKOS: Existing, altered, or repaired. There's an -- let's see -- Any state-required damage disclosures. And then, salvage or reconstructed, theft recovery, stolen vehicles, including history. While the word is -- While the word safety may not be put in here, the bottom line is, reconstructing these cars improperly can create safety issues. Everybody knows that, and the -- to say, oh, gee, the auction rules don't say you have to announce frame damage because of a safety issue is kind of ludicrous.

And that we have an expert who is going to come and testify that this car is unsafe, it's dangerous, and it shouldn't be on the road. It goes -- I -- it stuns me to say that, in a fraud claim, in an unfair trade practice claim, that a condition of the car -- you're basically hiding the truth from the jury if you say you can't say safety in the courtroom because it's cut in half it is unsafe, it's dangerous. Mr. Walker knows that's a crucial part of the case, and like I said, he's trying to take the wind out of the sails of this case as much as he can, and I understand that.

But at the end of the day, what was done is

horrendous, and that's based on South Carolina law. South Carolina court, in the Supreme Court, in *Stokes v Austin*, found that selling a wrecked car, a previously-wrecked car, without disclosure is reprehensible. And here, what you have is not just simply a wrecked car, you've got two wrecked cars, cut and welded together, that aren't to Honda specification. It's a dangerous vehicle, not only to the occupants of the car, but the people on the street; because if this car comes apart on the road, lots of people are getting hurt. And to simply say, oh, gee, this is a simple contract case and safety has no part in it is ludicrous.

THE COURT: Yes, sir.

MR. WALKER: Reprehensibility is punitive damages, and the U.S. Supreme Court clearly has said you can only look at harm to O and W Used Cars. There is no personal injury of any sort alleged. We've talked about the auction rules. He's held them up for you. They do not show the seller promising anything about safety, period. It's not an element of the claim. It is something incredibly -- you can tell by the passion in his voice, the prejudice drips from his lips when he talks about this.

MR. MOSKOS: And he's scared, very scared of this case, and that's why he's trying to keep it out. And he ought to and the dealership should be. They should be ashamed for selling this car. And it's not just simply the

fact that this car could hurt a lot of people, you also got -- you also have Mr. Whitley, who's selling this car. These -- he had to go and explain to his customer that he sold them a clipped car, a dangerous car.

Now, I don't think those folks just went home and forgot that they bought a car. I think they talked to other people. And when that starts happening, now you're talking about damaging Mr. Whitley's reputation. That's very important. It all goes into -- you know, to say safety -- like I -- I don't know how to say it any other way. Safety, in dealing with this car, is very important, and it needs to be -- the jury needs to know about it. It's simple.

MR. WALKER: Your Honor, Mr. Whitley's reputation is not an element of damage, and I've spent a good bit of today fending off the pushing of the envelop on the evidence in this case. That's what we've spent much of the day doing. And this is Exhibit A in that effort, and I would urge the Court to exclude it.

THE COURT: Okay. The -- You got a copy of any of those cases y'all talked about?

MR. MOSKOS: Well, you talking about *Stokes versus Austin*? I don't have it with me. I mean, it's a South Carolina case, but I -- 2010. I don't have it with me.

MR. WALKER: Let me see.

THE COURT: Okay. That's not -- And I'm familiar with that case. I need to read it again after all I'm from Manning.

MR. MOSKOS: Well, you have to read it -- read two of them, because they had to come back and -- and do a second opinion.

MR. WALKER: And your Honor, I apologize for not having copies. They are cited.

THE COURT: Can we -- And I understand that's an issue in this case, and that -- and I need to read these cases and think about it. I mean, my first blush is, they had a right to testify about the car, this particular car, and its condition, you know. Now, general safety on the roads and all this, I don't, you know, as far -- how far the envelop goes, I don't know yet. But the --

MR. MOSKOS: They had the opportunity -- they've inspected this car. They had their expert inspect it. So, if, you know, it's a question -- the information is admissible. Now, it goes to -- what he's talking about goes to the weight of the evidence that the jury wants to give it. If they want to put somebody up who's going to say it's a safe car, obviously they have that right.

THE COURT: All right. Is there a situation where we can start this, and you all can do opening statements rather than going there?

MR. WALKER: I certainly can.

MR. MOSKOS: I'm -- I -- I'm --

THE COURT: And I can stop. I mean, the reason I'm asking, clearly if it's a -- if it's a breach of contract case, then --

MR. MOSKOS: This isn't an ordinary breach of contract case.

THE COURT: That's what they told me it was. What do you think?

MR. MOSKOS: I think it's a fraud case. It's a clear fraud case, and it's an unfair trade practice case.

THE COURT: Okay. Well, assume this -- you've certainly got a right to testify about what you bought and its condition. Now, how far the safety issue goes as far as, you know, punitive damages and everybody else on the road -- because it wasn't a situation it was on the road and caused problems and caused any damages. It's just, you know. I don't know if you've got a right to talk about potential damages that it could cause, but you've certainly got a right to testify about what you bought and what condition it was in.

You know, at least that's what I'm thinking at this point. I need -- if you've got some other law to the contrary, I'll be glad to look at it, but you clearly got a right to testify to the condition of what you bought. Now,

the fact that it could have killed everybody on the road is another situation, because it didn't happen. You know, those damages never occurred. Right?

MR. MOSKOS: That is true. But the potential for harm is something that can be put before the jury.

THE COURT: To some degree. I mean, it --

MR. MOSKOS: And I have to applaud Mr. Walker. If you're thinking that this is simply a contract case, Mr. Walker has done an outstanding job of advocacy; because it is, to us, they disregarded North Carolina state law. There's a damage disclosure form that they were required to fill out. Everything is marked no. No reconstruction damage, hasn't been marked damage more than twenty-five percent of its value.

Number two, you have North Carolina common law, which North Carolina common law clearly says concealment of material items is fraudulent in North Carolina. And we have -- I don't think we've said this on the record, but this all happened in North Carolina, so substantively, we have to use North Carolina law.

THE COURT: And I am not familiar with North Carolina law at all. And our -- and I had -- You know, another problem I had, we didn't have any breach in anything. I mean, I had no idea what I was facing when I got here this morning. I hadn't had an opportunity to review any of

this.

MR. MOSKOS: Yes, sir. Well, I would've sent it to you, had I known you were going to be the judge, but with three judges, we -- I didn't have --

THE COURT: I know. This is not the case I was really assigned, and I got changed ten minutes before court this morning.

MR. MOSKOS: Yes, sir. But I have provided to your clerk a pretrial brief that sets out that law, and the law in North Carolina dealing with what is their Unfair Trade Practices Act. And, so you've got statutory law, you've got common law, and then you have the duties and responsibilities at the auction. The auction requires that under -- even under a red light sale, you have to disclose the three things that I told you about just a moment ago: unibody damage, state disclosure, anything required by the state disclosure laws, and one other thing. And so, failing to do so is a representation that those items do not exist.

Now, by failing to make the announcements as required, there are actually two impacts on Mr. Whitley. One is, he unknowingly bought this clipped car. So, now it's his problem he has to deal with. The second part is that the -- the auction has certain arbitration rules. If you buy a car, you have such a -- so much of a period to come back

and arbitrate the matter, and have the other, you know, possibly have the auction determine that the seller has to re-purchase the vehicle. By making the representations that it did, the defendant misled Mr. Whitley, and he thought the car was fine. There weren't any announcements. There wasn't anything on there about prior damage. He put the car out there and sold it. When he found out about it, obviously, -- Well there's a seven-day arbitration period that's in the auction rules, that the seven-day period had already passed, so, now, he was -- he was out those remedies, potential remedies.

And so, the defendant's actions of hiding these material terms greatly impacted Mr. Whitley. And you know, so it's -- it's -- it's a classic case of fraud, your Honor. And when you get to fraud, it's not a breach of contract. You're looking at more than just a contract. You're looking at the representations that occurred before the contract. That's what we're dealing with.

THE COURT: Okay. And I don't disagree with that. I mean, and those issues and what they didn't -- box they didn't check and what they didn't disclose clearly is relevant and admissible. And you know, you kind of asked me to rule on something, safety. How does --

MR. MOSKOS: I didn't ask you to rule on --

THE COURT: I understand that. And it's one of those

terms that, you know, you almost gonna have to bring up and object to. He's got a right to prove his case, based on what the pleadings are, and the fact that he can -- can't mention the word safe, I mean, you know, I - in certain circumstances, and you know, I -- in your opinion is the car safe? No, I don't think it's safe, that's probably admissible. I mean, I -- but you -- he may can go too far with it, but I don't know he's gone too far until he's does and then you have to object and see whether it's relevance has anything to do with this case.

MR. MOSKOS: And you know, my biggest concern, your Honor, is, we spent a lot of time today, I don't want to get up in my opening statement and say something, there be an objection, and then a request for a mistrial. I'm just trying to make sure I stay on the right side of the Court.

THE COURT: I understand that, but you probably -- the safest thing you can do and I don't want it -- and for sake of closing argument -- And you know, and -- because I don't know what to tell you until you, you know, it depends on -- You've clearly got a right to prove your case and you clearly it's a fraud situation, you clearly got the right to prove all that, you know. And, if you argue the same thing you just argued to me, I think you'd be fine. I mean, this is a situation -- You know, you got -- in fact, you can -- I don't have any objection to you mentioning the

word safety. It's just what, you know, the way you carry it. And if the whole time, you're talking about, you know, safety issues and potential wrecks and little children getting maimed on the highway and all that it may go too far. But talk about fraud and what you -- what happened and that's fine. Okay?

MR. MOSKOS: Yes, sir.

THE COURT: All right. We got six minutes before the jury is coming back. So, have we got any other issues that we need to deal with before then?

MR. WALKER: Your Honor, you mentioned in chambers, we would ask to bifurcate this proceeding. South Carolina law permits me to do this. North Carolina law permits me to do this.

THE COURT: And you have to meet -- I don't know any --

MR. MOSKOS: I think that's what the law says.

THE COURT: I agree.

MR. MOSKOS: I don't know how soon a motion needs to be made, and I do have a question about that. Can they just walk into the courtroom and say, oh, by the way, we want to make a motion, and that's it? I don't -- I don't know. They surely didn't make -- give me that notice ten days in advance.

THE COURT: I understand that, and I'll look at the

rule again. I don't know that they have to give -- The only other time I've had it it happened right at the same time so its been a while. I'll look at it again.

MR. MOSKOS: Yes, sir.

THE COURT: I do think you can make it right now.

MR. MOSKOS: Now, I do have a couple of things, your Honor. One, I would ask the Court to rule that the Defendant cannot present any expert testimony. They've not identified any experts. The people that I've spoken to have no expertise, and -- excuse me. The people that I have deposed, the general manager, the used car manager, and the current general manager of the dealership, have expressed that they don't have any expertise. They haven't looked at the car, don't remember the car, or whatever, and no expert has been identified. So, I want to make sure that nobody is up here saying, oh, it's a safe car, or whatever.

THE COURT: What's your position on that?

MR. WALKER: Your Honor, I haven't retained an expert. These -- Pretty much all these witnesses are in the car business. And to the extent some question gets asked about evaluating cars, how do you -- how do you evaluate vehicles, what training, yada, yada, that's for stuff these people do every day. So, I --

MR. MOSKOS: Well, evaluation is different than saying

this car is safe; or I've looked at it, and it's -- the weld is fine; in fact, the stronger than when it came from the manufacturer, or something like that.

THE COURT: And I assume that, you know, if he's telling me he doesn't have any expert and he's not planning on qualifying anybody as an expert, and there won't be any expert from that, you know, I'm not -- If a question gets asked that you don't think he's qualified, we'll have to deal with that question, and based on that common knowledge and experience.

MR. MOSKOS: Fair enough, your Honor.

THE COURT: Okay.

MR. MOSKOS: Second thing is, the defendant has produced its -- some dealer financial statements that show its net worth. Obviously, this goes to punitive damages. They have provided me with 2011, 2012, and 2013, pursuant to my request for production. Obviously, it's now '16, and I would like 2014 and 2015, and as the Court knows, they have a duty to supplement their discovery responses, and we would ask that we be provided with that information.

MR. COX: Your Honor, two problems very quickly. First, that's the nature of the motion to compel, which isn't before you. This is a motion in limine. But to respond to his point, we're happy to get it. I can't really have them with us right now, but before we get to

punitive damages, we can get it.

THE COURT: Okay.

MR. MOSKOS: And no problem.

MR. WALKER: And excuse me. We haven't communicated with the client, I don't know if '15 is final yet. But whatever is -- whatever is available and complete ---

THE COURT: Okay.

MR. WALKER: --- that's what we'll get.

THE COURT: Okay.

MR. WALKER: I just didn't want to over-promise to the --

THE COURT: Right. I understand .

MR. MOSKOS: And just so your Honor knows, every month the dealership has to send in to Honda certain financial information, and all I need is one of those. Has the net worth. So, you know, it shouldn't be hard to get one of those.

THE COURT: All right.

MR. MOSKOS: The next thing is collateral source, or payments. As we said in chambers, Nationwide -- or as I said in chambers, Nationwide used to be a party in this case. The defendant has not sued Nationwide. They're out. There is a confidential settlement dealing with Nationwide and the terms of that settlement, or resolution, actually, are confidential. They relate to issues only with

Nationwide. They do not relate to issues with Midlands Honda. And so, we don't want any reference to that as testimony to the jury.

THE COURT: What's y'all's position?

MR. COX: Your Honor, the only reason we believe that the payment made by Nationwide is relevant is because we have a right to set-off at the end of trial for whatever amount the alleged joint tort feasor has already paid towards these damages. And we do have a motion to compel depending on that.

THE COURT: Okay. But that's not anything the jury needs to know about?

MR. WALKER: Correct.

THE COURT: Okay.

MR. MOSKOS: One of the things that I really didn't think was an issue in other cases, but I had one lawyer make it a big deal. One of the issues that may come up before the Court later deals with attorneys' fees, because there is a statute in North Carolina that allows for attorneys' fees, and those are for the Court to decide, not the jury. The only reason we raise the issue of attorneys' fees, I had this lawyer come in and he said, this is only about -- or he wanted to say, this is only about attorneys' fees and the lawyer getting rich. And I want to make sure that there's no reference to the attorneys' fee issue, or

my motivation in bringing this case to the jury.

THE COURT: All right.

MR. WALKER: None of my witness outlines address attorneys' fees.

THE COURT: Okay.

MR. WALKER: Or my closing.

THE COURT: Okay.

MR. MOSKOS: In the interest of time, I think I can wait on the rest of these, your Honor.

THE COURT: Okay.

MR. MOSKOS: If there are -- There is another issue. We planned on bringing the car down for the jury to see. We would like to just bring that up to the Court, so that you can figure out when. I need a couple of things: one, when they might be able to see the car; number two, a location that's convenient, so that we can, at the proper time, have the car there. It's got to be brought down on a rollback, and so the jury can see it.

THE COURT: Okay.

MR. WALKER: When the time comes, I will object. The vehicle was sold six years ago, and I do a lot of automotive work; so does he. I just looked at a car that had been sitting outside for a year and a half. It's moldy. It looks nothing like it used to. And his -- his clients testifying when you get this car up on a lift and

look under it, it's obvious. They sent me dozens of pictures. They sent me fifty more Friday evening. So, the jury doesn't need to see the car. It's inconvenient. It's, I suspect, going to be unduly prejudicial, and it's totally unnecessary. This is not a subtle, there's a little difference in the paint that you really need to be there to see. These are welds like, this big, and this -- it's just overkill. And when --

THE COURT: Okay. And we'll deal with that.

MR. MOSKOS: Yes, sir.

THE COURT: At the time I'll look at the pictures.

Y'all -- I assume somebody's going to testify about who welded it?

MR. MOSKOS: About who welded it?

THE COURT: Yeah.

MR. MOSKOS: No. We don't know who welded it.

THE COURT: Okay. I can look at the welds and tell. I do a lot of welding. Okay.

MR. MOSKOS: Yes, sir.

THE COURT: All right. We still lost a juror?

THE BAILIFF: No, sir, We've got them all.

THE COURT: So, she came back?

THE BAILIFF: Oh, no. She did come back.

THE COURT: We lost one of the jurors over lunch. She went shopping they tell me, so, we're down to twelve.

MR. MOSKOS: She went down to what?

THE COURT: We're down to twelve jurors now. And we had to put the alternate. We've lost Number Ninety is what they're telling me. All right. Number Ninety is Number ten on the list, Shamika Greene.

MR. MOSKOS: Okay. I thought maybe we done with the jury.

THE COURT: She didn't come back. She got sick, went to the doctor. That's what they're telling me. So now, we're down to twelve. It's amazing how often it happens to me. That's why I told them to come back. I had one county in my circuit, they never come back. And when they have the craziest excuses, she's gonna miss her stories. In the afternoon, she can work in the morning, but she can't come to court in the afternoon, her stories are on. She wasn't coming.

MR. WALKER: That's -- that is a new one on me.

THE COURT: Okay.

JAMIE FLYNN: Your Honor, may I ask you a question?

THE COURT: Certainly.

JAMIE FLYNN: My name is Jamie Flynn. I'm with Goodman, McGuffy, Lindsay, and Johnson. We represented Nationwide. They have subpoenaed the Nationwide witness who I have on standby. I'm just trying, for housekeeping purposes, to see if we think we'll reach him today or not.

THE COURT: Is that -- you're the first witness?

MR. MOSKOS: He's my first witness, your Honor.

JAMIE FLYNN: And I will interject, your Honor, that, if at all possible, if he's going to need to testify, we would like for it to be today.

THE COURT: Okay. And I'll deal with -- Depends on how long they do in the opening. If they do -- you know, if they take two hours each in opening, we won't get to him today. You know, if they take, you know, a reasonable amount of time -- like I said, when I finished law school, the adult attention span was nineteen minutes. Now, they tell me it's eight minutes, and some people say eight seconds, so. But you know, they can talk as long as they want to, but after nineteen minutes, nobody's going to pay them any attention. That's just my experience in life. You know, my preacher, after twenty minutes everybody's looking at the clock. They got to get to the main restaurant before the Baptists get there, so, whatever. And it will be today, unless they take a real long opening.

JAMIE FLYNN: Thank you, your Honor.

THE COURT: Okay.

MR. MOSKOS: Just so I'm clear, your Honor, that -- going back to the jury, that means Mr. Johnson is now on the jury?

THE COURT: That's correct. Yes, sir. Okay. You

need a break?

MADAM COURT REPORTER: Yes, sir.

THE COURT: All right. Take you a quick break, and I'll bring the jury in here, and then we'll get rolling.

(COURT IN RECESS AT 03:35 PM.)

(COURT BACK IN SESSION AT 03:42 PM.)

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBERS ONE THROUGH ELEVEN, REMARKED FOR IDENTIFICATION.)

MR. MOSKOS: Your Honor, these are the first eleven exhibits. This is your copy.

THE COURT: Thank you. Are there any objections?

MR. MOSKOS: Well, Mr. Walker's looking at them now.

THE COURT: Okay.

MR. WALKER: Your Honor, Exhibit Eleven, I suspect, is the estimate. We discussed prior to this proceedings, I already -- my objection is its already on the record, and you've already ruled against me, so, for the record, I can express my objection, understanding it's overruled.

THE COURT: Certainly.

MR. MOSKOS: This will be your copy. This goes to the back of it.

THE COURT: Okay.

MR. MOSKOS: So, these are all admitted into evidence, your Honor, as I understand?

THE COURT: Any question or is or over your objection,

understanding the objection, anything else?

MR. WALKER: No, sir.

THE COURT: Okay. And these photographs, they were not part of Exhibit Eleven, right?

MR. MOSKOS: No, sir. They're all marked individually.

THE COURT: So, you -- you don't have any objection to the photographs, right? Only the estimate?

MR. WALKER: Correct.

THE COURT: And I -- Okay. Then, they're all in.

(WHEREUPON, PLAINTIFF'S EXHIBIT ONE THROUGH ELEVEN, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

MR. MOSKOS: And the first document there is a copy of the Damage Disclosure Form.

THE COURT: Okay.

MR. MOSKOS: That we've been talking about.

THE COURT: We are ready for the jury?

MR. WALKER: Yes, sir.

MR. MOSKOS: Yes, sir.

THE COURT: Okay.

MR. MOSKOS: I'm sorry.

THE COURT: If you will bring a jury please, sir.

(JURY RE-ENTERS COURTROOM AT 03:44 PM.)

THE BAILIFF: Jury is seated, your Honor.

THE COURT: Thank you. You may swear them.

MADAM CLERK: Ladies and gentlemen of the jury, would you please stand and raise your right hand to be sworn?

(PETIT JURY SWORN AT 03:45 PM.)

THE COURT: Ladies and gentlemen, I'm going to briefly explain to you about your duties and role in this trial, and what your responsibilities are. This is not a charge on the law. I will charge you the law in this case at the end of the trial. But basically, it's your job is to listen to the testimony and listen to the evidence in this case, and determine what the true facts are.

My job is to rule upon the admissibility of that evidence, what evidence I rule that you're allowed to hear, as well as charge you on the law at the end of this case.

Now, I'm not allowed to have an opinion about the facts, so if I say anything or do anything during this trial that you think I have an opinion about the facts, you are to disregard that; because under our system, you. and only you. can determine what the true facts are in this case. And you're going to make that determination on the evidence that comes before you. You're basically going to see that evidence in three forms.

First of all, through sworn testimony. Witnesses will testify before you, either on the stand or by a deposition or a video. The other way you may receive evidence is through documents that are introduced into evidence in this

case. And the third way is by stipulation of the attorneys. And that's the evidence that you're going to determine what the true facts are in this case. So, I ask you to pay close attention throughout this trial.

If at any time you can't hear, or, you know, one of the questions from one of the attorneys or a statement from a witness, simply raise your hand, and I'll correct that where you can hear it; because it's important for all twelve of you to hear the evidence in this case, because I'm looking for a fair and impartial jury, who is going to listen to the facts and reach a verdict that speaks the truth.

I will try to -- We will normally start about nine thirty every morning. We will break for an hour, hour and a half for lunch, and I'll try to get you out of here by five or five-thirty at the latest in the afternoon, and every hour or so, I'll try to take a break. And I usually try to take that break between witnesses, but sometimes the witness is so long you can't.

But having said that, if at any time you need a break before that, just raise your hand, because if you're uncomfortable, you can't pay attention. And I need each one of you to pay attention to the evidence in this case. So, simply raise your hand. We'll stop the testimony. We'll take a break and come back, and begin the testimony

again.

Now, throughout this trial, everything you know about this case, I need you to learn from this courtroom and from this witness stand. So, you can't read anything, and I don't think there's anything going to be on TV, but if it was, you can't watch it. You can't Google anybody. You can't do any research on the computer, and you can't talk about it, even, you know, among yourselves.

I know when you get home tonight, your family is going to want to know what you've been doing all day. And if they're anything like my family, they might have an opinion as to what you are doing. But they haven't been here. And so, I don't want you to talk about it to them, either. You can't even talk about it among yourselves in the jury room yet, because, you know, after one witness or two witnesses, you go back there on a break and you start discussing what you think the case is about, at the end of the case, you're going to want to defend that opinion you had in the beginning to your fellow jurors. And I don't want you to express those opinions to each other until you've heard all of the case, 'til you've heard the entire case, as well as the law that I'm going to give you, and then, and only then, is it proper to talk about the case.

The system works when everybody does what they're supposed to, and it works well. And you know, this is an

important case to both sides, and I'm looking for a fair and impartial jury, who is going to determine what the facts are. And like I say, you make a mistake, it's very hard to correct that. If I make a mistake at some other time and some other place, it will be reviewed. But if you make a mistake, it's hard to correct. And so, please pay close attention. Listen to the evidence in this case.

And then, in the end of the case, I'll give you the law that you're going to apply to this case, and go back and reach your verdict.

In a few minutes, the lawyers are going to get up and make an opening statement to you, and they're simply going to tell you what they think this case is about, and what the evidence is going to show you and not show you. In the end of the case, they will argue to you as to what the evidence shows or doesn't show in this case. And then, I will charge you on the law, and you will go back and deliberate, and hopefully reach a verdict. I remind you though that what the attorneys tell you in opening statements is not evidence, and what they argue in closing arguments is not evidence. Even their questions are not evidence. The evidence is what you hear form the witness stand or from the video deposition. Okay?

If you pay close attention, the attorneys will begin their opening statements.

MR. MOSKOS: Yes, sir. Thank you.

THE COURT: Yes, sir.

OPENING STATEMENT BY MR. MOSKOS:

MR. MOSKOS: Good afternoon, ladies and gentlemen.

1987, North Carolina passes a law that requires people and companies to tell potential buyers of cars if a car has been damaged more than twenty-five percent of its value. Included in that is a requirement to disclose any sort o flood damage, salvage damage, or reconstruction damage. And North Carolina lets everybody know why this is important, and they say *"The titling of salvaged motor vehicles constitutes a problem in North Carolina because members of the public are sometimes misled into believing a motor vehicle has not been damaged by collision, fire, flood, accident, or other cause; or that the vehicle has been altered, rebuilt, or modified to such an extent that it impairs or changes the original components of the motor vehicle. It is therefore in the public interest that the Commissioner of Motor Vehicles issue rules to give public notice of titling of such vehicles, and to carry out the provisions of this part of the motor vehicle laws of North Carolina."*

They passed this law because they found people were being cheated. Okay. North Carolina courts have also heard these kinds of cases, and they have determined that

there are two types of fraud. One is where you just out-and-out lie, either saying something to somebody or providing something in writing. Another way that fraud occurs is by concealing a material part of a transaction, something that would change your decision to buy that item.

August 3, 2003 Sandra Gaskins buys a brand new 2003 Honda Civic. July 21, 2004, Sandra Gaskins' daughter is driving, it's about -- it's late at night and a deer runs out in front of her. She veers off the road and strikes a tree. Car winds up looking like this.

(PHOTO DISPLAYED TO THE JURY.)

MR. MOSKOS: Nationwide insured the vehicle. They paid the claim, they bought the car. They sent it to a salvage auction. Somebody bought it. It winds up being repaired and put back into the stream of commerce. It's purchased by a lady named Nancy Watkins, and in 2008 Mrs. Watkins shows up to Midlands Honda. At Midlands Honda, she sells the car. Doesn't trade it, sells it to them.

Midlands Honda has their used car manager inspect the car, to be able to put a value on that car, and they eventually buy that car from her. As part of that process, they pulled a Carfax, and on the Carfax, it shows that the car was wrecked. It doesn't say how bad, but it says it was wrecked. July 1, 2008, Midlands Honda takes this car, this Civic, and runs it through a one hundred and fifty-

nine point inspection. It wants to sell this car as a certified pre-owned car. It passes the inspection. Midlands puts it out on its lot.

August 28 -- excuse me -- August 20, 2008, Charles Ecklund shows up. He's a resident here, works for the VA. He's shown this certified pre-owned Honda. He decides he's going to buy it, and he pays over thirteen thousand dollars for this car. March 2010, Mr. Ecklund is driving -- He's now been moved by the VA to Alabama. He's going to work, he's leaving his apartment complex, and a lady backs into the rear-passenger door.

He takes the car to a body shop to have it repaired, and there he learns that this car is a clipped car. A clipped car is known -- well, it's known in the industry as a clipped car, because what has happened is somebody has taken the car, cut it in half, taken another car, cut it in half, and welded two different cars together. Painted it, put it back out on the road.

Mr. Ecklund was really upset about that. He considered the vehicle unsafe, not what he bought, and he called the general manager at Midlands Honda. And he told them, you all sold me an unsafe car that's dangerous, I'm unhappy, I want my money back. Midlands sent a tow truck over. They pick up the car. They bring it back to the dealership. Midlands runs another Cargax, sees the

accident.

They run it through their body shop, the mechanics and repair shop in the back, and they inspect it, and they see, when you lift it up in the air, you see, across the bottom, a weld where it was cut in half, and somebody got up there and welded it back together.

Mr. Ecklund comes to the dealership March 26, 2010, and he complains, and he says he wants his money back. Midlands Honda refuses. All they're going to do -- Mr. Threatt, he's talking to Mr. Threatt, the general manager. All the general manager will do is trade him out into another vehicle, and he winds up buying a 2000 Accord. Mr. Ecklund believes he has no choice, it's not worth the effort to make him -- to fight it, and he leaves.

Now, after the inspection of the car, after Mr. Ecklund drops the car off, and it's inspected by the dealership, Mr. Threatt, the general manager, gets with a guy named Brent Farrell. Brent Farrell is the used car manager at the dealership, and he's involved in this, because he buys and sells the used cars at the dealership. And Mr. Threatt tells Mr. Farrell, get rid of this car, send it to the auction. The auction is the ADESA Auto Auction in Charlotte, North Carolina, the big auction. They sell thousands of cars each -- each week.

Now, the auction process is very interesting. What

happens is this. There are dealer-only options, which means only dealers can go in there. Normal customers can't come in to this type of auction. And when you walk in, you have to get one of those swipey cards, and you have to register. They have to know you are there. And when you come in, there are rules on the wall. There are rules in front of the counter where you register. So, everybody knows what the rules, the terms and conditions are.

And after you have signed in and gotten -- and paid whatever you need to pay, gotten your badge, gotten your rules, you go outside. You go into where they're selling the cars.

Now, where they sell the cars is also very interesting. It is a huge sheet-metal building, looks almost like a barn, and it goes hundreds of feet. And what they'll have is -- or what they have is these like, garage doors that go up, high. And on the ground is a painted area. The floor is actually two tones, one where everybody is supposed to stand and look at the cars; the other is where the car is driven into the building, running, fellow sitting in the driver's seat. He stops, and there is an auctioneer. And above the auctioneer are lights. They can be round, they can be square. And up there will be a green light, and it will have the word *green light* written on it. Then, there's a yellow light, with *yellow light* written on

it. Then, there's a red light, and *red light*'s written on it. And then, a blue light.

The green light means that you're buying a vehicle that is mechanically sound. It's good. There aren't any problems with that vehicle. Yellow light means -- Well, excuse me. There are two parts to a yellow -- a green light. One is that it's mechanically sound. Number two is that, if there's a problem with that car, you have seven days to arbitrate that issue.

What does that mean? That means, if you have a problem and you come back to the auction, the auction gets the seller involved and the buyer involved, and the seller and the auction makes a decision, and says, seller, you got to buy the car; or buyer, you got to keep the car. And the issue was resolved right then.

Yellow light means there are some problems with this car, be careful. Your arbitration rights are a little more limited. Red light means you're buying this car as-is. However, it's not in the common sense of as-is, as in you have no rights.

As you will hear, at the auction, there is a list of problems that the auction talks about whether you have to disclose or not. So, the as-is is really, you're buying this vehicle as-is, subject to whatever is in the terms and conditions of the auction. So, you're going to need to

look at those rules very, very closely.

So, the car comes through and stops. The auctioneer has his microphone. The light turns on. The car -- people start bidding. They're looking at the car. They walk around the car. They can do all of that. After the bidding has stopped, it takes about thirty seconds to a minute, a couple a minutes, the car drives off. If it sold, great, somebody gets to buy it and get a receipt and pay the money. If not, it may go back to the seller or come back to the auction at a later date.

Now, one thing that's interesting is that, at the auction, with the auctioneer, is the seller standing next to the person, next to the auctioneer. The person selling the car stands next to the auctioneer. But the car business now is becoming where lots of people send their cars to the auction, and they just call in, or they text in, or they fax the -- the cars that they're selling and any issues or announcements that have to be made with the car.

The auction, as a condition of being at the auction, the seller is required by the auction to give the auction a power of attorney. In essence, the auction is the seller's agent. And so, if the seller is not there, an auction person, based on what the seller says, is standing there next to the auctioneer, letting people know what the

announcements are, what the problems are with this vehicle.

So, back to our 2003 Civic. It comes up to the auction, and it comes out, down the lane. Roger Whitley is there. He's a dealer in North Carolina. He has a little lot and sells about -- or has about fifteen cars on the lot in Shelby, North Carolina, and he's there, trying to buy some small cars that his market will buy. So, up comes a 2003 Honda Civic. Nice little car. Still has the damaged door. Roger says to himself, I can fix that, and go get another door and put it on there. Good as new. Paint it. It'll be great.

Car comes up, stops on the block. The auctioneer starts the bidding. A couple of people bid, gets to Forty-seven hundred dollars. The bidding stops. The seller is not there, so somebody from the auction leans over, shakes their head, car doesn't sell, drives off.

Now, Roger's still interested in this car. He goes to the office, and he says, did the car sell? No. So, he says, I tell you what, call the dealer. Tell them I'll pay Five thousand dollars for that car. The lady leaves, comes back. Five thousand dollars is not enough. Midlands wanted Seventy-two hundred dollars. No, no, no, no. During the process, Midlands agrees to sell the car for Fifty-two hundred dollars to Roger, and Roger says, okay, it's a good-looking car, I'll buy it. Roger goes out and he test-

drives it. Engine runs fine. The transmission's not slipping. Fix the door, it's a good little car. Make him a little bit of profit.

What you have to understand is what was important to Roger at that time. The auctioneer is standing there, and he's required to make announcements about unibody damage, reconstruction damage, frame damage. In North Carolina, as I said at the beginning, has a damage disclosure law. That damage disclosure law says that if a car has been damaged more than twenty-five percent of its value, you have to disclose that damage. If it's been flooded, you have to disclose it. If it's a salvage, you have to disclose it. If it's been reconstructed, you have to disclose it.

Now, the interesting thing about the first four items is that that is for a model year -- a car that's five years or less in age. Okay? So, only brand-new cars up to five years old have to be disclosed. However, the auction doesn't let any car go through without a seller putting on the paper, whether the car's been damaged, flooded, salvaged, reconstructed, and that's one thing.

While there's a five-year limitation on the twenty-five percent damage and the flood and that kind of thing, there isn't any limitation, there's no time limit on reconstructed damage. You've got to put that down. There were no announcements. No one said anything about the

damage. Nobody said anything that this car was a clipped car.

What does that mean? That means there was a representation that there was no salvage damage, wasn't a junk car. Wasn't reconstructed. That was the representation made at the time of the sale or at the auction. And you're going to get to see the original damage disclosure form, with all the no's marked over here.

So, Roger, depending on the damage disclosure form, and the fact that there aren't any announcements about the prior damage, buys the car, takes it home. Excuse me, I misquote. He doesn't take it home. He's -- This is on like, Thursday. So, he's going to come back Friday or Saturday to pick it up. The ADESA Auto Auction's thirty minutes from his shop, not a problem. Comes back Friday, car's not there. Saturday, car's not there.

He learns that the car, for some reason, had been sent back to Midlands Honda. Car comes back on the following Monday. Roger gets the car, takes it to his shop. Roger's not a mechanic. Okay. He checks the oil, looks good. Checks the transmission fluid, looks good. Drives the car, engine's fine, transmission's fine, he puts it on his lot for sale.

June 28, 2010 Kay White comes to Roger's dealership. Let me back up for just a second. Roger has a partner.

His name is Dan O'Shields. Dan wasn't involved in this case, really doesn't have anything to add. He's not going to be here with us because, frankly, he had some stints put in his heart last week, and he just can't get down here. Just wanted you to know so that there is no issue about where he is.

But Roger has this car out on the lot, and a lady named Terry Evans actually works at a mechanic's shop behind Roger's shop; she works for him a little bit, and she met with Mrs. White. And the lady, Mrs. White, was there with her sixteen-year-old daughter to buy a car, and they look at this 2003 Honda Civic. And they decide this is a good car for their daughter and they buy it. In buying it, Roger said to them, hey, if there's some problems with this, timing belt, a few other little issues, tell you what, you bring it back when you're ready, and I'll fix it. I'll replace the timing belt and some other things. Fine.

She comes back, it's about ten weeks later, says, I need this stuff done. Fine. They take it to the mechanic behind Roger's shop, put it up on the lift, and there is the weld. That's when Roger learned that this car had been cut in half, and it about made him sick. He was so worried about that sixteen-year-old girl driving this car, he refused to give the car back. You don't get the car back.

What he's going to do is, he's going to go try to find another car for her. He can't. He can't find one that suits them and what they want. So, instead, he gives them back all of their money. In fact, he pays for the registration fees that they paid to put this car in their name. Needless to say, Roger's not a happy camper, and he says, you know what, let me find out what I can do. And he contacts the auto auction, and he's basically told you're outside your arbitration rights. You could have come back seven days after buying it, but you're outside that. You might recall the dealership.

So, he picks up the phone, and he calls Midlands Honda, and he talks to Brent Farrell. And he says, I got this clipped car you sold me; you need to come and get it, and bring me my money back. Mr. Farrell gets the VIN number. He says, I'll call you back. He never does. That's what brings us to you.

You're going to hear about Roger's damages. All right. They involve the price of the car that he paid, some auction fees that he paid, and the door that he had to buy. There was another switch that he bought. The profit that he lost, the fees that he paid, and it all totals about Sixty-six hundred and fifty dollars. Those are what we call actual damages. And that's what he's lost. And that's why he's here, and he's asking you to tell Midlands

Honda to pay him the Sixty-six hundred and fifty dollars.

Thank you, your Honor.

THE COURT: Yes, sir. Thank you.

Mr. Walker.

MR. WALKER: Thank you, Judge.

OPENING STATEMENT BY MR. WALKER:

MR. WALKER: Good afternoon. My name is Clay Walker, I'm a lawyer in town. The guy with me is Greg Nalewaja. He is the general manager at Midlands Honda. The fellow who was there with me earlier is a lawyer in my office, and he was here to take care of some of the legal stuff, so, he's gone back to do other things, so, I'm going to be trying the case.

This -- I'm going to be real brief. This is a fight between two car dealers. This is a fight over what are your damages for buying about a five thousand dollar car. So, it's a fight between car people, and the dollars involved aren't huge. We sold this car at an auction April 1 of 2010. We got sued in January of 2013, almost three years later. And unfortunately in that time, all the people who were involved in this, the then-general manager, Mr. Farrell who he mentioned, all these people are gone, so, they don't work for us any more. I had to track them down. And needless to say, in three years, a lot of people's memories have faded. So, you're going to find our

witnesses, they're -- they're not rocket scientists, and they're going to give you the best testimony they can; but they were first approached about this years and years after this came up.

Now, this car, when we sent it to the auction in early 2010, we knew it was a bad car. We knew it was damaged. That's why we sent it to the auction. And we didn't send it to the green light or the good place, we sent it to what's called a red light, and it's going to be right there. And I mean, common sense, red light means danger, risk, warning. And if you look at the paperwork, I don't have a lot of documents here, because this case really is pretty simple.

There are very few really important things. There's a bill of sale, where the title gets -- or the vehicle gets sold. Right there, plain as day, it says, red light, I think in all caps. And then, it says, as-is, and as-is means with all faults, period, the end. It's an unconditional sale.

Now, you're going to hear Mr. Farrell say that's what he thought the rules were, as-is means as-is. Turns out, Mr. Farrell was wrong. In January of 2010, there were a new set of auction rules, and they've got a nice, neat chart, and there's no question that chart says if you've got frame damage, or this kind of reconstruction, you're

supposed to say so. So, the only problem is, we looked all over the place, we don't have a copy of those rules.

And in this case, you're going to have to really pay pretty close attention. Some of the most important stuff is what you don't see and don't hear. They're going to put in dozens of exhibits, but one thing you're not going to see is a cover letter from the auction and Midlands Honda, saying here's your hot-off-the-press January 2010 new auction rules. There's no proof they ever got sent to us. Nothing.

No question, the auction did put new rules in place, and if you find we're bound by those rules, we breached our agreement on selling this car that sold for a little over Five thousand dollars. And you'll hear, I think, that they thought it was only worth two. So, we've got a two thousand dollar-ish difference in value, if we're going by those rules.

Now, you know, my folks, they're not perfect. They didn't have the rules, they didn't have that straight and it is what it is.

Now, you've heard talk of fraud and hiding things. One thing you're going to see is, when this car went to the auction, Midlands Honda sent it up here, you've already heard Mr. Moskos tell you, there's a dent in the door. We didn't fix it. We didn't try to hide the fact this car had

body damage on it. We just sent it up here. You'll hear the car was, when it went through the auction lane, dirty. Not even washed. So, if you all forget anything else -- everything else I say up here, please remember, Midlands Honda didn't do anything to pretty-up this car to go to the red light sale.

And these welds you've heard talked about underneath the car, nobody went under there and painted those over when Midlands Honda sent it to the sale. They sent it up there just as dirty, banged-in door, mud along the bottom, just the way it was. They did nothing to hide the condition of that car. And they didn't send it to sell on the green light, they sent it under the screaming-red warning red light. That's what you do with problem cars.

Now, no question these folks bought it, and they had it, they put a new door on it. But they want to fuss at us about inspections and all, they didn't look under the car. And when they got it, it's got a big dent in the door. How do you think it got a dent in the door? Being in an accident. So, they got it, they didn't look. And the auction rules that you heard Mr. Moskos say they are available everywhere, you're going to hear they didn't have a copy of the correct rules, either. We didn't have it, they didn't have it. So, they then turn around and sell this car to a customer, don't disclose its damage. Very

same thing we did. Very same thing.

Now, the damages. One thing I might forget, that disclosure statement, that thing he held up, Mr. Farrell didn't sign it. Some clerk somewhere at the auction did. Mr. Farrell never saw it, but we'll talk about that later.

Now, damages. This is a ballpark thirty-five hundred to four-thousand-dollar case. They bought the car for a little over five thousand, I think fifty-two hundred. They say it's only worth two, so a little over three thousand dollars is the difference in value. And they thought they'd make a few hundred dollars on a sale whenever they were going to do it. So, this is somewhere between thirty-five hundred and four thousand dollars. It's a -- if you believe we're bound by those auction rules, we breached our agreement with them. We didn't disclose this problem, and we owe them, ballpark, thirty-five hundred to four thousand bucks.

You're going to see a lot of evidence. There's going to be a bunch of documents coming in. I don't have a whole lot of documents. You all decide this case on the evidence, not on who puts in how much paper. You're going to hear me talk about the red light a lot, because that's kind of a common-sense thing. And there's -- Frank Epps was one of the guys I tried a lot of stuff with when I was young. He's a -- he's a huge guy, but he would always tell

juries, do not leave your court -- do not leave your common sense on the courthouse steps. Take the common-sense approach to this case. There's going to a lot of evidence, and it's going to be hard to really stay focused on the important things. We knew this was a problem car. We sent it to the auction under the red light. It was auctioned as-is, and, you know, we thought as-is meant as-is; and under the auction rules, they came in three months before that, it didn't. So, if you find we breached the contract, that's fine. But when we sent this car to the auction, we didn't pretty it up. We didn't bang out the dent in the door. We didn't cover up the wells. We didn't clean it, we just sent it to the red light. Thank you for your time.

THE COURT: You may call your first witness.

MR. MOSKOS: Yes, sir. At this time, your Honor, I'd call -- Well, Nationwide Mutual Insurance Company, their 30B representative is Kevin Ivey.

THE COURT: Okay.

(WHEREUPON, KEVIN IVEY, BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

MADAM CLERK: State your name pleas.

A. Kevin Ivey.

MADAM CLERK: Ivey. Thank you.

DIRECT EXAMINATION

KEVIN IVEY BY MR. MOSKOS

Q. Mr. Ivey, who do you work for?
A. Nationwide Mutual Insurance Company.
Q. And what do you do for Nationwide?
A. I'm a material damage claims manager.
Q. And what does that mean?
A. I over see the claims adjustors in the Midlands of South Carolina.
Q. And are you familiar with the policies and procedures of how Nationwide Mutual Insurance Company handles automobile property loss claims?
A. Yes.
Q. Now I believe Gary Boykin actually handled this Gaskin's claim; is that correct?
A. Yes.
Q. Why isn't he here?
A. He's on vacation.
Q. So, Nationwide sent you?
A. Yes.
Q. The boss?
A. Yes.
Q. Have you reviewed Nationwide's file?
A. Yes.
Q. And regarding this 2003 Civic?
A. Yes, sir.
Q. And are you familiar with the records ---

A. Yes, sir.
Q. --- provided? Tell us about Mrs. Gaskin's claim.
A. Mrs. Gaskin daughter was driving the car, she lost control of the vehicle to avoid hitting a deer, impacted a tree. Did pretty severe damage to the car.
Q. And when Mrs. Gaskin's made the claim for the property damage, what happened?
A. Her claim was assigned diretly to the repair facility of her choice which was East Cooper -- I forget their full name, but East Cooper Auto Body where the damages were assessed by their representatives. Photos and a estimate of damages were provided to Nationwide.
Q. Okay. Take a look at the documents that are in front of you. Those are Exhibits Two through Eleven. Are those pictures of the car after the wreck? And Number Eleven being the estimate.
A. The photos match those in the file.
Q. And how about the estimate?
A. Yes. And it is also representative of what was in the file.
Q. And how much -- how much did the body shop say the vehicle was going to -- how much was it going to cost to fix the vehicle?
A. Their estimate of damages was Ten thousand, three hundred and eighty-eight dollars and ten cents.

Q. And based on the estimate, what did Nationwide do?
A. We handled the vehicle as a total loss, paying Mrs. Gaskins the actual cash value of the car, less her deductible, and plus the tag transfer fees and a sales tax.
Q. Okay. And what was the -- Well, and then, what did Nation -- what did you all pay her for the car?
A. I don't --
Q. You don't remember?
A. Don't remember, exactly. No, sir.
Q. All right. And so, Nationwide pays Mrs. Gaskins for the car. What happens then?
MR. WALKER: Your Honor, I don't think how they disposed of the car is relevant. The damage, I understand, needs to be put to the jury, but what they did with it's not relevant to anything.
THE COURT: I --
MR. MOSKOS: Excuse me? I mean it's just --
THE COURT: Go ahead. I overrule the objection.
MR. MOSKOS: Thank you.
Q. And so, what did Nationwide do? They paid Mrs. Gaskins. Then, what --
A. We paid Mrs. Gaskin then the vehicle was taken, to my understanding, to Sadisco which is a vehicle auction company where they auctioned the vehicle for Nationwide, and we received the proceeds from the salvage value.

Q. And Sadisco, is that like, a regular auto auction? Or does it deal with specific type of vehicles?

A. I can only say from my knowledge that they deal with wrecked salvage vehicles. I've never known of them to deal with undamaged, but I can't testify to that to a certainty.

Q. But that's what -- is that where Nationwide sends their wrecked cars?

A. It was in 2004.

Q. Okay.

MR. MOSKOS: No further questions, your Honor.

THE COURT: Okay.

MR. WALKER: No questions, Judge.

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

(WITNESS LEAVES WITNESS STAND.)

MADAM COURT REPORTER: Those are mine now, Mr. Bailiff. Thank you, sir.

MR. MOSKOS: Your Honor, at this point, we would want to be -- we would want to play the videotape, and we would need to make the edits that we had talked about.

THE COURT: Can you play it in thirty minutes?

MR. MOSKOS: Well, we have to make those edits that were asked.

THE COURT: So, now, what you're telling me we need to stop for the day?

MR. MOSKOS: Yes, sir.

THE COURT: Any objection?

MR. WALKER: No, sir. Certainly.

THE COURT: Ladies and gentlemen, now, we'll -- The next testimony in this case is going to get us past five o'clock, and I'm going to do everything I can to get you all home by five or five thirty every day, so, we will stop for the day, and ask you to be back in the jury room at nine thirty in the morning.

And I've lost a juror, so I'm down to twelve, so, I need all of you back in the morning, unless it's a dire emergency. If you do, you need to call the Clerk's Office. If not, I will see you at nine thirty. I remind you, don't talk about this case, or allow anyone to talk about it with you. And don't text, Google, do any computer research. I'll see you in the morning. Thank you so much.

(JURY EXITS COURTROOM ON EVENING RECESS AT 04:30 PM.)

THE COURT: Okay. Anything before we leave for the day?

MR. WALKER: No, sir.

MR. MOSKOS: No, sir.

THE COURT: All right. I'll see you all at nine thirty. Thank, y'all.

MR. MOSKOS: Yes, sir. Thank you.

(COURT IN EVENING RECESS AT 04:31 PM.)

(COURT BACK IN SESSION TUESDAY, APRIL 19, 2016 AT

09:40 AM.)

THE COURT: Thank you. You can be seated.

MR. MOSKOS: Good morning.

THE COURT: Good morning.

MR. WALKER: Good morning, Judge.

THE COURT: Are we ready to go? We got the jury.

MR. MOSKOS: Just one thing to bring to your attention, your Honor. Yesterday we dealt with Mr. Ecklund's deposition. We have our portions ready to go, to be played by video. The question then becomes, Mister -- or, the ADESA Auto Auction representative, I don't think we went through the things that come in and stay out, the objections that Mr. Walker had. And obviously, it's better to deal with it while the jury's not out -- or not in here, than to try and deal with it when they are, so, I wanted to bring that to your attention. My understanding is, the first video is about forty, forty-five minutes long. Whether the Court wants to take a break, deal with that, or we can deal with it now, that's the question.

THE COURT: How long do you think it's going to take to deal with that?

MR. WALKER: Most of my objections is and there are probably double the number of concerns I had in the first one. But many of them are very much the same thing, so I think you could probably --

THE COURT: Is --

MR. WALKER: Well, it's -- the document speak for itself, and he has a witness from Reid ,excerts, and lots of documents ---

THE COURT: Okay.

MR. WALKER: --- so, it's the same objection over and over. And then, we have some issues at the end, where there are some gotcha-type questions in my view that I don't think are appropriate. Those will take some individual consideration.

THE COURT: Okay. Well, maybe if you all give me those issues, I can be looking at them, and we can go ahead and play the deposition for the jury, and then, take a break and deal with them, and that would give me a chance to at least read them. You know, obviously the stuff is clearly hearsay.

MR. MOSKOS: It's not hearsay stuff. Mainly, what he's objecting to is the witness reading the document. Some of it --

THE COURT: Or the best evidence rule issues?

MR. WALKER: Correct.

MR. MOSKOS: Right. But part of the problem is, the best evidence rule deals with whether there's a question about the document itself, and then getting the original. And there is no question as to whether or not this is an

authentic document. He -- the man identifies it, there's never been a question, and so, the best evidence rule really doesn't apply. What he's worried about is the cumulative effect. Some of the documents are a little hard to read, because they've been copied and transmitted and all that. So, having him read them just simply helps the jury understand what's going on.

MR. WALKER: Or --

THE COURT: Are the doc -- I'm sorry. Are the documents themselves admissible?

MR. MOSKOS: Yes, sir.

THE COURT: Do you agree with that, Mr. Walker?

MR. WALKER: Most of 'em yes sir.

THE COURT: Okay. So, you have a problem with him publishing the documents?

MR. WALKER: Correct.

MR. MOSKOS: Which happens all the time in the courtroom.

THE COURT: So, what's -- If the documents are admissible, and he simply publishes 'em, how -- what's the difference between any scenario when an attorney or a witness is publishing documents to the jury?

MR. WALKER: And your Honor, you stated the basis of most of these objections, which is the best evidence rule, and a lot of it eventually becomes cumulative.

Well, I -- your Honor, rather than sit here and talk at a theoretical level, once again, I've got a transcript that's highlighted in the same fashion. And here's a written list of the concerns.

THE COURT: Okay. Well, if you all will just kind of let me look at it during the video, we'll take a break between testimony. Now is that -- We're going to show this video of Ecklund, and then the next is going to be --

MR. MOSKOS: This gentleman. Yes, sir.

THE COURT: Okay. So, we'll just -- it'll give me some time to at least, you know, and we'll deal with it now, instead of stopping right now, and going through the whole thing and try to get it. And then, after that how many more witnesses do you think you'll have?

MR. MOSKOS: I have -- Well, and that raises a question. I've got two fellows who are not with the defendant any more. They're -- they've got their own car dealership, and I want to bring them in to testify. Mr. Farrell, who is one of the owners of this Blythewood Motors, says that he's in some sort of auction this morning. I guess he's doing it online, and you know, if we can get him after lunch, that works out for him. I'm not sure. Like I said, the first video is about forty minutes. I think the next one is hour and a half, something like that. That puts us real close to twelve. Have both of the

gentlemen come down after lunch, and testify.

THE COURT: Okay. Do you have any objection to that?

MR. WALKER: Absolutely not.

THE COURT: Okay. Well, we'll try to work with that.

MR. MOSKOS: Yes, sir.

THE COURT: Take lunch at -- I've even taken lunch at eleven thirty, twelve, twelve thirty. I usually don't go to lunch after one or one fifteen because I found out if you wait 'til two o'clock, everything closes.

MR. MOSKOS: Yes, sir.

THE COURT: By 1:00 o'clock, we're going to lunch.

MR. MOSKOS: Yes, sir.

THE COURT: We'll work that out. Okay. And I, now, as far as jury charges, when do you all think we'll get -- Cause if you want -- I have only South Carolina law and South Carolina charges. The only thing I know about North Carolina law is a guy dressed up like a woman can't go to the bathroom in the women's bathroom. Other than that, I don't know North Carolina law. So, if you want me to charge under North Carolina law you better give me some.

MR. WALKER: We can take care of that right now.

MR. MOSKOS: I gave Ryan some information this morning. The North Carolina folks have added jury instructions, which should be very easy to conform. I've looked at some of them. I've -- I apologize, I don't have

a printer in the courtroom.

THE COURT: Okay. I just want to make -- you know, if we get it to the jury this afternoon, somebody's got to give me something to charge, or I'm going to charge 'em what I know.

MR. MOSKOS: Well, I still have two folks, which I'll expect to get to tomorrow.

THE COURT: Okay. Well, that's fine.

MR. MOSKOS: So.

THE COURT: I just want to be sure, if you all are, you know ---

MR. MOSKOS: Yes, sir.

THE COURT: --- that, since we are -- Something unusual, you all are going to have to give me some law before we can go to the jury. If we do not get to them today, that's no big deal.

MR. WALKER: Your Honor, here's our proposed instructions. I've got a copy for you and your clerk.

THE COURT: Okay.

MR. WALKER: If there's any law cited, there is no -- It's -- it ought to be corresponding to the charge. So, if there's anything you need to look up, it's here, and I've got a copy for opposing Counsel, as well.

THE COURT: Okay. That would be great. Thank you.

MR. MOSKOS: Your Honor, here are the designations.

I've given you that. I think I gave that to you yesterday. But anyway, those are the designations that we were asking to have put in from the ADESA thing.

THE COURT: Okay. Thank you.

MR. MOSKOS: I believe. Let me just double-check that. I want to make sure I gave you the right one.

Yeah, I think the video is a little -- the timing is a little off. So, that's --

THE COURT: Okay.

MR. MOSKOS: --- it's all the same.

THE COURT: So, are we ready for the jury? We've got somebody --

MR. WALKER: When we were speaking yesterday about the issue of safety, there were two cases I referred to that were U.S. Supreme Court cases, and I was supposed to have copied and didn't. But I got those overnight, and you had ask about them. It's highlighted, and I've got a copy for opposing Counsel, as well.

THE COURT: Okay. All right. Are both cases before *Austin versus Stokes*, or after?

MR. WALKER: Your Honor, these are U.S. Supreme Court cases.

THE COURT: I understand that. I was just trying to see if they were in existence before --

MR. WALKER: One's in 2003; one's in 2007.

THE COURT: Okay.

MR. WALKER: And the tenor of the cases is, punitive damages can only be used to punish for harm suffered by the plaintiff. And again, our position is, in the absence of any personal injury, safety is not a factor that can considered in punitive damages.

THE COURT: Okay. I will read these. Thank you. All right. Anything else before we bring the jury in?

MR. MOSKOS: No, sir.

MR. WALKER: No, sir. Thank you.

THE COURT: If you'll get me the jury please, ma'am.

THE BAILIFF: Yes, sir.

THE COURT: I hope we got all twelve of 'em.

MR. MOSKOS: I'm sorry? Oh, twelve.

THE COURT: Yeah.

THE BAILIFF: Your Honor, jurors are present.

(JURY RE-ENTERS COURTROOM AT 09:51 AM.)

THE COURT: Thank you. Thank you, ladies and gentlemen. We're going to continue with the testimony in this case. You're going to hear a video deposition, and a deposition is allowed under our rules, and it's sworn testimony. The witness is sworn in, just like they would be in your presence. The attorneys are present. They're asking questions. You are to consider it like any other evidence, and give it the weight and the importance in

making your determination. Okay.

(CHARLES ECKLUND VIDEO DEPOSITION PUBLISHED TO THE JURY AT 09:52 AM./STOP AT 10:30 AM.)

MR. WALKER: Your Honor, I believe we went over --

THE COURT: Okay.

MR. MOSKOS: I think this is one of those that came in, your Honor.

THE COURT: I gave you back that copy.

MR. WALKER: May I approach the Bench?

THE COURT: Certainly.

(BENCH CONFERENCE, OFF THE RECORD, OUT OF HEARING OF THE JURY AT 10:30 AM.)

MR. WALKER: My mistake. I'm sorry.

THE COURT: Thank you.

MR. WALKER: My apologies, Judge.

THE COURT: You may continue.

MR. WALKER: Sorry about that.

MR. MOSKOS: May I just read the question again, your Honor?

THE COURT: Okay.

MR. MOSKOS: *What did you tell Mr. Austin when you were at the dealership the second day about this transaction?*

(CHARLES ECKLUND VIDEO DEPOSITION CONTINUES TO BE PUBLISHED TO THE JURY AT 10:31 AM./STOP AT 10:33 AM.)

MR. MOSKOS: That's the plaintiff's case, your Honor. Or not the case, the plaintiff's case. That's the plaintiff's testimony ---

THE COURT: Okay.

MR. MOSKOS: --- in this video.

MR. WALKER: Your Honor, I have a mercifully short excerpt here, which I understand in the Video, and I can't find my copy of the disc, so I'm just going to read it.

THE COURT: Okay.

MR. WALKER: *Mr. Ecklund, I understand, from what you've said and looking at the documents, you bought this car in August of 2008, right?*

Answer. Yes.

And I'm assuming you were driving back and forth between Augusta and Huntsville in 2008, in this car?

Answer. Yes.

Did you have any trouble with it when you were driving it in 2008?

No.

I'm assuming you kept driving it back and forth in 2009?

Yes.

Did you have any trouble with it in 2009?

No.

I'm assuming before this lady backed into you in a

parking lot in 2010, you were still able to drive back and forth, and didn't have any problems with the car?

Answer. Before she did that?

Yes, sir.

Answer. Yes. Yes, it drove just fine.

I understood you to tell Mr. Moskos that, after Midlands Honda made the repairs you wanted initially, the car was fantastic.

Yeah, it was a good car.

When you drove it when you purchased it, you didn't notice any issues with it, right?

Answer. I noticed a few of them.

Other than the ones we talked about?

Answer. Right, they fixed.

And Midlands Honda made the repairs you wanted them to initially, right?

Answer. Yes.

Thanks, Judge.

MR. MOSKOS: The only other thing, your Honor, I -- on the video, I move to introduce Exhibits Twelve through Forty-four. I need a ruling on that, and --

MR. WALKER: No objection.

THE COURT: Okay. They're in without objection.

THE COURT: Okay. Ladies and gentlemen, I need to

take up some matters of law outside of your presence, so I'm going to send you back to the jury room. I remind you, please don't discuss the case yet. I'll get you back out as quick as I can.

(JURY EXITS COURTROOM AT 10:35 AM.)

MR. MOSKOS: One more thing, your Honor, and just to be clear. Yesterday we talked about Exhibit Forty-five and Forty-six during one of the conferences that we had. I believe it's already on the record, but I just want to make sure those are in evidence, also. Those are the last two documents that Mr. Ecklund just testified to.

THE COURT: Okay. Is that your understanding? Any objection to that?

MR. WALKER: I like to see copies of 'em.

MR. MOSKOS: Here's a copy of the whole set.

Your Honor, I'll hand you a copy of the whole set that was given -- or dealt with by Mr. Ecklund.

MR. WALKER: No objection, your Honor.

THE COURT: Okay.

MR. MOSKOS: Thank you, your Honor.

THE COURT: Now, does the court reporter have all these and marked?

MR. MOSKOS: No, sir.

THE COURT: Okay. Well, if they're not there and marked, even though we said it on the record, they're not

there. The jury doesn't get to see them.

MADAM COURT REPORTER: Yes. Yes, sir.

MR. MOSKOS: Let me --

THE COURT: And if it does go up.

MR. MOSKOS: Okay. Let me -- let me make sure I get this right, because I've just made a mistake. The documents that we were talking about yesterday were, I believe, Forty-three and Forty-four. That was at the end of Mr. Ecklund's deposition, I mean, video. What I did was I picked up the copies that were supposed to be the court reporter's were exhibits, and I thought they were additional documents. I said they were Forty-six -- Forty-five and Forty-six. That is a mistake. The affidavit and notification of sale of motor vehicle should be Forty-three, and the power of attorney should be Forty-four. Forty-five, forty-six, goes into something else.

THE COURT: So, at this -- do you have any documents marked, Wanda?

MADAM COURT REPORTER: I do not. Only One through Eleven, Plaintiff's One through Eleven.

THE COURT: So, at this point, we need you all to have her mark everything that, to date, is in without objection so we will have that record clear.

MR. MOSKOS: Yes, sir.

MADAM COURT REPORTER: Judge, can I have a few minutes

to mark all these?

THE COURT: Sure. Absolutely.

COURT REPORTER: Thank you, sir.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBERS TWELVE THROUGH FORTY-FOUR, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

MADAM COURT REPORTER: Mr. Moskos, you want me to start with Number Twelve?

MR. MOSKOS: Yes, ma'am.

MADAM COURT REPORTER: Yes, sir. And I'm going to label and mark them in the order in which you have handed them to me.

MR. MOSKOS: Yes, ma'am.

MADAM COURT REPORTER: Yes, sir.

MR. MOSKOS: Your Honor, these are the exhibits that, I think are discussed during the next deposition.

THE COURT: Okay. And any objection to those -- and I understand this isn't on the record right now, but I want my court reporter to hear it.

(OFF THE RECORD.)

MADAM COURT REPORTER: I got you, Judge.

THE COURT: Okay. And I can come back and do that. I'm just trying to --

MR. WALKER: Make some progress.

THE COURT: Yeah. Do you have any objection to those?

MR. WALKER: I'm wading through them.

THE COURT: Okay.

MR. WALKER: I apologize for sitting down.

THE COURT: No, no, take your time.

MR. WALKER: I know. We're off the record.

(OFF THE RECORD.)

THE COURT: Okay. Do we have everything marked now? You got everything marked?

MADAM COURT REPORTER: Yes, sir.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBERS FORTY-THREE THROUGH SIXTY-FIVE, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

THE COURT: Okay. All right. You want to go through this objections list? And do you need your copy back?

MR. WALKER: No, sir. I've got another copy today.

THE COURT: Okay. All right. We'll start, page thirteen. Are you --

MR. WALKER: Well, your Honor, we've spoke off the record about the Court's view that the best evidence rule for the document is in isn't going to be considered by the Court as a reason to exclude any of the testimony, so.

THE COURT: And do you think -- If you think I interpreted that rule wrong, I'll be glad to listen to with y'all. .

MR. WALKER: We had a discussion off the record, and I understand the Court's ruling on that, so, I think

everything on the first page is gone.

THE COURT: Okay.

MR. WALKER: The first entry on the second page, same thing. That's best evidence.

THE COURT: All right. And number thirty -- page thirty-two, line twelve.

MR. WALKER: And there, I've got him talking about what dealers ---

THE COURT: Right.

MR. WALKER: --- and he's not a dealer.

THE COURT: Right.

MR. WALKER: No, and that objection, I think, is well-founded.

THE COURT: And I agree with that. You want to -- do you want to be heard on that, Mr. Moskos?

Page thirty-two, line twelve through sixteen.

MR. MOSKOS: Yes, sir. He testifies in his deposition as to how the operation of the dealership works. Excuse me, the auction works. Everybody gets the rules. Everybody knows the rules. You can't go in there without following all the rules and knowing about the rules, registering, and getting a copy of the rules. That's just basically what he's saying. Do all the dealers know that --

THE COURT: But how can he testify as to what all the

dealers know? I mean, I understand. One dealer didn't know that, or we wouldn't be here.

MR. MOSKOS: Well, yes, sir.

THE COURT: All right. I'll exclude that. That which is page thirty-two, line twelve through sixteen. Okay?

All right. And what about anything else on that page?

MR. WALKER: Well, your Honor, page thirty-nine, starting at line fifteen, he starts essentially interpreting documents, talking about his understanding of what sort of disclosures are required. And he's published the document, but then he starts trying to interpret it.

We've got thirty-six.

MR. MOSKOS: No, that's it.

MR. WALKER: Thank you. Sorry.

THE COURT: And he's saying that they don't have to disclose if the car's been clipped, whether it's a frame or a unibody structural damage he's required to disclosed that. Is that what the document said?

MR. MOSKOS: Yes, sir.

THE COURT: And I thought you had agreed early on that you check those blocks. So, I mean -- Because there's nothing in there that he has to notify about a clipped car although -- But if there's certain frame damage.

Now, you objected to the form of the question on line twenty-three. And that is a leading question.

MR. WALKER: Well, I stand on my objection, your Honor.

THE COURT: You know, question -- line twenty-three -- You know that in fact is a leading question, so, that's out.

MR. WALKER: And the rest of my concerns on the next page have all been addressed by the Court as the best evidence concern.

THE COURT: Okay. So, now where do we need to go?

MR. WALKER: Now, we are at page seventy-three, line one.

THE COURT: Okay.

MR. WALKER: And the witness is testifying that a non-disclosure is the equivalent of an affirmative misrepresentation and that's a legal issue and far beyond the qualifications of some guy running the auction.

He has invaded your job here, Judge.

MR. MOSKOS: That would be incorrect, your Honor, because there are certain requirements that the folks at these deal -- at these auctions have to meet. And they know that silence means that there's not a problem. If you're up there at the auction and the car comes across, and the -- and they tell you, hey, it's got sludge in the engine, and the water pump's leaking, and, you know, it's got a big hole in the trunk, you buy what you buy. But if

there -- if the seller, who is standing next to the auctioneer who doesn't say anything, that's a representation that the vehicle conforms to the auction rules, and that's part of the representation that Midlands is making to Mr. Whitley; that this vehicle had no announcements, did not have any frame damage, and that's what it -- that's what it's -- that's the automobile -- that's the standard at auctions. Standard conduct in the auction industry.

What Mr. Walker is talking about is kind of like, if I got up -- or the witness got up and said -- I asked him if the car had been wrecked, the salesman told me no, and I say, is that a false representation? Objection. That -- because false representation is part of a fraud cause of action, it's a legal question that the witness can't answer. That's not correct.

THE COURT: Okay.

MR. MOSKOS: What I'm saying is, he's not making a conclusion of law, he's saying what they do at the auction.

THE COURT: And I -- You want to be heard any more on that?

MR. WALKER: Your Honor, there's a big difference between telling somebody a lie and something getting omitted. And, this steps right into the Court's role, and starts characterizing an omission as an affirmative

misrepresentation. And, that's way beyond here's how we do things at the auction.

And your Honor, I would add, there's -- North Carolina does not recognize a claim of negligence for omitting something.

THE COURT: Okay.

MR. MOSKOS: That's not correct, your Honor.

THE COURT: Didn't they -- after you file that -- so, if the State -- if a 2000 -- at the bottom of the page seventy-three, it's a 2003 Honda Civic goes across the block, and the seller does not make the announcement that the vehicle has been damaged more than twenty-five percent of its value, it is a salvage vehicle, it is a flood vehicle, it is a recovered theft vehicle, or it's been reconstructed, is it -- is that a representation that those items do not exist and he objects to the form of the question. Now it says it's a game that I assume. Yeah.

What's the other problem as to those questions? He's objecting to the form and they are leading.

MR. WALKER: Your Honor, they've got the rules in. It's obviously a car with severe damage. He can argue all he wants to the jury, but he can't use a witness like this to beat me up.

MR. MOSKOS: And what he wants to do is exclude the evidence, and then make a directed verdict motion and we

haven't proved our case, and I'm the one beating him up. So, as I said, your Honor, he's talking about the standard in the industry and what's going on at the auction. Obviously, he's been there a long time. He's the general manager. He knows what's going on.

THE COURT: Yeah, but how -- and it's a lot of other references in this that in fact there were representations made that the car, the frame had been cut.

That's in, right?

MR. MOSKOS: I'm sorry. Say that again, your Honor?

THE COURT: You know, there's a -- throughout this deposition and the one before, there, you know, there's proof that the car had been clipped. And the fact that it wasn't checked, you know, the jury can, you know, they sent it up there, it hadn't been -- it hadn't been announced that there had been frame damage, you know, or had been clipped. That's in evidence, I guess, in that deposition as well as this one.

MR. WALKER: And Exhibit One, your Honor.

THE COURT: So, you've got -- the evidence is all in. This is just asking him to draw a conclusion. There wasn't any question.

MR. MOSKOS: Not necessarily, your Honor. Not necessarily, your Honor. One of Mr. Walker's arguments that he made, I believe, in opening statement, or at least

in the Court yesterday, is that his client never made a representation to my client. That's what he's saying. That all the documents came later, that he never saw any of these documents, and --

THE COURT: I understand, but how does this make any representations? Basically, you know, he's -- you're asking him, does that mean that the blocks aren't checked. That's a representation that those had been --

MR. MOSKOS: No, sir. What I'm asking him is, when the car comes across the block, and the auctioneer is silent on frame damage and reconstruction damage, that's a representation that those items aren't there. That's being made by the seller, because they're standing right there.

THE COURT: I understand that. But you should ask him, what does that mean. And he should have said, those are represen -- the problem is, you testify in both of those ques -- it's your testimony, and they're both leading questions, and he objected to the form of the question. If that had happened in my court and he objected I'd would have made -- you know, I would sustain his objection, and you would have had to ask it some other way. And the witness didn't testify to that, you did. I mean ---

MR. MOSKOS: Yes, sir.

THE COURT: --- if the witness. So, I'll exclude that under the form of the question. I think you've got it in

in other ways.

MR. MOSKOS: Which -- I just want to make sure we have that --

THE COURT: It's basically, you asked -- you start off with a question on line -- you start off with one and re-change it and then, start off at five, and he asks the question -- and you ask, and he objected to the form of the question. I don't -- and his answer was, I assume, yes. You asked the question again on line twelve the same way. His answer is the same.

MR. MOSKOS: So, what I'm trying to make sure is we exclude what needs to be excluded.

THE COURT: Okay.

MR. MOSKOS: And which --

THE COURT: So, well, the only thing that seems to not excluse -- And those damages disclosed that are on Exhibit One those are acquired by the State.

MR. MOSKOS: Well --

THE COURT: I don't know what that means, but I assume nineteen, twenty, and twenty-one, you object to that even thought you've lined it what --

MR. WALKER: He's asking the witness about a legal question, what disclosures were required by North Carolina law. And I don't think he can render a legal opinion.

THE COURT: What does Exhibit Number One say? What is

Exhibit Number One?

MR. WALKER: It's a damage disclosure statement that --

THE COURT: And that's the form that's in question?

MR. MOSKOS: Well, that's -- that's the -- yes, sir. That's this document.

THE COURT: And are they, in fact, required by state law?

MR. MOSKOS: Yes, sir.

MR. WALKER: That's correct.

THE COURT: Okay. If he knows the answer to that I'll allow nineteen, twenty, twenty-one, and twenty-two in. But the rest of that page is gone because of the leading question.

MR. MOSKOS: Even without the -- even though -- even the ones without the objections?

THE COURT: No, he's objected to that whole page, according to what he's given me.

MR. MOSKOS: Oh. Are you talking about on --

THE COURT: Page seventy-three, he's objected to the whole page, all the way down to line ---

MR. MOSKOS: Yes, sir.

THE COURT: --- six, through six, on page seventy-four. So, because of the leading question, that's out. The only thing on seventy-three that's in is line nineteen,

twenty, twenty-one, and twenty-two. And then, we start back up on page seventy-four, and line eight's okay. All right.

Now, you want to deal with any other objections, Mr. Walker?

MR. WALKER: Your Honor, the very last one on page ninety-seven.

THE COURT: Okay.

MR. WALKER: The witness was asked whether her conduct was a mistake, and I think that's getting awfully close to the ultimate issue in the case, and witness is giving his opinion about it, and I think it's inappropriate.

THE COURT: But his answer -- His answer doesn't give an opinion, does it? I don't -- I don't delve into the level of assigning blame, I guess. I simply will look at whether the complaint is inside or outside the policy. That would be the extent in which we look at it. Is that what you talking about?

MR. WALKER: Your Honor, I -- once again I apologize for mis-communitating, your Honor. You've got my only copy of that deposition.

THE COURT: Okay. It doesn't seem -- and I'll be glad to show it to you -- but it doesn't seem to be ask -- his answer doesn't -- doesn't mean anything.

MR. WALKER: Got it.

THE COURT: I don't think it hurts you at all, but you're welcome to look at it again.

MR. WALKER: No, we'll let it in, your Honor. That's fine.

THE COURT: He said -- he said he doesn't pointing the blame at anybody.

MR. WALKER: Okay.

THE COURT: He just -- Okay.

MR. WALKER: That's the last of my issues, your Honor.

THE COURT: All right. Thank you.

MR. WALKER: And if I may recover my transcript ---

THE COURT: Certainly.

MR. WALKER: --- from the Court.

THE COURT: Thank you, sir.

MR. MOSKOS: Your Honor, just one more thing I want to make sure I have correct. There's ninety-three, four through seven?

THE COURT: Okay. He doesn't object to that.

MR. MOSKOS: Okay.

THE COURT: At least he didn't tell me --

MR. WALKER: I don't know why that got objected to, your Honor.

THE COURT: Okay. So, it's -- the only other thing that's out is what we talked about on seventy-three and part of seventy-four, but everything else is in. Okay?

How long is that going to take you to fix this?

MR. BOUKNIGHT: It wouldn't take me long, your Honor, but I need the help of my attorney, to make sure I've got it straight.

THE COURT: Okay.

MR. MOSKOS: Just make sure we get the numbers right.

MR. BOUKNIGHT: We want to get the numbers right. I don't want to play the wrong thing. Technically, it won't take long, but understand what we're doing.

THE COURT: How long?

MR. BOUKNIGHT: Thirty minutes?

THE COURT: Okay. I'm trying to figure out about lunch then. That means if we -- if we don't get the jury back in here 'til quarter 'til twelve, and we're going to play an hour and a half video, so it'll be one thirty or one fifteen. Of course, now, if we go to lunch now, we're talking about -- of course, if you could do it in fifteen minutes, we could be gone to lunch at one.

MR. BOUKNIGHT: As long as we don't get a mistrial if I make a mistake.

THE COURT: Well, you might.

MR. BOUKNIGHT: That's my concern.

THE COURT: All right. Let me -- I'll give you -- see what you can do in fifteen minutes, and there are only a couple of things you need to take out, I don't think.

MR. MOSKOS: It's really, your Honor, there are -- I apologize. There are a couple of objections I have to Mr. Walker's designations, if we could go over those.

THE COURT: Okay. I'm sorry.

MR. MOSKOS: Eighty. Starting on page eighty. Mr. Walker starts talking about if cars that go under a red light, in your experience, typically do have some sort of mechanical or other -- some problem, mechanical or otherwise, right?

To me, you know, that's speculation. There's no foundation that there's -- that there -- that he's a mechanic, that he's looked at these cars, inspected these cars. He's just assuming that, because they're under the red light, there's a problem, and I would ask that that be excluded.

THE COURT: I thought that's what you all were saying the whole time, that -- that ---

MR. WALKER: The red light means danger.

THE COURT: --- a red light meant the mechanical problem. Doesn't it? That's what you all were telling me the whole time.

MR. MOSKOS: Well, it could have a mechanical problem, but that's what it -- more than likely that's what it has. But he's asking him to speculate about why they're going through.

THE COURT: Well, I thought that was the reason that any red light. Because if they didn't have problems, they would come up and go under some other light, wouldn't they?

MR. MOSKOS: Yes, sir.

THE COURT: Okay.

MR. MOSKOS: Right. Eighty-two, page eight-two, starting at line -- well, on line nine, Mr. Walker asks Mr. Guyer to read something from the rules, some policy things. And he says, Mr. Guyer states, "buyers are cautioned to inspect, quote, lot sale, end quote, vehicles very carefully, and verify announced conditions before purchasing."

I don't have a problem with that. The next line, however, the next question is, "Okay. And why is this -- why is this provision in here?" And his answer is, "I would assume it is a buyer-beware advertisement that the N-triple A is attempting to convey. The N-triple A is the National Arbitration -- Automobile Arbitration Association, something like that. So, he's guessing, he's speculating as to what a third party is meaning by these words, and I would ask that page eighty-two, lines thirteen through sixteen be omitted.

MR. WALKER: Your Honor, what we're talking about here, and quoting from, are the rules of the auction that govern this sale, and we're on page one of the rules that

govern the sale. And Plaintiff's already argued this guy's the guru of the auction, and he knows all about his policies and procedures, and I essentially asked him why something in your rules that govern this sale, and he answers it.

MR. MOSKOS: And as, you know, Mr. Walker, earlier, said, Mr. Guyer's guessing at what other people are thinking. That's what he's asking for here, a rule interpretation based on what some other group did, because they're --

THE COURT: Well -- I'm sorry. I didn't mean to cut -- the other question, though, that I ruled on is the dealers, what other dealers thought about it. I mean, this is -- you're offering him as an expert on the auction rules, aren't you? So, can't he give his opinion as to why the rule's there? I mean, that opinion is different than what -- that's his opinion about a rule there versus the other question that asks about what some dealer thought.

MR. MOSKOS: Well, it's one thing to be an expert and come in and say, here are the rules, here's why. He's saying -- he's specifically saying, because I think Mr. Walker caught him off-guard, I assume it's the -- it's a buyer-beware type thing. He doesn't know. He's guessing. And as a result that shouldn't come in.

THE COURT: He's an expert on the rules, right? I

think that's different than him giving an opinion as to what somebody else thought. This is just what his opinion is about the rules, and I think as an expert, he has a right to give an opinion, and he has the right to cross-examine him on the basis of that opinion. I'll allow that. I mean, I assume, early on in the deposition, that you held him out as an expert, right? Is he qualified as an expert?

MR. MOSKOS: Well, I did not qualify him as an expert.

THE COURT: Okay. Okay. The next item is eight-four -- page eight-four, line nineteen through fourteen. We read -- Mr. Walker is asking -- we read the language about inspecting vehicles carefully. Does ADESA expect buyers to properly examine the cars after they take possession? And the answer is, it's a fair assumption that a buyer is going to look at what they just purchased, which is non-responsive and speculation.

THE COURT: I mean, that -- he said, yeah, or I don't -- I don't -- it seems to be a -- I think that's proper too. That seems to be a reasonable answer to me.

MR. MOSKOS: Your Honor, if Mr. Walker is going to read eighty-seven -- page eighty-seven, line twenty-two through eighty-eighty, line six, I would ask that he continue through line thirteen. It's talking about the arbitration rules and when they took effect, and starting on line four on page eighty-eight, Mr. Walker says, and

this is four months before the sale of the vehicle in April, right? The answer is yes. So, these were a new set of rules, right? Answer, four months' worth, yes. That's where he stops. What I'm asking to be included in is "And this Appendix One that you discussed with Mr. Moskos, the chart, that didn't exist before January, did it?" Answer, "I believe the matrix did exist in the previous rules, that's correct."

THE COURT: What about it, Mr. Walker?

MR. WALKER: Well, your Honor, he wants me to just hammer home that it's a separate piece of the rule, but the witness already says right here, this is -- the rules themselves came into effect four months earlier and that's what's important. I don't think it's necessary to hammer on this one piece was also part of it, as well.

MR. MOSKOS: Well, he asked the question, and I would like for it to be added in there, because the implication is that the matrix only be -- became into existence four months before. Well, if you leave off that extra bit, it appears -- it gives a different -- it gives the wrong impression to the jury. It implies that the matrix has only been there for four months, when, in fact, it's been there longer, and that's what his testimony is.

THE COURT: Well, I mean, from a procedural matter, I understand that. Normally, if the witness is here and on

the stand, then the entire witness's testimony comes in. You all are picking and choosing what's coming in, and you have a right to bring in whatever you want to if its there and if it's admissible under the rules. So, from -- from a practical standpoint, that -- he's answered the questions on the video so you can't play them, and you're gonna ask him to read 'em? Is that what we gonna do?

MR. WALKER: For me, yes, sir. And I'm probably going to go through while he's testifying, and I'm probably going to try to cut this down a little bit.

MR. MOSKOS: My point is, if he's going -- if he's going to read that section, he needs to add four lines, that's it.

THE COURT: And you object to that, Mr. Walker? He can stand up and read it I guess.

MR. WALKER: I stopped at six, because that's where I intended to stop.

THE COURT: Okay. So, I mean, your option, too, is 'till you bring it up.

MR. MOSKOS: Yes, sir.

THE COURT: Okay. Anything else?

MR. MOSKOS: Not at this time, your Honor.

THE COURT: Now, we're closer to -- we're closer to eleven thirty. I'm probably thinking about time frame now.

MR. BOUKNIGHT: I think I'm ready in about five

minutes. I got to check two more.

THE COURT: Okay.

MR. BOUKNIGHT: But I think we're good.

THE COURT: So, we could get them in here and play it and be done by one?

MR. WALKER: And even if we have to stop in the middle of it, ---

THE COURT: Okay. That'll work.

MR. WALKER: --- I think it would certainly --

THE COURT: I'll -- we'll take -- we'll take a break for five minutes while you're doing that, and give my court reporter a break, and when you all get ready come and get me or if you don't come I'll come back.

MR. MOSKOS: Yes, sir.

(COURT IN RECESS AT 11:23 AM.)

(COURT BACK IN SESSION AT 11:45 AM.)

(JURY RE-ENTERS COURTROOM AT 11:46 AM.)

THE BAILIFF: The jurors are seated for you, Judge.

THE COURT: Thank you, ma'am.

Ladies and gentlemen, I'm sorry it took so long. We -- The next thing that we hear is another video deposition, and then we'll break for lunch and come back again this afternoon.

(JOE GUYER VIDEO DEPOSITION PUBLISHED TO THE JURY AT 11:47 AM./STOPS AT 01:12 PM.)

MR. MOSKOS: That's it for us for this witness from us, your Honor.

THE COURT: Okay. Anything else we need to bring out before we go to lunch?

MR. WALKER: Your Honor, not at this time. There are a few additional excerpts that I need to read into the record, but -- it's after one o'clock, and I hate to hold the jury.

THE COURT: Okay. Ladies and gentlemen, we'll break for lunch. At two thirty, does that give you all enough time? Will that give you all enough time to eat? All right. I'll see you back at two thirty. I remind you, please don't discuss this case. Have a good lunch. Thank you.

(JURY EXITS COURTROOM ON LUNCH RECESS AT 01:13 PM.)

THE COURT: Okay. I'll see you all then.

(COURT IN LUNCH RECESS AT 01:15 PM.)

(COURT BACK IN SESSION AT 02:37 PM.)

THE COURT: Thank you.

THE BAILIFF: Please make sure your cell phones are all off, please.

THE COURT: Thank you. You can be seated. Okay. We ready?

MR. WALKER: Yes, sir. And I -- Judge I had what I was going to read. They're tired, so --

THE COURT: Okay. All right. If you'll bring the jury, please.

And one thing I need you all to let me know, under the causes of action listed in the complaint -- how much -- which ones -- Does North Carolina law apply to all the causes of action, or parts of them? And you don't have to answer that with the jury walking in. I just need to know that from what charge book that I go out of.

(JURY RE-ENTERS COURTROOM AT 02:38 PM.)

THE BAILIFF: Your Honor, jurors are present.

THE COURT: Thank you. Okay.

MR. WALKER: Thank you, Judge. And as earlier, I'm the low-tech guy today and I've got just five excerpts, and I'm going to keep it short.

THE COURT: Okay.

MR. WALKER: And again, obviously, same witness.

"And when would Exhibit One, the Damage Disclosure Statement, have been given to him?

Answer. To the buyer? To Mr. Whitley, yes. At the time that they would have paid for the vehicle, that's when the title is then released, with this attached to it, to the buyer.

Okay. You didn't have the title; is that correct?

Answer. Correct.

It was sold T/A. Title attached?

Answer. Correct.

Would he have gotten a disclosure form when he received the receipt that is, I believe, Exhibit Fifty-four?

Answer. No. It would have come later. It would have come when he got the title. This would be attached to the title.

Okay. And we'll talk about policies in a minute. Okay? And if cars go through under the red light, in your experience, typically, do they have some sort of problem, mechanical or otherwise, right?

Answer. Yes.

That's why they're red-light cars?

Answer. Correct.

And that's common knowledge in the car business?

Answer. Correct.

I'm looking at paragraph 3(d), as in dog.

Answer. All right.

Would you read that for us?

Buyers are cautioned to inspect, quote, lot sale, unquote, vehicles very carefully, and verify announced conditions before purchasing.

Okay. And why is this -- why is this provision in here?

I would assume it is a buyer-beware advisement that the NAAA is intending to convey.

And I understand this vehicle was sold off the block, right?

Answer. It appears so, yes.

Does that mean it's sitting outside the building, in a parking lot somewhere, after it's gone through the lane?

Answer. The physical place of the vehicle is unchanged. It's where the transaction would take place.

It's not taking place across the block with an auctioneer and recording devices? Well, I'm just -- and I may have asked a really bad question. After the vehicle has gone through the lane and, for example, here, didn't sell, is it parked outside the building?

Answer. Yes.

A car that's parked outside the building and didn't sell, can buyers come and look at it?

Yes.

And since it's not running through the lane there in the thirty seconds to three minutes, the buyer can take all the time he or she wants to look at the car, right?

I would assume so.

We read the language about inspecting vehicles carefully. Does ADESA expect buyers to properly examine their cars after they take possession?

Answer. It's a fair assumption that a buyer is going to look at what they just purchased.

I next want to talk about Exhibit One, this Disclosure Statement, and I guess, in connection with it, a brief discussion about announcements. I understood that when a seller is going to sell a vehicle, things can be communicated informally, like a telephone call, right?

Answer. Uh-huh.

Could be just a text, right?

Answer. Uh-huh.

And as I understood it, you related it could be as simple as, I've got a 2003 Honda I'm going to send up and sell under the red light, correct?

Answer. Yes.

Those and that level of detail in conversation is actually going to be fairly common in communications between sellers and the auction, right?

Answer. That's correct.

MR. WALKER: Thank you, Judge.

THE COURT: Thank you, sir.

MR. WALKER: And I'm trying hard not to back up into that thing.

MR. MOSKOS: Your Honor, at this time I would like to call Brent Ferrell to the stand.

THE COURT: Okay. If you will come around, please, sir, and place your left hand on that *Bible,* and raise your right.

(WHEREUPON, BRENT FERRELL, BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

MADAM CLERK: State your name for the record.

A. Its Norman Brent Ferrell.

DIRECT EXAMINATION

BRENT FERRELL BY MR. MOSKOS:

Q. Mr. Ferrell, ---

A. Yes, sir.

Q. --- how are you today?

A. Excellent.

Q. Wonderful. It's your position that Midlands Honda didn't do anything wrong in the way it sold the car, this 2003, Civic, to Mr. Ecklund. Isn't that correct?

A. Mr. Ecklund being who?

Q. Mr. Ecklund.

A. Ecklund, being the gentleman who purchased it originally from Midlands Honda?

Q. Yes, sir.

A. Right. Yeah, it wasn't.
Q. You all didn't do anything wrong, did you?
A. No, sir.
Q. Okay. And you don't think that Midlands Honda did anything wrong in the way it sold the car to Mr. Whitley, do you?
A. And Mr. Whitley being?
Q. The fellow who bought it at the auction.
A. No, sir.
Q. You don't think you did anything wrong there?
A. No, sir.
Q. Now, you were -- you started in the automobile business in 1998?
A. Correct.
Q. And that was up at a Honda store in Rock Hill?
A. Correct.
Q. And you're not really a car guy, one of those guys that likes to hear the rumble of an engine, or anything like that, are you?
A. No, sir.
Q. You just -- you're just interested in it for the metal and being able to sell it?
A. Exactly.
Q. You sell it, you move it, and you don't care whether somebody -- never mind. You're just -- you just want to

sell the cars, as you're not a big car guy?

A. Exactly.

Q. Okay. And you're not -- you haven't been trained in any sort of automotive -- automotive repair, mechanics, or anything like that?

A. No, sir.

Q. You're not a auto body repairman?

A. No, sir.

Q. You've never worked at a body shop; is that right?

A. No, sir.

Q. And you haven't gone to any classes to learn the specifications on how to fix Hondas, have you?

A. No, sir.

Q. Now, working at a car dealership is, based on our prior conversation in a deposition a little while ago, it sounds like it's a -- it's a pretty hectic place.

A. It can get busy.

Q. It can be busy. And you've got a lot of people -- I'm talking about Midlands Honda. Let's talk about Midlands Honda.

A. Right.

Q. You own a dealership now, right?

A. Correct.

Q. And that's Blythewood Motors?

A. Auto Pros, Columbia.

Q. Auto Pros?
A. Yeah.
Q. And where is that located?
A. It's out on 6001 Two Notch Road.
Q. All right. When you were over at Midlands Honda, it was a pretty hectic place, right?
A. Correct.
Q. And you all had a lot of employees, a lot of cars coming in, a lot of activity, a lot of customers?
A. Correct.
Q. And the car business is pretty competitive, isn't it?
A. Yes, sir.
Q. I mean, you've got a lot of dealers around the area, don't you?
A. Correct.
Q. And they are all competing for the same market, pretty much.
A. Correct.
Q. And even in a dealership, it can be kind of competitive, right? I mean, one salesman's trying to outdo the other.
A. Yeah.
Q. And that's because there's a lot of money involved.
A. It can be, if you're good at it.
Q. And a salesman of the month makes more money, might

get a bonus, something like that?

A. Yes. Discretionary through the owners, or to GM.

Q. But that's out there, right?

A. At some dealers. I don't -- I mean, I can't speak for all of them.

Q. Well, how about Midlands Honda, when you were there?

A. I think, at times, there might have been some discretionary bonuses.

Q. Now, in the dealership, the salesmen get paid a commission. Isn't that true?

A. Not at all of them.

Q. Well, at Midlands Honda. When you were working there --

A. I believe, at that time that I was there, they were being paid on a commission.

Q. Right. And the finance and insurance manager, he gets paid on a commission basis, too. He might get a little salary, but he also gets commissions?

A. Correct.

Q. And the used car manager, that was your position, right?

A. Correct.

Q. You got paid some commission, too?

A. Correct.

Q. And the general manager, who was above everybody else,

would get a little piece of it, too, right? Of what was being sold, the financing, and the insurance, he would get a piece of all of that also.

A. Correct.

Q. All right. So, everybody's trying to make as much money as possible, right?

A. Correct.

Q. Now, in 2010, sales were a little bit slow, weren't they?

A. I -- I couldn't recall.

Q. You don't -- you don't remember, you know, the economy collapsing ---

A. In '08.

Q. --- in '08, right?

A. In '08 and '09, yeah.

Q. But it hadn't recovered in '10, had it?

A. Yeah, yeah. I think we were selling -- We were back to selling a lot of cars back in '10.

Q. But you all were still trying to make up for '08 and '09, right? Those were tough years.

A. Yeah. Ever since I've been in the car business, it's a month-to-month business. You know, it's just -- I wasn't in it that deep to worry about '08 or'09, so. I mean, I couldn't speak for that.

Q. Now, your job as the used car manager at Midlands

Honda, you were responsible or when a customer came in, you were responsible for valuing that car?

A. Correct.

Q. And the way you did it was, you would go out to the car, and you would walk around it. I mean, that's part of the inspection that you would --

A. Visual, right.

Q. Visual inspection.

A. Right.

Q. And then, you would get in it, and you would look at the inside, the interior, because that's important, right?

A. Right.

Q. And then, you would drive it to make sure there's not an engine or a transmission problem?

A. Correct.

Q. And you would look on whatever system, computer, or black book, or NADA book, and you would put a value on that car?

A. Correct.

Q. And if there was a problem with the car, something didn't sound right, you would send that to the shop, so a technician could look at it and tell you what the problem was.

A. Occasionally.

Q. And if, after you made your evaluation -- Well let me

ask you this. When you -- when you were doing your normal inspection, would you take every car back to the shop, and put it up on a lift and check it?

A. No, sir.

Q. Okay. So, your walk -- your inspection just ---

A. I --

Q. --- consisted of walking around the car, getting in and driving it, and putting a value on it?

A. Exactly.

Q. After that, after putting a value on it, you would give it back to the salesman, the value to the salesman, and he would go and finish the deal?

A. Correct.

Q. Now, when you sold the Honda Civic at the auction, that too, was a business transaction for Midlands Honda, right?

A. Correct.

Q. And that's a -- that's a commercial transaction. You're dealing with commerce, and going back and forth in the automobile industry, right?

A. Correct.

Q. Now, back in 2010, when you were at Midlands Honda, you knew that as a general rule you had superior knowledge about cars, the cars that you were selling, than your customers, right?

A. Correct.
Q. Okay. You had access to the title, you would pull Carfax's, you had mechanics who can inspect it. Y'all had superior knowledge.
A. Right.
Q. And while you were there in 2010, you knew you had to be fair to your customers. Right?
A. Correct?
Q. And you knew that you had to be honest with them, correct?
A. Correct.
Q. And you knew that you had to explain thoroughly what was going on with the transaction, so that they understood what was happening.
A. Now, you talking about the salesperson tran -- doing the transaction with the potential buyer, or, or -- or me?
Q. Well --
A. That's where -- yeah, because ---
Q. Well --
A. --- you know I -- I can't speak on the salespeople, what they -- what type of transactions go on between them and the -- the potential buyer. I mean, because I -- I didn't get involved in that part of it.
Q. Yes, sir. Well, you were in this -- Let's do it this way, then. You were superior -- you had superior knowledge

about the car over the folks at the auction, right? The other buyers at the auction, the bidders?

A. Right, right. Yeah.

Q. Okay. And when you contacted the auction about this Civic -- well, just in cars in general, you intend for the auction to relay whatever you tell them to the bidders? You intend for the auction to relay whatever information you give to the bidders at the auction, right?

A. Correct. Yeah, if there -- if there is any information, I mean, as far as the -- they'll ask if I have a title, or is the title attached, title present. You know, anything like that.

Q. Right. And if you're -- if you're not there, and you're talking to them on the phone, they take that information over the phone, right?

A. Correct.

Q. And you -- they -- as you're on the phone, and you're talking to the lady, she'll say to you, you know, what kind of car are you dealing with. And you'd say a Ford truck, whatever, a 2010 Ford truck, blue. And she would say, well, are there any announcements? What do you want us to tell the bidders, right?

A. Yeah. I can't recall ever having any transactions over the phone, doing like that. I just would take them to the auction, and deal with them up there. So, I don't know

---

Q. Okay.

A. --- that.

Q. But whatever you say to the bidders at the auction, you intend for them to -- the bidders to rely on that information, right?

A. Correct. If there's anything to be announced.

Q. And you expect the customers up there, the bidders, to believe and to rely on the statements that you make about the vehicles that you're selling?

A. Correct.

Q. And you don't expect anybody -- any of the bidders to go back to -- well, after you've made these announcements, you don't expect the bidder to go back to Midlands Honda and say, hey, this guy, Brent Ferrell just told me x, y, z, is that true? You don't expect that, do you? I need you to say yes, sir.

A. No, sir. No.

Q. And you would agree with me that the buyers have a right to rely on what you're telling them. Isn't that true?

MR. WALKER: Your Honor, ---

A. I think it's based on --

MR. WALKER: --- I think that's drawing a legal conclusion, and I'll object to the question.

THE COURT: Rephrase the question.

BY MR. MOSKOS:

Q. Customers can rely on what you tell them about the cars at the auction, right?

MR. WALKER: And again, my objection goes the legal import of all that.

THE COURT: And I understand your objection, and I'll allow the question.

Go ahead.

A. Repeat it again. I'm sorry.

Q. Yes, sir. It's okay for customers to rely on what you're telling them, right?

A. Well, I mean, if they trust me, but it's -- it's, you know, the -- what I found out is the consumers know a lot more than people at dealerships about the vehicles than they do.

Q. But I'm talking about at the auction. They have a -- they have a right to rely on what you're telling them, don't they?

A. I'm not -- I don't -- I'm having trouble understanding this question. What -- where do you -- what are you trying to -- I can't.

Q. Okay. Well, if you stand up at an auction and you make an announcement, --

A. That the car is green light, yellow light, or red

light, or is that what we're talking about, or?

Q. Well, --

A. Or do I get up there and say there's something wrong with the vehicle that I -- I mean, I -- No, I didn't do that.

Q. I'm not asking if you did that.

A. Right.

Q. I'm asking, if you got up at the auction and you said the engine in this car is kind of funny, it's kind of bad. We're not sure what it is, but there's an engine issue.

A. Right.

Q. Do the bidders up there have a right to rely on what you're telling them? Can they rely on you?

A. Yeah. Yes, sir.

Q. And -- And can they rely on you and your representations if you don't announce something? In other words, if you get up there, and you don't tell somebody a car -- and you know a car's been wrecked, let's say you've seen the damage, it's been repaired, but you know it's there, and you take it to the auction and you're selling it, and you don't make -- excuse me. I'm sorry.

I apologize. I got off on a tangent. I'm sorry.

Let me back up.

A. No problem.

Q. You know that it would be unfair to lie to the bidders

at the auction, right?

A. If you green-light a vehicle knowing there's something wrong with it, yes. That is -- that's not acceptable at -- you know, you get a bad name for doing that. But when you sell a vehicle my impression is when it's a yellow light, there's a caution, there's either a recall, there's something -- something there that would bring caution.

Q. Sure.

A. When it's a red light, --

Q. Well --

MR. WALKER: Please let him finish.

A. When there's a red light, it's -- it's -- it's relinquishing, you know, all the liability from the seller that, hey, there's something -- there's something wrong with this vehicle, beware of when you purchase it.

Q. So, if a car is sold under a red light, you have absolutely no obligation to tell anybody anything. Is that what you're telling me?

A. From my understanding, from my knowledge, from my limited knowledge of how the auction -- all the rules that are involved in the auction.

Q. Well, you've been going to the auction at ADESA's for how long? Since 2000?

A. No. I didn't start going until probably 2008, when I became the used car manager.

Q. Okay.
A. And they were -- yeah ---
Q. So, 2008 --
A. --- I just first started going in '08, and --
Q. 2008, you started going?
A. Right.
Q. And when you went there, you walked in and you told them who you were.
A. Correct.
Q. And they had you sign a bunch of papers.
A. Correct.
Q. And they gave you a card, one of these ADESA cards, right?
A. Correct. Yes, sir.
Q. And you've got to put that in a little machine, and get a ---
A. You got a badge.
Q. --- sticker, or a badge, right?
A. Correct.
Q. That's the only way to get in it, right?
A. Correct.
Q. And when you first sign up, they give you the rules, right? They give you some rules?
A. Probably. I mean, I didn't read 'em, but.
Q. You didn't read 'em?

A. No.
Q. Did you bring them back with you, or did you just throw them in the trash?
A. Like I said, it's been eight years.
Q. And in those eight years, have you ever gone back and picked up a copy of the rules to figure out what the rules are?
A. No, sir.
Q. Do you understand that failing to tell one of the bidders at the auction about an important aspect of the transaction can also constitute fraud, just like telling them an actual lie?
MR. WALKER: And your Honor, objection ---
A. No, sir.
MR. WALKER: --- to the extent it goes to a legal conclusion about what fraud is.
THE COURT: And I'll sustain that objection. That does call for a legal --
BY MR. MOSKOS:
Q. How about this? If you're at the auction, and the auction requires you to disclose something that's wrong with the car, and you know it's wrong, and you don't disclose it, that's the same as lying about it, isn't it?
A. If that's what the rules are, yeah. I mean, that's what the rules were, or whatever they were at the time

which, like I say, I don't know what they were.
Q. Okay. So, in 2010, --
A. I never dealt in -- I've never purchased a red-light car. I've never -- a yellow-light car, I've always just dealt with green-light cars, because I know the difference between a -- a good one and a bad one.
Q. And you know that customers want to know if a car's been wrecked and rebuilt, don't they?
A. They want to know?
Q. Yeah.
A. Yeah.
Q. And the guys, the dealers at the auction, they want to know if the car's been wrecked and rebuilt, right?
A. Well, they should be able to -- I mean, if they know -- if they've been in it long enough, you can tell that there's any paint difference or what have you. I mean, they -- they should be able to tell, a lot of them, probably ninety-nine percent of them can tell you if a car's been in an accident, or painted, or.
Q. So, when Mrs. Watkins sold this car to Midlands Honda, you recognized the damage to the car?
A. No, sir. I'm the worst ever of spotting paint. I -- I can't do it. I miss them all the time, unless it's a yellow fender on a black car. I can spot that.
Q. Now, while working at Midlands Honda, if a customer

came in, and you knew a car on the lot had been previously wrecked and repaired, but the customer didn't ask if it had been previously wrecked, you don't think you would have an obligation to tell them about the prior wreck damage, do you?

MR. WALKER: Your Honor, I'm going to object to the questions about selling to customers. We're here about a sale at an auction. And I've -- I've let a lot of questions go that were broader but we need to focus on what the issue is in this case, which is not a sale to a consumer. It's between two car people.

THE COURT: Okay. So, how is that question relevant to the facts in this case?

MR. MOSKOS: I'm just trying to make sure I understand what Mr. Ferrell's thought process is in selling to customers, because the next thing I'm going to ask, aren't your bidders your customers.

THE COURT: Well, you need to ask those questions and go down that line.

MR. MOSKOS: I will. Yes, sir. Thank you.

Q. Mr. Ferrell, if you're at the auction, and you know about prior wreck damage in a car, and nobody asks has that car ever been wrecked, you don't think you have to tell them, do you?

A. Not under red light. I just -- I didn't know -- I

mean, I was -- I always assumed if it's red light, it's red light, and nothing, you know.

Q. And Mr. Whitley was one of Midlands Honda's customers, right?

A. Yes, sir.

Q. Now, back in 2010, were you all selling about twelve hundred cars a year? Or is that now what you all are doing over at Auto Pros?

A. No, that's what we're doing now at Auto Pros.

Q. How many were you selling back in 2010?

A. New and used, probably over four thousand, probably.

Q. And how many would you send to the auction?

A. I -- I mean, I don't -- I don't know. I mean, I just.

Q. You were the used car manager back then. Weren't you responsible for making sure those cars were getting over there?

A. Yeah, but we didn't take -- we -- we -- we probably carried probably ten percent of 'em

Q. What does that mean, carried ten percent?

A. I don't -- I mean, probably -- probably that -- about a hundred or less throughout the year.

Q. Going to the auction?

A. Yeah, back in . . .

Q. Now, when you all would sell cars at the auction, you sold them the same way, right? You sent them all to the

auction, or you took them up there, represented them the same way?

A. Right. If I went, or -- or ADESA represented 'em.

Q. And there's nothing different in the way this 2003 Civic was handled by Midlands in 2010, right? I mean, it didn't receive any special attention, or any -- it wasn't treated any differently at the auction than any other car?

A. Not that I recall.

Q. Now, you left Midlands in, excuse me, Midlands Honda in June of 2011, right?

A. Correct.

Q. And you opened up your own car lot in around August of 2011

A. Correct.

Q. Did you hide from the people at Midlands? Did you try to keep your location secret?

A. No.

Q. And fair -- If somebody needed to get a hold of you, they knew where you were?

A. Yes, sir.

Q. And you kept up a friendly relationship with the folks over at Midlands, right?

A. Yeah.

Q. Now, the first time that anybody spoke to you about this case was in March of 2015, last year, right?

A. I think that sounds correct.
Q. Just after you got a subpoena from me to show up and provide some testimony over in Mr. Walker's office?
A. Correct.
Q. And nobody from Midlands Honda contacted you from January of 2013, when this case started, until March of 2015, right? You didn't even know this was going on.
A. Uh-huh.
Q. I need you to say yes or no.
A. No, sir.
Q. Now, we kind of touched on it and started to go down -- You started to get ahead of me a little while ago, which is fine, but I want to talk about the ADESA Auto Auction.

Now, you've been up there, you went up there in 2010, right? You were going up there in 2010? 2009, 2010?
A. Yes, sir.
Q. And in fact, you were going up there once a week, right?
A. I reckon. I mean, I don't know. You know, it's just -- I mean, it's been six years.
Q. Well, you -- you testified to that last year.
A. Sometime -- Yeah. Sometimes, we -- I mean, sometimes I went; sometimes, we bought online. I mean, I just --
Q. Fair enough. But a lot of times, you were going up there, right? And you'd go once a week?

A. Correct.
Q. So, you know how it ran in 2009, 2010, correct?
A. As far as -- I mean, being ran, like, how?
Q. Well, as we started to talk about, you got -- you initially had to go in and fill out paperwork saying that you could represent Midlands Honda, correct? And they gave you a card, and you had to put it in a machine to get your badge?
A. Correct.
Q. And you always had to wear your badge while you were there?
A. Correct.
Q. And you saw the rules that were on the front door when you -- when you came up to the registration place, right?
You remember the rules on the door?
A. No, sir, I didn't. No.
Q. Well, you know that only dealers could be there, right? I mean, it wasn't open to the public.
A. No, sir.
Q. And you would go in, and there was a lady there at the information desk, and she would help you if you had any questions?
A. Correct.
Q. You'd walk down the halls and through to the -- to the sale area, right?

A. Correct.
Q. And in there, you would have -- it would be just this huge building, right? It was like sheet metal -- a sheet metal building?
A. Correct.
Q. And on one side, there would be giant doors that would come up, right?
A. Correct.
Q. And then, at the end would be the cars, lined up, right?
A. Correct.
Q. And in each car was a driver.
A. Correct.
Q. And you would have multiple lanes down the building. Isn't that right?
A. Correct.
Q. And then, you would have the auctioneer standing up on a block, kind of like the judge is here, correct?
A. Correct.
Q. And he'd have the lights behind him. And he had a microphone in front of him. And the person selling the car would stand up there with the auctioneer. Isn't that right?
A. Correct.
Q. Now, where the cars drove, that was a different color

area than the rest of the floor, right? That would tell you where the cars are driving, right?

A. Correct. I think, yeah. I think.

Q. Yeah. There's like, a dark green floor, and then a white lane?

A. Right. Yeah.

Q. And the cars who would drive on the white, and you needed to be out of the white when they're driving, correct?

A. Correct. Right.

Q. Okay. Have you ever been hit by a car?

A. Came close.

Q. Okay. And the car would come up and stopped right in front of the auctioneer, right?

A. Correct.

Q. And the car's running. Isn't that right?

A. Correct.

Q. And the people are milling around and walking around looking at it while the auctioneer is trying to get people to bid.

A. Correct.

Q. And there's a guy standing down there trying to get people to bid, too, right?

A. Correct.

Q. You ever crawl underneath that car while it's sitting

there in front of the auctioneer?
A. No, sir.
Q. Why not? Don't you want to make sure what's underneath?
A. Yeah, but not -- not there.
Q. Why?
A. You'll get run over.
Q. Okay. And after the bidding is done, whether it sells or not, car drives off.
A. Correct.
Q. And that car, if the bidding is going, and a lot of people are bidding on a car, it might be sitting there in front of the auctioneer two, three minutes?
A. Correct.
Q. But if it's not selling, it's leaving pretty fast; is that right?
A. Correct.
Q. Now, after you -- Midlands sold a car, all of the titling documentation would go to the ladies at the business office at Midlands, right?
A. Correct.
Q. And the ladies in there, they were -- they were up to speed, right? They were hard-working ladies.
A. Correct.
Q. And all the ladies in there knew who you were and what

your job was, right?

A. Correct.

Q. And they knew that you were selling cars at the ADESA Auto Auction, right?

A. Correct.

Q. And if there was a problem with the auction, with any of the cars, they knew who to come to. That was you.

A. Correct.

Q. Now, did you ever receive any of the documents that would come from the sale of a car through the auction, or did it all go to the business office?

A. It went through the business office. I would get a sale sheet at the auction. I would come back and bill it out to ADESA and turn it in to the office, and I seen it no more.

Q. And now you were done?

A. I was done.

Q. All right. Now, those ladies in the office, they have to be -- they have to have an eagle eye, right? Because they're dealing with tons of papers all the time.

A. Correct.

Q. And when some other documentation comes in from the auction, they know whether or not that's proper documentation, right? Well, how about this?

A. I -- You know, I don't know about all the proper

auction side of it, what documents they need, but they were pretty adamant on what they needed back in the business office on their end.

Q. Sure. And the ladies at the -- in the business office, they knew that the auction signed documents on behalf of Midlands Honda, right?

A. What was that again? I'm sorry.

Q. The ladies in the business office at Midlands Honda, they knew that the auction was signing documents on behalf of Midlands Honda. They knew --

A. I don't know if they -- You saying that ADESA had authorization to sign documents ---

Q. Sure.

A. --- representing Midlands Honda?

Q. Sure.

A. I don't know about that.

Q. You don't know about the power of attorney that Mr. Threatt signed?

A. No, sir.

Q. Well, the ladies never came back to you and said, hey, who is this person signing these papers, we don't recognize this person? They never came back to you and complained that somebody unauthorized was signing the -- this -- the paperwork dealing with the cars you all were selling, did they?

A. No, sir.
Q. And when the documents came in from the sale of this Civic, nobody came back to you and said, hey, Ran -- excuse me -- hey, Brent, who's this lady Haney, who signed this damage disclosure form? Nobody came back and asked you about that, did they?
A. Not that I can recall, no.
Q. And when this Civic came to the dealership in 2008, you did your standard walk-around at that time, right?
A. Correct.
Q. And you noticed the damage, that this was a clipped car?
A. No, sir.
Q. You didn't see it?
A. No, sir.
Q. How did you miss it?
A. I wasn't looking for it. I mean, I wasn't -- I just looked at the outside of it and drove it, and.
Q. And you inspected that the way you inspected every other car, right?
A. Every car.
Q. When the car went to the auction, though, you knew it was a clipped car.
A. No, sir.
Q. You didn't know it was a clipped car?

A. Uh-huh
Q. I need you to say yes or no.
A. No, sir.
Q. Well, you knew it hadn't been repaired properly, right?
A. Did I know it was being -- if it was being -- had been repaired properly?
Q. Yes, sir.
A. No, sir.
Q. Now, you weren't involved in the sale of the Civic to Charles Ecklund, were you?
A. No, sir.
Q. All right. So, in March 2010, when -- a -- Randy Threatt called you into his office to talk about a call he had received from Mr. Ecklund, didn't he?
A. Like I said, I mean, it's been so long, I mean.
Q. Well, you had a conversation with Mr. Threatt at that time, and he told you that Mr. Ecklund said he had purchased a clipped car from Midlands Honda. Isn't that what he told you?
A. I don't know if he used the word clipped. I think he -- I think it was referred back to a car that was in a accident, or -- or something to that.
Q. Well, you knew at that time that the car was coming back because of a prior wreck?

A. That the car had been in a wreck, and we were trading him out.

Q. Okay. So, Mr. Threatt had already told you that that's what -- that's what we're going to -- that was going to be Mr. Ecklund's remedy to switch him out, and trade him out into another car?

A. Right.

Q. And that's before the car showed up at the lot?

A. Correct.

Q. Now, at that time, Mr. Threatt told you to go find out what happened to the 2003 Civic, right? Go pull the sales file, go pull the service file, find out what's going on with this car?

A. Not that I can recall. I think it was just take the car to the sale, sell it as-is, and move on.

Q. Well, didn't you go into the various files, the sales file, and the service file in the service department and find out more about this car and why Mr. Ecklund was complaining?

A. Not that I can -- not that I can recall. No, sir.

Q. And at that point, you didn't feel like Midlands Honda had done anything wrong, did you?

A. No, sir.

Q. Now, you also pulled the Carfax on March 11; isn't that right?

A. I can't recall.

MR. MOSKOS: Any objection?

MR. WALKER: No.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER SIXTY-EIGHT, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

BY MR. MOSKOS:

Q. Mr. Ecklund, please take a look at Plaintiff's Exhibit Number Sixty-eight, which is being introduced without objection. You recognize that Carfax, right?

A. I recognize it as a Carfax, but not this particular Carfax. I mean, the one that's --

Q. Well, it was pulled by Midlands Honda, right?

A. I assume.

Q. Well, it says vehicle location, Midlands Honda, right here, on the top of the page?

A. Correct.

Q. That's -- that would be there when the dealership pulled a Carfax, right?

A. Correct.

Q. All right. So, the dealership was pulling this Carfax on this car, looks like March 11, 2010.

A. Okay.

Q. Is that right?

A. Yes, sir.

Q. And on the second page, it indicates that in January

22nd, 2004, that car had been in a wreck.

A. Correct.

Q. Now, you can't tell from a Carfax how bad a car has been -- has been damaged, right?

A. Correct.

Q. So, in order to really know, you've got to look at it.

A. Correct.

Q. And if you're not trained in analyzing that damage, you've got to find somebody who is?

A. Right.

Q. Like the service guys in the back at Midlands Honda.

A. I don't know if they're a body shop or -- I think they're more mechanics than they are body shop. We didn't have a body shop at the time, so I think that's.

Q. And when you pulled the Carfax, you went and told Mr. Threatt what you found.

MR. WALKER: Your Honor, he said he didn't pull the Carfax. And I would object to --

A. Yeah, I mean, I -- I -- I don't recall. I mean it's just --

THE COURT: Hold on just a minute.

A. -- it's.

THE COURT: He said he didn't pull the Carfax.

A. That I don't recall pulling the --

MR. MOSKOS: He doesn't recall.

A. -- Carfax. I mean, it's.

THE COURT: Okay.

BY MR. MOSKOS:

Q. Well, you took --

THE COURT: You need to rephrase your question.

MR. MOSKOS: Yes, sir.

Q. You took the Carfax that we're talking about to Mr. Threatt, and you talked about it with him?

A. I don't recall me taking the Carfax to the -- to him and talking about it.

Q. All right. How about, do you recall talking to him about the Carfax?

A. No, sir.

Q. Now, when the car came back from Alabama, Mr. Threatt went out and took a look at it, right?

A. I can't recall.

Q. Well, you went out there and looked at it, right?

A. I may have had when we traded for it, when we traded the customer out of it.

Q. Well, how many people were coming back to Midlands Honda complaining that they had purchased rebuilt, wrecked vehicles?

A. None, to my knowledge, except this one.

Q. Okay. So, according to you, this is an aberration, a surprise, right?

A. Yes, sir.
Q. This is a special case?
A. Correct.
Q. And you don't go out and take a look at it?
A. Not when we give the gentleman all his money back and get him in another vehicle, and resolve the issue. And the customer was happy, and I didn't -- I didn't go out and elaborate, or -- or get involved in the vehicle, or anything. No, sir.
Q. Well, are you all in -- are you all in the habit of selling wrecked cars?
A. No, sir.
Q. So, what you're telling us is this unusual car showed up, and you didn't have any interest in it, going out and looking at it, and seeing what went wrong?
A. No, sir.
Q. Well, when the car came in, did you take it to the shop to have it looked at to find out the extent of the damage?
A. No, sir.
Q. Now, a lot of times when cars are sold -- well, let's talk about Midlands Honda. Not in general, just Midlands Honda. When you were working there, you were aware that people would buy used cars from Midlands. And then, they would come back a couple days, a week, couple of months,

and complain, saying, oh, the timing belt needs to be changed, or the water pump went out, and I want Midlands to fix it.

MR. WALKER: Your Honor, I'll object. We're here to talk about an auction sale, not a sale to a consumer. Not relevant and not the facts of our case --

MR. MOSKOS: I'm testing his recollection, your Honor, about the events dealing with this car.

MR. WALKER: But it's a general question about the practice of the dealership and what they encounter. It's not appropriate.

THE COURT: Right. I mean, asking him in general practice, how is that dealing with his recollection of this car? Ask him about what he knows about this car.

MR. MOSKOS: Yes, sir.

Q. Well, Mr. Threatt. You knew that Mr. Threatt sent this car to the shop, right, to have somebody look at it?

A. No, sir.

Q. You don't know about that?

A. No, sir.

Q. Well, after Mr. Threatt looked at the car, he came back to you and said that the car had been clipped, right?

A. I don't recall. I don't -- I wouldn't think so, I mean, because it was -- the -- the customer had already stated the car was clipped. He was unhappy. He come back.

We found him another car. We traded him out, full refund. And we wouldn't have looked at the car or done anything, because it wasn't nothing we was going to.

Q. Well, you didn't give him a full refund, did you? Midlands didn't give him a refund. You forced him into a trade. He wanted his money back. Isn't that right?

A. No, sir. Not that I -- not that I recall, I mean.

Q. Now, you looked at this car, and Mr. Threatt looked at this car, and you all knew it was dangerous, right?

A. No.

MR. WALKER: Objection, your Honor. I don't -- I don't think that's --

THE COURT: Because he answered -- he answered negative. I mean, he answered no.

Go ahead.

A. No, sir. We did not look at it.

Q. You didn't look at it?

A. No, sir.

Q. But Mr. Threatt came to you and said, get rid of it at the auction.

A. Exactly.

Q. Did he tell you to make any announcements?

A. No, sir.

Q. The decision to get rid of the vehicle --

A. Well, let me back up. He did say, sell it red light,

and let's move on.

Q. Sell it red light, and move on. That's it?

A. That's correct.

Q. So, the decision to get rid of the vehicle was Mr. Threatt's, because he was the general manager?

A. Correct.

Q. And he's the one that made the ultimate decision to get rid of this vehicle, red light, move on?

A. Sounds right.

Q. And when he said send it to the auction, get rid of it, sell it at the red light, you knew that that meant to send it to North Carolina to the ADESA Auto Auction, and sell it?

A. Correct. Yeah, that's the only one we were dealing with at the time.

Q. Now, through your experience at the auction, you know that a red light is not synonymous with a vehicle having prior wreck damage, right? There are a bunch of reasons why a car can be sold under a red light.

A. Correct. There's different variables, yeah.

Q. So, the mere fact that you sold this car at the auction under a red light did not necessarily put anybody on notice that this car had been wrecked, another car wrecked, and the two parts welded together? There wasn't anything that gave any bit of that information, was there?

A. No, sir.
Q. And Mr. Threatt approved of the way -- of your handling of the Civic at the auction?
A. I -- I assume, yeah.
Q. Well, he didn't complain, did he?
A. No, sir.
Q. He didn't penalize you in any way, did he?
A. No, sir.
Q. Now, since you've been selling cars at the auction since 2008 in North Carolina, you're well aware of the damage disclosure form that's required to be filled out, right?
A. Correct.
Q. And that's on every car?
A. Correct.
Q. And that's a requirement of the auction, right?
A. Correct.
Q. I'm going to show you what has been marked as Exhibit Number One. Now, this is the Damage Disclosure Form for the Civic sold by Midlands. You are aware that somebody, on behalf of Midlands, was going to have to represent whether this vehicle had been damaged by collision or other occurrence, to the extent of damages that exceeded twenty-five percent of its value at the time of the collision? You knew that was going to have to be a representation made

to the buyers, the bidders.

A. Not under red light, I wasn't aware of it. No, sir.

Q. Well, this has to be filled out -- Read the top -- read this line right here for us, or two lines.

Those two lines. Start with *State law*.

A. "State law requires that every seller" --

Q. I'm sorry. You've got to speak up, because we can't hear you back here.

A. "State law requires that every seller disclose to the buyer, if he does or reasonably should know the information listed below. Failure to do so will result in civil liability."

Q. Is there anything in there that says, but you don't have to do so if it's under a red light?

A. No, sir.

Q. Are you aware of anything in the North Carolina law that says if you sell a car under a red light, you don't have to disclose prior damage?

A. No, sir.

Q. All right. So, at the time that this car was being sold at the auction, number one had to be filled out, right? That's a requirement of the auction, too. True?

A. Correct.

Q. And the answer on this form should have been yes.

A. Well, I mean, I don't know if it was -- if the damage

is where it's -- if the extent of it exceeded twenty-five percent. Who knew? I mean, nobody knew. We didn't have it in -- we didn't have it inspected and somebody put a value of how much damage was done to it.

Q. You didn't inspect it to find out? You knew that the law required it.

A. Hum. No, sir.

Q. No, you didn't know the law required you to make --

A. No, I didn't -- I didn't have -- we didn't have it inspected. No, sir. We didn't get a value of how much damage was done on the vehicle.

Q. The gentleman claims that the vehicle has been previously wrecked, and you're going to sell it in Charlotte, North Carolina, where you know you've got to make this disclosure, and you don't do anything to find out what -- how to mark this form? Is that what you're telling us today?

A. I mean, I didn't -- I wasn't -- I didn't do the form on this, so I didn't know. I wasn't --

Q. But you had to make the representations to the auction so that --

A. Only if it's sold when I'm there and hand them the title is this filled out. If it was sold after the fact, and I wasn't there, I don't know what transpired.

Q. Well, how about this? When you picked up the phone

and you told the lady on the other end of the phone at the ADESA Auto Auction you had a 2003 Honda Civic that you were going to run through the auction, but you weren't going to be present, did you tell her that the vehicle had been previously damaged more than twenty-five percent of its value?

A. No, sir, because we didn't know.

Q. And you did nothing to find out; isn't that right?

A. That's correct.

Q. Okay. And you didn't check to see if this was a salvage motor vehicle. You don't know.

A. Well, it had a clean title, so.

Q. A clean title?

A. Right. It had a clean title.

Q. Okay. Number five says, has this vehicle been reconstructed? You would agree with me wouldn't you that, if you cut two cars in half and weld the parts of the different cars together, and come up with a new car, that's a reconstructed vehicle?

A. Correct.

Q. So, that should have been marked yes, also, right?

A. If we would have known it at the time.

Q. So, is it your testimony that the law in North Carolina is simply that you have to disclose what you know only?

A. If he knows -- if, to the buyer, if he knows.
Q. Okay.
A. What it states on that first line.
Q. So --
A. If he knows.
Q. So, as long as you don't know, you don't have to tell, right?
A. If I don't -- if I don't know I can't sit there and tell somebody that the damage exceeds twenty-five percent when I don't know, or, if the vehicle has been reconstructed, when I don't know, so, I can't answer those.
Q. Now, you understand at a red-light sale, cars are purchased by other smaller dealers, right?
A. I assume. I don't -- I don't know. I mean, I don't -- I don't even -- whenever they mention red light I'm not gonna accept 'em and deal with 'em because I know --
Q. But you see the people there, right? I mean, you see the guys there who are bidding on the cars. Right? Some of them were your friends, right?
A. Some people do. Yeah, some do, and some don't.
Q. Right. Some of them are your friends.
A. I don't know. I don't know about that.
Q. You don't have any friends at the auction?
A. Yeah, but I don't know if any of them that buys red-light cars.

Q. But you know some of those cars are going to wind up at dealerships, and be sold to retail customers, right?
A. Maybe gravel lots or, you know, your lower-end vehicles. But dealerships, I doubt they going to buy -- they gonna bid, they gonna --
Q. Fair enough. I'm not using the right words.
A. Right, right. Yeah, a dealership --
Q. A mom-and-pop.
A. Yeah. Mom-and-pop --
Q. Your --
A. Yeah, gravel lot stuff, they probably -- they look for that kind of stuff.
Q. Right. Lower-end. They've got a market that would buy that car?
A. Exactly.
Q. And you know that, right?
A. Based on the history of the -- what they buy, yeah.
Q. Okay. And that's so that they could buy and sell it to a -- an individual. It's a retail -- retail purchase?
A. Correct.
Q. Okay. Now, when this -- when you sent this car up -- well, an auction is on Thursday, right?
A. I think it was on Thursday at ADESA's.
Q. I mean, that's when ADESA has their auction ---
A. Okay.

Q. --- on Thursday. And you had the Civic sent up to the auction about ten days before, right?

A. I -- I don't know.

Q. Well, you would have put it on a transporter and sent it up there?

A. Some we did, some we drove. You know, so, I don't know which one, that Honda that went up.

Q. So, you're -- As these are going up there, you call the auction. You tell them you've got a number of cars, four, five, six cars, however many, and you're going to sell them under the red-light sale, right?

A. Not necessarily.

Q. Okay. You might sell some through the green light, and some through the red?

A. Exactly.

Q. And the Civic, when you got on the phone with them, you told them to run the Civic through the red-light sale?

A. Correct.

Q. And the lady then ask you if there were any announcements on the car, right?

A. I don't recall.

Q. Well, you told her there weren't any announcements to be made, right?

A. I don't recall that, either. I -- I probably -- I mean, I know I just announced it red light, and.

Q. And you didn't tell her about -- to make any announcements, even though you knew this car was wrecked, potentially dangerous, all that, did you?

A. No, sir.

Q. Do you contend that you were required not to tell the auction that it was a clipped car?

A. Say that one more time.

Q. Did anybody tell you, don't tell them?

A. No, sir.

Q. So, it was your choice whether to tell the dealership about the prior wreck damage. That was your choice?

A. The dealership?

Q. Excuse me. It was your choice as to whether to tell the auction about the prior wreck damage?

A. Correct.

Q. And it's your position that you didn't have to tell them about it, because it was being sold under the red light?

A. Correct, yeah. Which is as-is.

Q. And you believe that it's up to the car buyers that are there to find out on their own, they got to be smart enough to figure it out?

A. Yes, sir.

Q. And on April 1, you received a phone call from Midlands Honda, saying that somebody wanted to buy this car

for five thousand dollars, right?
A. I assume, yeah. I mean, I.
Q. And -- but you wanted Seventy-two hundred dollars for that Civic. Isn't that true?
A. I can't recall what the dollar amounts were.
Q. Well, you were trying to get as much money out of it as possible, right?
A. Not necessarily, because I would have -- if I was wanting more I would have green-lighted it because they bring more money than a red light.
Q. You were -- you would have green-lighted this car?
A. If I was -- yeah, if I was wanting more money, yeah.
Q. Okay.
A. But I, you know, I didn't do that. I wouldn't -- we red-lighted it and sold as-is, and put a number on it, and.
Q. Well, the lady at the auction came back to you and said that Mr. Whitley wasn't going to pay what -- the Seventy-two hundred dollars. He told -- she told you that he would pay -- and you -- you went down to Fifty-two hundred dollars; isn't that right?
A. I don't -- I don't -- I cannot -- I can't answer that. I don't know what the dollar amounts were six years ago.
Q. Mr. Whitley agreed to pay Fifty-two hundred dollars, right?
A. I assume. I -- I mean, like I say, I don't know the

dollar amount, the transaction that --

Q. And once the car was gone, once it was sold, you forgot about it?

A. Exactly.

Q. And you didn't think about the consequences before or after selling this car?

A. Not under red light. No, sir.

Q. Now, in 2000 -- later, in 2010, Roger called you, and -- and he told you that he wanted Midlands to take the Civic back, didn't he?

A. I can't recall.

Q. You took --didn't he tell you that he wanted you to come and pick up the car, and pay him back his money?

A. I can't recall that conversation. No, sir.

Q. Do you have any evidence that that conversation never took place?

A. No, sir.

Q. And when you were talking to him on the phone, you remembered that it was this Civic that you had -- or that Mr. Ecklund had returned to Midlands, right?

A. I don't recall the conversation.

Q. You told Roger you would get back to him, you would call him back? Took the VIN number.

A. I don't recall the conversation.

Q. After getting off the phone with Mr. Whitley, you went

and talked to Mr. Threatt, and told him you all had a problem.

MR. WALKER: Your Honor, ---

A. I don't recall ---

MR. WALKER: --- I would object to --

A. --- the conversation.

MR. WALKER: It assumes a fact not in evidence. The man says he doesn't recall the conversation.

MR. MOSKOS: That was the conversation with Mr. Whitley. I'm asking about a conversation with Mr. Threatt.

THE COURT: Okay. Go ahead.

BY MR. MOSKOS:

Q. You went to Mr. Threatt and told him that you all had a problem, because the buyer was wanting his money back.

A. Like I said, I mean, I can't recall the conversation six years ago, or ever how long it's --

Q. Well, you never called Roger back, did you?

A. I can't recall the conversation.

Q. I'm going to show you what has been marked as Plaintiff's Exhibit Number Fifty-six, which is the Receipt received by Mr. Whitley at the -- after the sale. Okay? We're gonna talk about after the sale.

You've seen those before, right?

A. Yes, sir.

Q. In fact, every time you sold a car there, you would

get a copy, several.
A. Could --
Q. The only real difference would be up in the top corner, where there's a B, that meant the buyer got the receipt, and where the S is has got -- the seller got the receipt, right?
A. Never paid it attention.
Q. Now, over -- I want you to look over on the left-hand side of the page. Do you see where it says announcements?
A. Yes, sir.
Q. If a friend of yours brought this to you, and he had been at the auction, and he says, hey, is this car any good, from this -- can you -- what would you tell him?
A. That he needs to go have it inspected, thoroughly inspected, because there's something wrong with it.
Q. Okay. But there's nothing mentioned there, is there, under announcements?
A. Uh-huh.
Q. I'm need you to say yes or no.
A. No, sir.
Q. Thank you. But from the document that you have in your hand, I believe it's Fifty-six, there's nothing on there that would indicate that the car had been previously wrecked.
A. No, sir.

Q. Am I correct?
A. Correct.
Q. And if it had been, if it had been previously wrecked, it should have been announced, right?
A. Not necessarily. No, sir.
Q. Fair enough. If -- if that was -- that sheet, let's talk about that sheet. Should the fact that this car was a clipped car, shouldn't that have been listed on that receipt as an announcement?
A. No, sir. Not under a red light, that I -- that I -- that I had the understanding the way it was.
Q. Now, you don't think Roger Whitley did anything wrong in this, do you? You're not --
A. Buying the vehicle?
Q. The guy buying the vehicle.
A. No.
Q. He didn't do anything wrong, did he?
A. No, sir.
Q. And when you sell these cars at the auction, do you think you have any responsibility to protect the public by letting people know what kind of cars they're buying?
A. Not under red light. No, sir.
Q. When a car comes in to the dealership -- Well, excuse me. Let's go back. I want to be precise. In 2010, when you were working at Midlands Honda, and a car came in that

was a Honda vehicle, you all would certify those vehicles, right?

A. If it met the requirements, yes, sir.

Q. And who would be -- who would determine whether or not that vehicle would be looked at to see if it met the qualifications?

A. Certified ASA --

MR. WALKER: Your Honor, I'm going to object. In 2010, this car was at an auction, not certified. And this whole line of questioning is not relevant to the sale of this vehicle to the auction.

MR. MOSKOS: It goes to the knowledge of the defendant, and in selling this car to Mr. Whitley, because they had multiple opportunities to inspect this car, and I would need to know what they knew about the damage to this vehicle.

THE COURT: I understand that but I didn't -- based on his testimony, I didn't think that this vehicle had gone through that inspection.

MR. MOSKOS: Well, that's what I'm getting ready to talk to him about.

THE COURT: Well, you can ask him what this particular vehicle ---

MR. MOSKOS: Yes, sir. I'll do that.

THE COURT: --- what he knew of any inspection of this

particular vehicle.

MR. MOSKOS: I'll do that, your Honor. Yes, sir.

Q. Take a look at Exhibit Sixty-six.

Do you recognize that?

A. That is a report -- a repair order. Yes, sir.

Q. It's a repair order from Midlands?

A. Correct.

Q. And that gets filled out any time a car goes through the shop. That kind of a form, right?

A. Correct.

Q. And this deals with the 2003 Honda Civic back in 2008, right?

A. Correct.

Q. And at that time, the dealership ran it through the inspection process to make it a certified used car, right?

A. I assume, yeah.

Q. Well, read the -- read the first line right there.

A. "Used car request, 159-point check."

Q. And that's a 159-point check that's used for the certified pre-owned process, right?

A. Correct.

Q. So, the car was run through the shop, and you've seen them do the certified pre-owned inspection, right? You've never seen it?

A. No, sir.

Q. Well, you know that they put it up in the air, right?
A. Right.
Q. And they go all through this car, and they've got a little checklist that they go down, right?
A. Correct.
Q. So, at some point during the process in inspecting this car, it goes up in the air, right?
A. I assume. I wasn't back there when this car was being inspected. I don't know.
Q. When you go to the auction, do you take a lift with you?
A. No, sir.
Q. You get up to the car, and do they have lifts at the -- at the auction, where you can lift them up, and get underneath the car and check them?
A. No, sir. They have post-sale inspections that do all that you can pay for. If you want a car inspected, you can pay extra to have a inspection done on it.
Q. And when you go to the auctions, you don't shimmy under a car and check it?
A. No, sir. I only buy green-light cars, so I don't know how to deal with it.
Q. You've never seen anybody running around with a lift at an auction, have you?
A. No, sir.

Q. Okay. And sometimes, those cars are packed in pretty tight. It's hard to get between them?

A. Yes, sir.

Q. And you surely wouldn't have gotten under this Civic to look at it while it was running across the block?

A. No, sir.

Q. Now, you knew that if anybody did know about this damage at the auction, they wouldn't have purchased this car, would they?

A. I can't an -- I couldn't answer -- answer that for you??. I don't know what type of cars they buy.

Q. Isn't it true that this car really needed to go to a salvage yard and not to an auction?

A. I don't know. I didn't know the extent of the damage of the vehicle.

Q. Well, do you agree that it's unfair to sell a car without -- at the auction without following the rules?

MR. WALKER: Objection.

A. At the time I thought I was following the rules.

MR. WALKER: That's got legal implications --

THE COURT: I'll sustain that objection.

BY MR. MOSKOS:

Q. Well, how about this? You know you would have to follow the rules at the auction, no matter what they are?

A. Correct. Yeah.

Q. Okay. And just because you don't know what the rules are, that doesn't let you off the hook, does it?
A. I wouldn't think so, no.
Q. And you know that you have to follow whatever the state law is where you're selling the car?
A. If there's laws in place, yes, sir.
Q. Whether you know them or not, you're supposed to follow them, right?
A. Correct.
Q. And you have an obligation to learn what the laws are, so that you can follow them, right? The state laws?
A. Yeah, I reckon.
Q. And if somebody came to your lot today and had a clipped car, you would want to know about that, wouldn't you?
A. Yes, sir.
Q. And Midlands Honda had an obligation to tell Roger that the car was clipped before he bid on it, right?
MR. WALKER: Objection, your Honor. Calls for a legal conclusion.
THE COURT: I mean, he -- he can't -- I think he's testified earlier that he didn't know the car was clipped. He -- and he said -- But he didn't know the car was clipped, so, how can he answer that?
MR. MOSKOS: Fair enough.

Q. You know the car is clipped now, right?
A. No, sir. I hadn't seen the car, so I don't know.
Q. You don't know if the car's been clipped?
A. No, sir.
Q. You haven't seen any of the pictures in this case?
A. A few at your -- at the deposition that was blurry and you --
Q. Well, assume for a second that it has been or is a clipped car. Two cars cut in half and parts welded together. Okay? You still don't think you did anything wrong, do you?
A. As far as?
Q. Selling the car at the auction the way you did.
A. Under the red light, as-is?
Q. You didn't --
A. No, sir. Not from my definition of as-is, no sir.
Q. You didn't --
A. If I would have known the rules, and I did it, yes. I would have said I did -- it was wrong. But not knowing the rules, I didn't --
Q. You don't --
A. That's why I -- that's why I red-lighted the vehicle.
Q. So, you don't think you did anything wrong?
A. Under the red light, under the rule -- under what I thought was the right way of doing it, no, sir.

MR. MOSKOS: No further questions -- no further questions at this time, your Honor.

THE COURT: Okay.

MR. MOSKOS: If you'll give me a second, I'll take this stuff down.

THE COURT: Okay.

MR. WALKER: Well, we've been going an hour and a half, --

THE COURT: Right. I'll take a break.

All right, ladies and gentlemen, we'll take a break. I'll get you back out in a few minutes or so.

(JURY EXITS COURTROOM ON RECESS AT 03:56 PM.)

THE COURT: You can't discuss your testimony, okay, during the break with any - even to the lawyers. Okay?

MR. FERRELL: Okay.

THE COURT: Let me ask, these photographs that you all are dealing with, are they in evidence?

MR. WALKER: One through eleven?

THE COURT: Yeah.

MR. WALKER: Yes, sir.

THE COURT: Is this how the car looked when it was sold at auction?

MR. MOSKOS: No, sir. That's where it -- that's what it looked like when Nationwide bought it.

THE COURT: And so, somebody fixed it for him?

MR. MOSKOS: Yeah, they cut the back end off, took another car, cut that off, and welded it to this car.

THE COURT: Okay. So, but I -- I was under the impression that it -- that they wrecked it again, and that's how he found out it had been clipped.

MR. MOSKOS: If you look on -- you can't see it in here, but on the other side of the car, on the -- Yeah, here you go. Here you go.

THE COURT: Okay.

MR. MOSKOS: Well, this is actually the -- The car was cut in half. Mr. Ecklund was driving through a parking lot and a woman came back and hit the car door. He took it to the shop to get it fixed.

THE COURT: So was it --

MR. WALKER: I'm sorry?

MR. MOSKOS: That's when he found out, when they put it on the lift.

THE COURT: So this back, the end of this car right here, is that --

MR. MOSKOS: No, this is Mrs. Gaskin, the pictures were Mrs. Gaskin's wrecked car or her daughter wrecked the car.

THE COURT: And it was clipped after that.

MR. MOSKOS: Right. After this somebody bought it at the auction, cut the end off, welded it, sold it. Wound up

at Midlands.

THE COURT: This is not how it was at the auction?

MR. MOSKOS: Not when Mr. Whitley had it no, sir.

THE COURT: But had the car been fixed when it was at the auction?

MR. MOSKOS: No, sir, it was wrecked.

THE COURT: Well apparently the car was wrecked basically.

MR. MOSKOS: There was some damage yes, sir.

THE COURT: Okay. All right. We'll take a ten-minute break. From a scheduling standpoint, it's four o'clock. Are you planning on calling any other witnesses today, or is this?

MR. MOSKOS: I was going to call one more.

(COURT IN RECESS AT 03:58 PM.)

(COURT BACK IN SESSION AT 04:08 PM.)

THE COURT: How many more witnesses you got after this one?

MR. MOSKOS: I have Mr. Threatt, and then I have three more. I have Mr. Whitley; he's going to be short. I have an expert who is going to come in and talk about how unsafe this car is.

MR. WALKER: And we need to have a chat about that.

THE COURT: Yeah.

MR. WALKER: Because our position is, it's -- it's

already in. So, all that guy's going to do is try to polish up an apple.

MR. MOSKOS: Well, I appreciate Mr. Walker's attempts to sink the case. I'd appreciate it if the Court would indulge me.

THE COURT: Well, you know, I understand that you guys have totally different facts in the situation in this case and -- I mean, but you guys clearly the facts of the situation in this case. ?? I mean. ??

MR. MOSKOS: Are they going to stipulate that it's an unsafe car?

MR. WALKER: Your Honor, there's already ---

THE COURT: Yes, sir.

MR. WALKER: --- there's already testimony from Mr. Ecklund. That's the sort of stuff you said you would let in, that's why I let it go. But bringing somebody in here when On-Track doesn't require a safe vehicle. We never made any expressed representation it was a safe vehicle.

MR. MOSKOS: Well, they denied that they even knew that it was an unsafe vehicle.

THE COURT: Yeah, but they knew it was wrecked.

MR. MOSKOS: They did know it was wrecked.

THE COURT: And they put sell it as-is, which nobody puts the buyer on notice you better inspect it before you put it on the road.

MR. MOSKOS: I would disagree with you in this situation, your Honor.

THE COURT: Well, I understand that. That's why we're here. But I'm just telling you, you know, I don't know if -- if you can get by the *Gamble* factors on this one. We'll see.

MR. MOSKOS: Well, I would make the presentation, now whether I can get past your Honor, now, that's another -- that's another issue.

THE COURT: I understand that. I'm just, you know. This is a whole lot different case, and the facts are a whole lot different, but we'll see.

I mean, I haven't heard it all yet. And I -- We'll see. I'll just try to figure out a time schedule whether he's going to be able to make his flight or not.

MR. MOSKOS: I'm sorry. Who is that?

MR. WALKER: That's me.

THE COURT: Mr. Walker is supposed to be on ---

MR. MOSKOS: Oh.

THE COURT: --- a airplane at one o'clock Friday.

And I don't have any, you know, issues. I was just trying, you know, ---

MR. MOSKOS: Well, --

THE COURT: --- if he's not gonna make it.

MR. MOSKOS: Well, and cook dinner for twenty Saturday

night in Villanova, Pennsylvania I'll be in deep doggy you know what.

MR. MOSKOS: Well, it was his choice to bifurcate.

THE COURT: Well, we'll see.

MR. MOSKOS: All right.

THE COURT: I hope. You all ready to bring the jury in we'll try to wrap it up and get 'em out of here by five.

MR. MOSKOS: I do have one thing that I do need to deal with, your Honor. There was a -- I sent a request for admissions over to Mr. Walker dealing with one document that came from ADESA Auto Auction, to identify -- to admit the authenticity. There was no response. So, my expectation was -- admitted, and I would like to put it into evidence.

THE COURT: What's your position, Mr. Walker?

MR. WALKER: It is -- It's authentic.

THE COURT: Okay.

Are you going to put Mr. Ferrell back on the stand?

Mr. Ferrell, where is your family from?

MR. FERRELL: Rock Hill.

THE COURT: Before that? Do you know?

MR. FERRELL: Sir?

THE COURT: Before that?

MR. FERRELL: Before that. Winston-Salem, up toward Winston-Salem.

THE COURT: Okay. That's -- that is my middle name, and that's what I go by, Ferrell. And my grandmother was Mamie Ferrell from Roughing, North Carolina. It goes back to Ira Ferrell, so. And most people spell it with an A, and you spell it with an E, just like -- So, maybe we're connected in some way.

MR. MOSKOS: Sixty-nine. Thank you.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER SIXTY-NINE, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

THE COURT: Okay. Bring in the jury.

(JURY RE-ENTERS COURTROOM AT 04:14 PM.)

THE BAILIFF: The jurors are seated, your Honor.

THE COURT: Thank you.

Okay. Mr. Ferrell, if you want to come back to the stand.

(WITNESS RETAKES THE WITNESS STAND.)

THE COURT: Yes, sir.

MR. WALKER: Thank you, Judge.

CROSS-EXAMINATION

BRENT FERRELL BY MR. WALKER:

Q. Mr. Ferrell, I want to talk about the sale of this vehicle, and how it ended up at the auction. I understood that your boss told you, I think your words were, to take the car to the sale and sell it on a red light. Is that what you were told?

A. Correct.
Q. And you also had some indication it had been in an accident, right?
A. Correct.
Q. That's what you knew when you were going to go take it to the sale, right?
A. Correct.
Q. Now your boss told you to take it to the sale on the red light. You did exactly what you were told, then, right?
A. Right. Correct.
Q. Now, you talked a lot about your understanding of red light. I'm going to show you what's been marked as Exhibit Fifty-five. This is one of these receipts from the auction. You've seen those things before, hadn't you?
A. Correct.
Q. Would you look over on the left-hand margin, and if you look about two-thirds of the way down, do you see the words red light?
A. Yes, sir.
Q. Is there a check by it?
A. Yes, sir.
Q. And that shows this vehicle was sold under the red light?
A. Correct. As-is.

Q. And right next to it, it says as-is, doesn't it?
A. Correct.
Q. That means buyer-beware, doesn't it?
A. Correct.
Q. That means you're not making any promises about this vehicle?
A. Correct.
Q. Everybody in the car business knows that, don't they?
MR. MOSKOS: Objection.
THE COURT: Okay. What's the objection?
MR. MOSKOS: He's --
A. I can't speak for everybody in the car business, but for my knowledge --
THE COURT: Hold on just a minute. She can't -- she's got to get us all talking.
A. Oh, I'm sorry.
THE COURT: You've got to wait 'til I rule on this ---
A. All right. Yes, sir.
THE COURT: --- and then I'll let you in.
A. All right.
THE COURT: I sustain the objection.
You can rephrase the question.
BY MR. WALKER:
Q. Well, I'll talk about your perspective. I understand you don't buy cars at the red light.

A. Correct.
Q. And -- and really I guess the jury doesn't understand this. You haven't worked at Midlands in years, have you?
A. Correct.
Q. And right now, you are working at a used car lot on Two Notch Road in Columbia, South Carolina?
A. Correct.
Q. And your used car lot, you all buy cars, right?
A. Correct.
Q. You buy some at auction, don't you?
A. Ninety-nine percent of 'em.
Q. But you never buy under the red light, do you?
A. No, sir.
Q. Why not?
A. Because there's something wrong with 'em.
Q. Well, when you were talking with Mr. Moskos, you, in answer to a question, said you'd recommend, I think your words were that they had the car thoroughly inspected?
A. Correct.
Q. And that's because, if you buy it under a red light, you know it's got some kind of problem, don't you?
A. Correct.
Q. And I understand you, since you don't buy cars at the red-light sale, you don't hang around the red-light area?
A. That's -- well, they -- they come through any lane,

really. Just depends, yeah.

Q. I'm going to hand you what's been marked as Exhibit Fifty-two. And it's -- I've counted it up, it's fifteen pages. You've -- are you familiar with this document at all?

A. No, sir.

Q. I've turned to a page, got a chart on it. You with me?

A. Yes, sir.

Q. And there's a column on this chart, says, disclosure required. Do you see what I'm talking about?

A. Correct.

Q. And about a third of the way down, there's an entry for frame unibody damage, and the word yes appears there. See where I'm talking about?

A. Let's see. Yes, sir.

Q. Now, if these were the auction rules that applied when this sale took place at the auction, and this vehicle had frame damage that should have been disclosed, even under the red light here, shouldn't it?

A. Correct.

Q. Did you know about these rules in 2010?

A. No, sir.

Q. Would you flip back to the first page with me? Up at the top, is there a date?

A. January 2010.
Q. And this car got sold at the auction April 1 of 2010?
A. Yeah, I assume. Yeah.
Q. Well, there's plenty of documents got that date on it.
A. Yeah. That -- Yeah.
Q. In March and April of 2010, were you familiar with this document at all?
A. No, sir.
Q. Why not?
A. I just didn't -- I just didn't -- like I said, I just didn't deal with those type vehicles. I didn't, you know, ever learn the -- or know the rules. I just.
Q. Well, what was your understanding of what a red-light sale was in 2010?
A. That it was sold as-is, and relinquished the seller of any liability.
Q. A real quick tangent. Was there a guy named Terry Smith, who was a technician at Midlands when you were there?
A. Yes, sir.
Q. Where is Terry today?
A. He's deceased.
Q. Do you know when he was deceased?
A. Seemed like it might have been in early 2011 or after, somewhere in that time frame.

Q. Okay. We need to talk about this Exhibit One. Okay? And that's this Disclosure Statement. You were asked to read portions of this thing before. Do you remember that?

A. Yes, sir.

Q. And at the very top, it says Damage Disclosure Statement, right?

A. Correct.

Q. Right under it, doesn't it say vehicles five-years-old and newer, applies to numbers one and four?

A. Correct.

Q. And this vehicle is 2003, right?

A. Correct.

Q. If this is in 2010, it's more than five years old, isn't it?

A. Correct.

Q. So, right here on the face of this Disclosure Statement, does it say -- doesn't it say that numbers one and four don't apply to this vehicle?

A. Correct.

Q. Now, item five there at the bottom talks about reconstructed vehicles. When you sent this to the auction in late March of 2010, you had no idea this was a clipped car, did you?

A. No, sir.

Q. And I understand you don't know, because we didn't

send this thing through service, and do all this investigation?

A. No, sir.

Q. So, you didn't do anything to make this car look any better, or spiff it up, before you sent it to North Carolina?

A. No, sir.

Q. You didn't try to hide anything on that vehicle, did you?

A. No, sir.

Q. And the signature on this Exhibit One, this Disclosure Statement, is not your signature, is it?

A. No, sir.

Q. Did you ever talk to anybody about their intention to sign this for you?

A. No, sir.

Q. And I apologize, we're having to kind of skip around to come in behind a long chat.

I understand your memory's kind of vague. It's been six years?

A. Correct.

Q. Was your memory of these events a lot better in late 2010?

A. More than likely, yes, sir.

Q. Early 2011, better then, too?

A. Yes, sir.

Q. Middle of 2011, better then than now?

A. Yes, sir.

MR. WALKER: Your Honor, do you mind if I chat briefly with my client?

THE COURT: No. Not at all.

(PAUSE.)

MR. WALKER: No further questions, Judge. Thank you.

MR. MOSKOS: Very short, your Honor.

REDIRECT EXAMINATION

BRENT FERRELL BY MR. MOSKOS:

Q. Mr. Ferrell.

A. Yes, sir.

Q. You still buy and sell cars the way you did at Midlands Honda, right?

A. Yes, sir.

Q. That's the way you've learned how to do it in the business?

A. Over the years.

Q. And you were taught that by Mr. Threatt?

A. No, sir.

MR. WALKER: This is not responsive to anything on cross.

THE COURT: Yeah, how is that responsive?

MR. MOSKOS: I'll move on, your Honor.

THE COURT: Okay.

MR. MOSKOS: I'm sorry.

Q. Midlands Honda sold previously damaged cars too, right?

MR. WALKER: Not responsive, your Honor.

MR. MOSKOS: Yes, sir.

Q. Mr. Walker talked about the Damage Disclosure Form, right? And the five years -- the five-year provision that he was talking about. Do you remember that?

A. Yes, sir.

Q. The auction doesn't care about that five-year limitation, does it? It requires you to fill one out for every car.

A. I don't know. I can't speak on behalf of the auction. I don't know.

Q. All right. Every time you've been to the auction, regardless of the car that you sold, whether it was five years old, one year old, twenty years old, the auction required you to fill one of those Damage Disclosure Forms out, right? That's the auction policy, right?

A. It might be. But like I said, you know, some -- only when I had the titles available did I fill them out. I don't know about if they were title attached, and without a title to them.

Q. Well, I'll change my question a little bit. On the

cars that you sold at the ADESA Auto Auction, and you had the title with you, and you sold a car, whether it was one year old or twenty years old, the auction made you fill out one of these damage disclosure forms, right?

A. I can't honestly answer if it was more than five years old if I had to fill one out.

Q. And you didn't do anything to find out the extent of the damage to this car before you sold it at the auction. Is that your testimony?

A. Correct.

MR. MOSKOS: Thank you.

THE COURT: You can step down.

(WITNESS LEAVES WITNESS STAND.)

MR. MOSKOS: Your Honor, at this time I'd like to call Randy Threatt to the stand, please.

THE COURT: Okay. If you would come around, please, sir, and place your left hand on the *Bible*, and raise your right.

(WHEREUPON, RANDY THREATT, BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

MADAM CLERK: Thank you. Have a seat in the witness stand please and state your name for the record.

A. Randy Threatt.

MR. MOSKOS: I'm sorry, your Honor. I seem to have misplaced his deposition. I'm trying to locate it. Oh,

here we go.

DIRECT EXAMINATION

RANDY THREATT BY MR. MOSKOS:

Q. Mr. Threatt, when you -- You were general manager at Midlands Honda, the business was owned by four guys, four men?

A. PSC Corp.

Q. I'm sorry?

A. Well, PSC Corp., is the way I remember it. I don't know how many owners it was.

Q. Okay. Now, you received direction from those fellows, right? From the corporate office?

MR. WALKER: Your Honor, I'm going to object on the relevance grounds. We're here about the sale of a vehicle to an auction.

MR. MOSKOS: I need to know the motivation of the dealership, your Honor, and what they're doing to sell cars and this particular car, too.

THE COURT: I'll allow it. I mean, you need to stay within what's relevant in this case, but you can at least establish the pecking order to come.

MR. MOSKOS: Yes, sir.

Q. And the company required you to sell so many cars a month. They were -- they were watching your numbers?

A. Correct.

Q. And you knew that if you didn't keep your numbers up, and you didn't meet whatever the quota was, you would be fired?

A. No.

Q. You didn't know that?

A. No.

Q. Well, they would -- they would contact you, and ask you why your numbers were falling, right?

A. No.

Q. They just left you alone to do whatever you wanted to do?

A. No. But I wouldn't get fired if we didn't have a -- hit a certain number, no.

Q. Well, if -- Obviously, people have bad months. I get that. But if you were consistently underperforming or losing money, you'd be nervous about your job?

A. I would not. No, sir.

Q. You would not have been?

A. No, sir.

Q. All right. And you told your bosses about this car, right? This Civic?

A. Being six years ago and listening to everything, I don't remember six years ago what happened. I've had a lot of jobs since then, and I don't remember talking to anybody about it, except when at your deposition, when you tried to

remind me of things that happened. But I -- I don't remember what happened six years ago. I'm sorry.

Q. So, you don't have any recollection of calling your bosses ---

A. No, sir.

Q. --- boss -- bosses, and saying hey, we've got this problem car?

A. No, sir. Sorry.

Q. Now, when you were the general manager at Midlands, you knew that you were buying and selling -- excuse me -- you were buying cars that may have been previously wrecked?

A. No, sir.

Q. You didn't -- You weren't aware that people who were trading in their cars might have prior wreck damage?

A. Trade-ins?

Q. Yeah.

A. Yes, sir. You said buying cars like I'm interpreting that as going to an auction and buying cars.

Q. My apologies. When a customer would come in and trade in a car and buy a new car, many of those cars had previous wreck damage.

A. That's correct. Yes, sir.

Q. And sometimes, Midlands would keep those cars, and sell them on their lot, right?

A. It would be normal to -- you know, we would pull a

Carfax, and if it was -- and Carfax rates those minor damage, major damage, minor damage, severe damage, and total loss. There's different levels of that. So, if it was a minor, which would be, at the grocery store, you had a bump-up with a buggy, then that would have a bad Carfax. It don't mean the car's been wrecked, but it could have a bad Carfax. You know, we might keep something like that, something very minor that's not a big problem.

Q. And you understand that Carfax is not a hundred percent, right?

A. Yes, sir, I do.

Q. And just because something is on a Carfax, or, in fact, something's not on a Carfax, doesn't mean that it's true?

A. It's a guide.

Q. In other words you --

A. It's a guide.

Q. Right. You could have a Carfax that's clean, and yet the car still have a significant damage to it?

A. Yes, sir. But it's better than the alternative of not having a Carfax.

Q. Fair enough. And if you have a Carfax and it shows accident damage, that puts you on notice that there's something you need to go look at, to evaluate?

A. Yes, sir.

Q. Now, sometimes Honda -- Excuse me, Midlands would take in cars, and they would sell them to wholesalers.

A. Correct.

Q. Right? They would take a trade-in, sell it to a wholesaler, and the car would go away. Sometimes you would take it, put the car on the lot, and sell it. Sometimes, you would take a trade-in, and take it to the auction and sell it.

A. Correct.

Q. And people who are the wholesalers, they would take those cars and sell them at different lots, or maybe even directly to retail customers.

A. They were doing something with them, because they would always come back and want more. So, I guess they were selling them and making some type of money, or they wouldn't keep coming back, so, yeah.

Q. Now, the employees at Midlands Honda, they were highly-trained professionals, right?

A. That's -- yeah. I guess you would say -- I don't know that they were highly trained professionals. I think they were professionals. But I don't know to the extent of what training they had. Which -- which employee are you referring to?

Q. Wait a minute, wait a minute, wait a minute. You didn't -- you don't know the training they had?

A. I don't know which employee. Give me an exact of an employee.

Q. All right. But in 2010 -- let's start in 2010.

A. Uh-huh.

Q. You were the general manager.

A. Yes, sir.

Q. You were the most important guy there. You were running the whole show?

A. Yes, sir.

Q. And you had about a hundred and ten employees at that time, right?

A. I don't remember that, how many employees we had.

Q. How many departments did you have?

A. I want to -- I'm guessing four.

MR. WALKER: Your Honor, I'm going to object on relevance grounds. We're here to talk about auctioning a vehicle.

MR. MOSKOS: Well, we're trying to find out what kind of employees he has. That's what I'm trying to find out.

THE COURT: Well --

A. But you asked the question, were they all highly-trained, and I don't -- define highly-trained, and tell me who the employee was and then I'll try to help.

Q. Okay. Let's talk about your service department.

A. Give me an employee's name, and I'll try to --

Q. Well, I -- I'm sorry, but Midlands Honda didn't share their personnel information with me.

So, let's do it this way.

A. Okay.

Q. The guys in the service department, they're Honda trained, right?

A. Yes, sir.

Q. They're Honda technicians, trained and certified by Honda, to be able to work on Honda cars.

A. Yes, sir, I agree one hundred percent.

Q. Do you consider those folks highly-trained?

A. I agree that they're trained by Honda to their standards and certifications. That's what I agree with.

Q. Do you agree that they're highly-trained professionals?

A. I agree that they're professionals.

Q. Not that they're highly-trained?

A. They're trained by Honda to their certification and their standards.

Q. Why won't you answer if they're highly-trained or not?

A. Because I don't know who you're talking about.

Q. All of them.

A. I don't know. I can't answer the question.

Q. Are any of them highly trained?

A. I would imagine some of them are, but I don't know

which one you're talking about.
Q. How about this fellow that did the 159-point inspection, that's now deceased? He was highly-trained, wasn't he?
A. What's his name? I don't know. Tell me who he is. I don't know who it is.
Q. You don't know who inspected this car?
A. No, sir. I don't. I'm sorry.
Q. Now -- All right. Now, if a person -- well, the folks, the staff folks, the folks in the finance office, the F and I department guys, they were trained, right?
A. They were trained, yes, sir. I agree with that.
Q. But you won't say they're highly-trained; they were just trained.
A. I don't understand the definition of highly-trained. I don't -- if you would break it down and explain it to me, then I maybe could agree with you. But I don't understand it. I'm sorry.
Q. Well, there's one thing to have somebody walk in the door and sit down at a -- at a desk, and say okay, when this person comes in, hand them this form, and have them sign it. It's another thing to send them to a school, so that they understand how the process works and what you're trying to accomplish; and obviously, continuing education courses to maintain that level of professionalism. And

what I'm trying to find out from you is, did you have folks at Midlands that knew what they were doing, and were trained, highly-trained professionals?

A. They were trained. Yes, sir. They were trained.

Q. All right. How about Mr. Ferrell? Was he highly-trained?

A. He was trained.

Q. And you trained him?

A. And I was just trained. I'm -- I'm not going to say I was highly-trained. I think I was trained, but I'm not going to say I was highly-trained because I still don't know the definition of it.

Q. All right. So, if a person wasn't doing their job right, you all would try to educate them and help them along. And if they continued to be sub-par, you would let them go?

A. Yes, sir.

Q. Take a look at what has been marked as Plaintiff's Exhibit Number Sixty-seven. Do you recognize that?

A. It's a Carfax.

Q. And it came from Midlands Honda, right? In 2008?

A. It says that in the top-left corner. Yes, sir.

Q. And that was in 2008. You were the general manager then?

A. Yes, sir.

Q. Okay. Now --

MR. WALKER: And your Honor, we're here about a sale that took place at an auction in 2010 and I'm going to object to the relevance of a 2008 Carfax.

THE COURT: How is a 2008 Carfax relevant?

MR. MOSKOS: It goes to their knowledge, and I was about to ask him about what's on the second page which deals with the accident.

MR. WALKER: And I'm going to argue it's also cumulative. We've went through the 2010 Carfax, that also says there's an accident.

MR. MOSKOS: And they had multiple, multiple times to inspect this car, to find out what's wrong with the car.

THE COURT: All right. I'll allow the question. Go ahead.

MR. MOSKOS: Thank you.

Q. So, that would have been -- that's -- that was in 2008, when you all bought the car, right?

A. It says 2008 on the top-right corner. Yes, sir.

Q. And when you all buy cars from consumers you -- back in 2008, you all were pulling Carfaxes, right? That was part of the inspection process.

A. It was part of the process. Yes, sir.

Q. And on -- Would you look on page two for me? I believe there's a January 22, 2004 entry.

A. Yes, sir.
Q. And that tells you that there was an accident, right?
A. Yes, sir.
Q. And when your used car manager looked at that, he had an obligation to take the car to the deal -- to the shop, and have it inspected, to find out the extent of the damage, right?
A. No, sir.
Q. You didn't have to do that?
A. No, sir.
Q. Did that change in 2010, when Mr. Ecklund returned that vehicle?
A. No, I don't --
Q. The Civic?
A. -- I don't remember it changing. No, sir.
Q. So, is it your testimony that, even though the dealership would become aware of prior wreck damage, it did absolutely nothing to find out how extensive that wreck damage was?
A. I don't remember what happened in 2008 when this was pulled, or 2010.
Q. You were in charge of the policies at the dealership in 2008 and 2010, right?
A. Correct.
Q. And you don't remember any of those policies?

A. No, sir.
Q. Well, you remember Mr. Ecklund calling you, don't you?
A. No, sir.
(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER SEVENTY, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)
Q. All right, Mr. Threatt. Take a look at what has been marked Exhibit Number Seventy, and introduced without any objection. Isn't it true that Mr. Ecklund called you and left a message for you?
A. Based on this handwritten note, yes.
Q. And we're looking at the overhead now. It's that note, right? It's on one of those little pink notepad things, right?
A. Yes.
Q. That's one of the pink things? All right. That was Mr. Ecklund, and he was calling -- or his wife calls, and wants you to call him about the car they got. She said it was two cars welded together, and it's not safe. She said they are going to call their lawyer. That's -- was the message, right?
A. Yes, sir.
Q. Okay. On the back side are some other notes. That's your handwriting?
A. No, it's not.
Q. Now, that was -- that was on the note.

A. It's not my handwriting.
Q. I understand. Don't get excited.
A. No. I didn't even have to read it. I know it's not mine, so.
Q. But this is in -- this was in the Midlands file, and it says, looks like under insurance company, Silver slash light; fix equals total; while Civic partly welded and glued back in can't be repaired because of previous work color difference. You were aware of that information, weren't you?
A. I can't say I was. I get an average of a hundred calls a day, and two hundred emails, so I can't remember this. I'm sorry. Been six years ---
Q. You --
A. --- I --
Q. You got a whole bunch of calls from people who bought previously wrecked and welded cars?
A. No, I get a lot of business associates, vendors, customers, different people I get information from.
Q. Well, how many other calls have you gotten, where people were saying they bought a clipped car, and they were going to sue you?
A. I can't remember. None of 'em that I can remember, and I don't remember this one.
Q. So, this should -- this should really stand out.

A. It don't. I wish it did. It would be easier for -- should be easier for all of us, but I don't remember. I'm sorry.

Q. Well, when you got this note, you contacted Mr. Ferrell, right?

A. I don't remember.

Q. To find out what was going on?

A. I don't remember that.

Q. And you -- you told him about the call.

A. I don't remember that.

Q. You told him to go get the file, the service file and the regular file, right?

A. I still don't remember that.

Q. Well, you had him pull a Carfax.

A. I don't remember that.

Q. Who did you have pull the Carfax?

A. I don't remember. I don't know that I had anybody pull it. I don't remember.

Q. Do you know who pulled the Carfax? There's -- it's right there in front of you.

A. I just said, I don't know. No, sir. I don't know. I'm sorry. I wish I did.

Q. Well, you called Mr. Ecklund back, and you talked to him about the -- the -- the problem, and you told him that you were going to bring the car back to Columbia. You

remember that.
A. No. I don't remember it.
Q. Okay. And the car did come back to Columbia. You know it came back on a rollback, right?
A. No, I don't.
Q. Well, when the car showed up, somebody let you know that the car was there.
A. It's been six years ago. I don't remember. I'm sorry. I don't remember it. I know you want me to, but I'm sorry, I don't remember it.
Q. All right. So, when the car showed up, didn't you tell the folks to send it to the shop so that you could find out how bad this car was?
A. I'm sorry, but I don't remember.
Q. Well, this note indicates that somebody looked at it, and talked about how bad it was.
A. I don't disagree.
Q. You must have -- you must have done that, right?
A. I don't disagree with what's written on the back, even thought it wasn't my writing. I don't remember it. I see what you've presented as evidence, but I don't remember what happened. I'm sorry.
Q. You do get a lot of phone calls during the day.
A. At that time, I did, when I worked that job; but now, I don't.

Q. Sure.
A. At that time, I did.
Q. But back then, when you were working for Midlands Honda, you would sell -- you all were selling a whole bunch of cars, right?
A. Yes, sir.
Q. You all would sell like, two thousand in a year, right?
A. No.
Q. Not that many, or more than that?
A. More than that.
Q. Oh. Okay. Well, people would buy used cars from you, and then they would have a problem with the car. And they would call up, and they would say, hey, my -- I need a tune-up, and I think you should pay for it, because I just bought the car. You've got those kinds of calls, right?
A. I didn't get those calls. No, sir.
Q. The dealership got those calls?
A. Well, somebody in front of me might have got those calls. Yes, sir. Maybe a sales rep would have got that call, you know. I didn't get those calls, no, sir.
Q. But you knew those kind of calls were coming, because you had been in those positions, the sales position and the sales manager position, before, right? You knew those calls came in?

A. Not how many came in, no, sir.
Q. Well, when somebody calls in and says, I bought a previously-wrecked car, you knew back in 2010 that you needed to look at it and make sure maybe he didn't wreck it, and he's trying to get you to buy his problem.
A. I don't remember that.
Q. But isn't that what you would do back then, in 2010?
A. If somebody would have bought a car and had a problem, and come back and said they bought a wrecked car, I would think that that's what we -- I would have a manager look at it, if it got to me, and they would look at it, I think that would make logical sense. I don't know what happened. I don't remember what happened. I wish I did remember, but I'm sorry, I don't.
Q. And you didn't keep any sort of notes, did you?
A. No, sir.
Q. And when the car got there and was inspected by whoever you instructed to look at it, --
A. I don't remember having anybody -- telling anybody to look at it. Or instructing anybody, I'm sorry.
Q. And you don't remember talking to the technician in the back about what he found?
A. No, sir, I don't remember that.
Q. And you don't remember going back to the technician, who did the 159-point inspection, and talking to him about

--

A. No, sir. The used car manager would a did that, or the general sales manager would a done that; or the new car sales manager ---

Q. All right.

A. --- would a probably -- possibly done that.

Q. So, --

A. I know I didn't do it.

Q. So, you were --

A. That's why I don't remember.

Q. You would have delegated that responsibility --

A. No. It probably didn't even get to me. We had people in place that do their job. They get paid to do a job, and we let people do their job. If I did everybody's job, I wouldn't need any help.

Q. This -- this phone call came to you.

A. Uh-huh.

Q. And Mr. Ecklund already testified that he spoke to you. Okay?

A. And I don't remember it. I'm sorry. I wish I did.

Q. Fair enough. But you are now telling us that somebody else in the dealership would have handled it. I mean, you may have talked to them, but somebody else dealt with it.

A. I don't remember it. I don't remember who did it, because I had a staff of people that worked with us, and

somebody there could have possibly handled it. I don't remember handling it. That's why I can't answer the questions.

Q. How about this? So, after the inspection of this car, you went out and looked at it.

MR. WALKER: Objection, your Honor.

A. It was six years ago, sir. I don't remember it.

MR. WALKER: --- assumes --

A. I'm sorry.

MR. WALKER: Assumes a fact not in evidence. Nobody's testified to an inspection.

THE COURT: If he's asked that and he don't remember something I'll --

MR. MOSKOS: Yes, sir.

Q. Well, you do remember talking to Mr. Ferrell and telling him, get rid of it?

A. It was six years ago. I don't remember. I'm sorry.

Q. So, sitting here during Mr. Ferrell's testimony, that didn't help bring anything back to you?

A. No. When we did the deposition with you, and you asked me all these questions over and over and over, that didn't make me remember anything, either.

I wish I remembered it. It would be easier for both of us, but I don't. I'm sorry.

Q. Well, you didn't tell him to disclose any of the

damage that in the car, right?

A. It was six years ago. I don't remember. I'm sorry.

Q. All right. Well, how about this? Being the general manager, you were responsible for the whole dealership at that time, in 2010, right?

A. Yes, sir.

Q. And when you told them -- when you -- Mr. Ferrell said you told him to get rid of it at the auction. Just get rid of it. You knew the rules at the ADESA Auto Auction, right?

A. I don't remember what I told Brent. If he said that, Mr. Ferrell, I don't remember that. And I'm not an expert on the rules at ADESA Auto Auction. I know if you sell a car red light, you're selling a piece of junk, and people that buy that are buying junked cars. They're fully aware that they're buying junked cars.

So, if he sold the car as a red light, he was selling it that he knew something was wrong with it, and the guy that bought it, he knew he was buying junk. I'm a hundred percent positive of that.

Q. Okay. So, does junked equal previously wrecked car?

A. Junk is as-is, you assume all liability. Red light means danger. We all -- everybody in this room knows danger, be -- be concerned. And if it was sold like that, the person bought that, they accepted that responsibility

and that liability. They knew what they were buying.

Q. Are you telling this jury that a red light automatically means that a car's been previously wrecked?

A. I'm saying, red light means danger, be concerned, be aware. We all know that.

Q. Okay.

A. That's what I'm saying.

Q. Let me show you what is Appendix One in the terms and conditions of the ADESA Auto Auction that applied to this matter. Let me get you the terms and conditions.

MR. MOSKOS: That's it. That's Fifty-one. Not sure where Fifty-two is. Here's Fifty-two. Got it right here.

Q. Let me show you Exhibit Fifty-two. You were aware of that back in 2010, right?

A. No, sir.

Q. So, would you agree with me that, in 2010, that this Appendix One applied to the car, and it says at the top of the page, disclosure required? That's what it says, right?

A. I'm under the understanding that if it's older than five years, no. That's my understanding in 2010. I don't know what it is now. I'm not an expert. I don't claim to be one.

Q. Do you see anywhere on this page where it says that this only -- that Appendix One only applies to five-year-old cars?

A. That was in my opinion of the knowledge that I had.
Q. But you -- Take a look at Appendix One, and up at the top it says disclosure required, and it has a column for red-light sales, right?
A. I see it says as-is, is what I see.
Q. Right. Right above the word as-is, is red light.
A. Yep. Red light, as-is. Yes, sir.
Q. Okay. And if you come down about forty percent of the page, it says frame unibody damage.
A. Based on this piece of paper here it says yes but I'm under the understanding that, if it's older than five years, that it's not -- you don't have to disclose it. And furthermore, we didn't do an inspection on the car. We didn't examine the car. We apparently wholesaled the car, based on all the information that you've given to me, through the deposition and what I've heard today.
Q. And that's pretty convenient, because then you can sell it and say, oh, I never knew any problems.
A. Well, first of all, I have no skin in this game today. I got -- it doesn't matter which side ---
Q. No. Not ---
A. --- it means, I don't have anything to do with either of you so --
Q. --- today, but you did back then.
A. No. I didn't have any skin in the game.

Q. Back in 2010, when you were running the place?
A. Yeah. I wasn't -- there's no advantage for me to sell a car that has been put back together, as you say. There's no advantage in me to --
Q. Sure.
A. How -- how --
Q. If you sell -- If you sell this car, you can make some money back.
A. Okay.
Q. If you don't sell it ---
A. What's the difference?
Q. --- you're stuck with ---
A. What would the difference be?
Q. --- Fifty-two hundred dollars.
A. Okay. So, we would sell it for fifty-two hundred; or we'd sell it for thirty-five hundred; or we'd sell it for five hundred. That's not -- I don't understand. It doesn't ---
Q. You think there's a market --
A. --- make a difference.
Q. --- you think there's a market out there for selling cars that have been cut in half, are dangerous, unsafe, you think --
A. If we would have had the knowledge of the car had been cut in half and unsafe and unreliable, if we'd have known

all that, we would have still took it to a sale and wholesaled it, and disposed of the vehicle.

Q. But you all --

A. We didn't know that.

Q. But you all --

A. I don't remember knowing that.

Q. Y'all chose not to know that. You made a conscious decision not to send it back to the -- the service department and find out.

A. Well.

Q. Isn't that right?

A. No. I don't remember doing that.

Q. Well, did you inspect it, or did you not inspect it?

A. No. I don't remember any of that stuff. That's what I was telling you earlier. I don't remember. But it wouldn't have been an advantage to me to do it, and you're implying that there was some shadiness or underhandedness going on, and we wouldn't do that.

Q. If you'd done an inspection, there would've been a service record. Right?

A. On a wholesale piece, we're not going to do an inspection. Never. You're not going to waste the money to go out there and inspect the car and service the car and spend money on a car that you intend to wholesale. That wouldn't make good sense.

Q. So, you're not going to spend the money to find out if you're putting --

A. If it's a wholesale piece --

Q. Excuse me.

A. If we want to retail the unit, yes, we would.

Q. Excuse me.

A. But since we were wholesaling it, the guy that purchased the wholesale unit under a red light, meaning as-is, meaning buyer-beware, that guy would assume the responsibility to inspect it, have it conditioned, and have it checked before he sold it. That's the way that would work.

Q. So, by not checking it out, get rid of it, you get rid of the responsibility ---

A. You wholesale it.

Q. --- Excuse me, sir. --- and you put it on somebody else, right?

A. That guy that bought it, whoever he was, and I don't know who he was, whoever he would be, anytime you wholesale a car, they're buying a car to try to make a profit. They're buying a car to try to turn around and sell it to somebody. So they assumed -- they assume the responsibility to have the car inspected, to make sure the car is in proper condition, to make sure the car is right, before they sell it. That's what they would do.

Q. But you don't assume any responsibility for making sure that they know that they're buying an unsafe vehicle.
A. On a wholesale unit, sell it to a wholesaler that plans to turn around and sell it himself, and service it properly, and get it conditioned and sell it as a retail unit, no, I do not assume any responsibility on that because it was a wholesale unit, as-is, buyer beware, red light. So, no, I don't feel like we should have serviced that car and did a full inspection on a wholesale unit. No, sir, I don't feel like that.
Q. Not to mention you didn't think you needed to do an inspection to make sure Mr. Ecklund wasn't lying to you. And you didn't need to do an inspection to make sure that that vehicle was safe?
A. I don't remember Mr. Ecklund, and I don't remember this particular car. I'm talking in generalities here, but just any car that we would wholesale, no, I would not service a wholesale car. It wouldn't make sense. I'm fixing a wholesale car to a wholesaler. He's going to service it. He's going to inspect it. He's going to make sure the car's in great condition. It wouldn't make sense for me to go and do that.
Q. Okay. Let's look at this matrix again. And it says salvage or reconstructed, right about -- a little over fifty percent of the page down the page, that has to be

disclosed, right?

A. I don't know when this form's from, but what I was aware of, the rules and regulations, was five year -- older than five years. I think the car was an '03, based on the Carfax you showed me. And if we did it in 2010, that's seven years. So, from my understanding, what I know, in my opinion, I don't think it was required at that time.

Q. Wait a minute.

A. Based on the fax.

Q. This is an '03 car. You're absolutely right. The rules, if you need to, if you turn to the front page, it says January 2010.

A. Okay.

Q. Okay? At that time, those were the rules, and this matrit was part -- matrix -- was part of the rules.

A. From what I understand --

Q. Do you remember reading the rules, to be familiar with these?

A. No. I don't remember reading these rules at all. No, sir.

Q. Do you have a copy of the rules that say you only have to provide information about a frame unibody damage and salvage reconstruction damage, if it's a less than a five-year-old car?

A. No, sir.

Q. Do you still have those rules?
A. No, sir. I saw the seller disclosure that you had up just a minute ago that said that.
Q. But that's required by state law, right? North Carolina state law.
A. I just saw the evidence that you presented said that it was only valid for five years. That's what I saw.
Q. Do you know if the Damage Disclosure Statement is a North Carolina mandatory document, required by the North Carolina DMV?
A. I saw what you presented just a few minutes ago, that said that it was five years, and this was seven years. So, that's what I saw.
Q. I understand that.
A. Okay.
Q. This is a different question.
A. Okay.
Q. My question is, do you know if the Damage Disclosure Statement, the MVR-181 ---
A. Uh-huh.
Q. --- is a document that is mandated by the State of North Carolina to be completed?
A. I do not know that.
Q. Do you know if the auction requires that the MVR-181 to be completed in its entirety?

A. I do not know that.
Q. But ultimately, you told Mr. Ferrell to get rid of the car at the auction, sell it at a red-light sale and it was your choice whether to have it inspected and disclose that information --
A. I don't remember that. Sorry. It was six years ago.
Q. You never did tell Mr. -- Well, Mr. Ferrell's testimony is, you never told him about the vehicle being clipped; is that correct?
A. I don't remember talking to Mr. Ferrell about it.
MR. WALKER: Your Honor, he's pitting one witness against another.
BY MR. MOSKOS:
Q. Did you tell Mr. Ferrell that the vehicle had been clipped?
A. I don't remember having a conversation with Mr. Ferrell about the car at all. I don't remember the car or the situation at all. It was six years ago. I'm sorry.
Q. And you haven't been involved in this litigation, other than the deposition you gave last year and being here today, right?
A. That's correct.
Q. And you aren't aware of anything that Roger Whitley did wrong, are you?
A. I don't know Roger Whitley, or never heard the name

until --

Q. The person who bought this Civic.

A. Okay. Not aware of anything.

Q. Okay. And you don't think Midlands Honda did anything wrong in the way it handled this car, do you?

A. In my opinion, when you take a vehicle to auction to wholesale it, and you sell it under red light, which means danger, buyer beware, as-is, and a professional wholesaler comes to that establishment and buys under those conditions and terms, he knew exactly what he was buying. There was no confusion. So, no, I do not think Midlands Honda did anything wrong here.

Q. You don't have any evidence that Roger Whitley knew he was buying a clipped car, do you?

A. No, sir, I don't. Not that I'm aware of, I don't have any.

Q. So, you don't know what he knew at that time, do you?

A. If he's a wholesaler and he does it as a professional, and to me, the definition of that, if you get paid to do a job, you're a professional, so if he went to an auction to buy a car with a red light, which means danger -- we all know that; I think we learned that in first grade, that red means danger -- and he bought it, and he chose to do that, there was some concern. And he could have got an inspection done on that car. He could have had it checked

out. He could have found out there's -- you know, when you put your heard-earned money down to buy a product to turn around and sell it and make more money on it, he knew what he was doing. It wasn't as if we wholesaled the car to someone off the street, a mom and dad working at a school. We didn't do that. It was wholesaled to an auction, to a professional that does it every day for a living. That's how he provides for his family.

So, I feel like, one hundred percent, whoever bought the car knew what they were buying. Based on all the information that you give me during the deposition, and you shared with me, one hundred percent. Based on the facts that you've shared, I feel he knew a hundred percent of what he did.

Q. Just like Mr. Ferrell, when he took it in for the dealership back in 2008, right?

A. When he appraised it?

Q. Yeah.

A. When he appraised it, I don't know that he inspected the vehicle, because it wasn't dis -- let me finish -- because he didn't -- it wasn't disclosed as a buyer beware to him.

Q. What do you mean?

A. How was it disclosed as buyer beware?

Q. When --

A. Wholesale --
Q. Well --
A. Hold on. Can I answer?
Q. Well, I'm trying to get a question out.
A. Can I answer?
Q. You keep running over me.
A. I don't --
Q. That's all right. Go ahead.
THE COURT: You can't talk --- both of y'all -- you can't talk at the same time.
A. When you go to a wholesale auction, it's wholesale, and it's stamped buyer beware, red light, to me that is different than a consumer coming in and trading a car in.
Q. You know that consumers come in all the time -- one of the problems that a car dealership has to be concerned about is somebody coming in to try to get something over on a car dealer. They're trying to get the best price for a car. They're not going to come out and buy -- some of them will -- but most people won't voluntarily tell you about prior damage until you ask them, right?
A. I think most of them are honest when they tell you.
Q. But you still have to watch out for some of those folks, don't you? And you can't just go on what they say, you've got to independently verify, right?
A. Yes.

MR. WALKER: Your Honor, I'm gonna object to questions about dealing with consumers, and I've tried to be patient, but I'd like to talk about auctioning vehicles.

THE COURT: And I sustain --

MR. MOSKOS: Okay.

THE COURT: You have covered that point.

MR. MOSKOS: Fair enough.

Q. Midlands Honda chose not to do an inspection of this car prior to sending it to the auction. Yes or no?

A. Any wholesale vehicles we had, or any dealership I've ever worked with, when you're wholesaling a vehicle, you would not do an inspection and spend money on it, because you are going to wholesale the vehicle. You are disposing of the vehicle. And everybody that buys a car from the auction understands that they're buying a car wholesale, and they allocate reasonable amounts of money to recondition the vehicle, so they can turn around and sell to a retail customer.

Q. And it's your opinion that Midlands Honda did absolutely nothing wrong in selling this car the way it did at the auction?

A. In my opinion --

Q. Right?

A. In my opinion, selling it as-is, red light, we did nothing wrong.

Q. Thank you very much.

MR. MOSKOS: Let me get this stuff down, your Honor.

THE COURT: Okay.

CROSS-EXAMINATION

RANDY THREATT BY MR. WALKER:

Q. Mr. Threatt, we're going to have a very short chat. It's late in the day. You can help me out if I'm confused, but if a wholesaler -- Well, let's take it in two pieces. I understand if a car person, like yourself, at the time at Midlands Honda is going to wholesale a car, you don't send it to the shop and spend money on it, right?

A. Correct.

Q. You're not trying to spiff it up, make it pretty, right?

A. Correct.

Q. And if there are no service records at Midlands Honda for March or April of 2010, that's an indication that they didn't do anything to this car?

A. Correct.

Q. And the reason for that is, you're simply going to turn the car over to someone else by sale, and go on to the rest of your life.

A. Yes, sir.

Q. Now, on the other end of that, if you buy at the red light, -- I'm trying to figure out the best way to ask this

-- What should you do if you buy a car at the red light?
A. I've never bought a car red light. I don't know of anybody that's ever bought a car at red light, so, I wouldn't know how to answer that question. I'm sorry.
Q. Now, you were talking earlier about inspections.
A. Okay.
Q. Anything about inspections if you're buying a car wholesale?
MR. MOSKOS: Objection. He's already testified he doesn't know what to do.
A. I don't know about red-light cars. I know about green-light cars.
BY MR. WALKER:
Q. Well, if you buy a -- if you buy a car at auction back in 2010, would you normal -- red-light, green-light, whatever, would you normally inspect it when you get it back?
A. First of all, I've never -- I want to put this on the record. I've never bought a red-light car. We wouldn't buy that. That's a junk car that wouldn't be -- wouldn't make sense to buy that for our dealership. Any car that we would buy now -- I'm looking at what we do now and then; it's the same process, so nothing's changed -- you would inspect the vehicle. You would --
Q. Why?

A. Because you want to see if anything's wrong with the car.

Q. If something's wrong with it, don't you go to arbitration with the auction?

A. You have arbitration. So, as soon as you buy the car, you take it home, you have it inspected. If something's wrong, you can call the dealer -- or call the Mannheim Auction back, or the ADESA Auction, who it was I think, and have it checked out, arbitrate it, if something's major wrong with the car. If you do red-light, from the way I understand it, it's as-is and you would have no arbitration. That's why we don't mess with red-light cars.

Q. But if you had arbitration rights, that's the proper way to get the problem solved at the auction?

A. You -- Immediately. Yes, sir.

Q. Okay. And as I understand it, that's an auction person who conducts something in a hurry. That's not a full-blown --

A. Yeah. You don't have that, yes, sir.

Q. And that person's got the power to say, let's go -- everybody go back where they were, refund the money, and start over?

A. Yes, sir.

MR. WALKER: Your Honor, if I can check with my client, and --

THE COURT: Certainly.

MR. WALKER: Your Honor, no more questions. And I'm sorry to keep you 'til after five o'clock.

MR. MOSKOS: Hopefully, only one, your Honor.

THE COURT: Okay.

REDIRECT EXAMINATION

RANDY THREATT BY MR. MOSKOS:

Q. Mr. Threatt, did I understand you to say that nothing has changed in the way you have handled cars, the process by which you handle cars, between 2010 and today?

A. The way I buy green-light cars for any dealership that I would work for, I would buy a car from an auction.

Q. But has the process changed?

A. I'm going to explain it, if you'll let me.

Q. I'm not asking what the process is.

A. You're not asking the right question. Let me ask -- can I answer it?

Q. You're not -- Mr. Threatt, please, it's after five o'clock.

A. I understand.

Q. Just answer my question. Okay? The question --

MR. WALKER: Your Honor --

THE COURT: Answer the question, then, you have a right to explain it.

A. That's what I want to do, sir.

THE COURT: You've got to answer it first, and then explain it, all right.

A. As far as me and my opinion and my process --

Q. Mr. Threatt, please. Please.

A. It's not a yes or no question.

Q. Well, let me ask the question.

A. You did. And I'm trying to explain it.

Q. My --

THE COURT: Let him ask it again.

BY MR. MOSKOS:

Q. My question is real simple. Did the process by which you buy and sell cars change from 2010 until today? Have you changed the way you bought cars?

A. Yes, I have.

Q. But not as a result of this car, have you? The change in the way you buy and sell cars is not because of what's happened in this case?

A. Of a red-light car? No, sir. Because I only buy green-light cars. I wouldn't change it for a red-light car. No, sir.

Q. So, as far as red-light cars go, you'd do the same thing?

A. I've never bought a red-light car.

Q. Well, how about selling one?

A. Never sold one. Evidently, this one is what we've

sold. It's the only one I'm familiar with.

MR. MOSKOS: Thank you.

THE COURT: Okay. You can step down.

(WITNESS LEAVES WITNESS STAND.)

THE COURT: Ladies and gentlemen, we're going to quit for the day, and we'll see you back at nine thirty.

And I remind you don't discuss the case yet. And I hope y'all have a good evening.

(JURY EXITS COURTROOM ON EVENING RECESS AT 05:11 PM.)

THE COURT: Okay. Anything else?

MR. MOSKOS: I -- yes, sir. I talked yesterday, I believe, about bringing the car down and showing it. We still would like to do that, and I'm trying to figure out a time and a place.

THE COURT: Now, he has objected.

MR. WALKER: Your Honor, there's, I don't know, fifty-some-odd pictures already in evidence. They depict the car as a clip at the time. We are now looking at a car that's six years older than it was when this happened, and I'm very confident it doesn't look the same. On top of that, this is cumulative. And given the deterioration I would expect with any car, its going to be unduly prejudicial to my client. Not to mention which the time we don't have.

THE COURT: I understand that. I -- I mean, you've discuss --

MR. MOSKOS: I'm sorry?

THE COURT: I mean, where has the car been, and how is the jury going to benefit at all from seeing this car?

MR. MOSKOS: Well, I --

THE COURT: I mean, it's pretty well -- it's been cut, and everybody's agreeing, and.

MR. MOSKOS: Well, Mr. Walker's wanted me to present the best -- you know, the best evidence rule he brought up many times in his objections, so, I'm bringing the best evidence, which is the car itself.

THE COURT: I --

MR. MOSKOS: So, it's just an expense we're trying to figure out -- and I don't want to bring it down here and incur an expense, and then somebody say, whoops, that's not coming in, and we're not going to be able to show it. So, I just -- I'm just trying to --

THE COURT: At this point, I don't see any reason. I mean, unless -- It's not something unique, you know, that I don't think you can get in with pictures. You know, I've had situations where, for the jury to get the full impact, they need to see. I mean, a wreck situation or a piece of evidence they needed to see because you couldn't tell from photographs or anything else. In this particular incident, it's not contested. You know, if his position was it never was cut, and it never has been, you know, chopped up or

clipped and put back together, then maybe the jury needs to make that call themselves whether they can recall whether it was welded back together. Everybody agrees to that. So, unless you can show me some real -- I don't see any reason to waste the time to look at the car.

MR. MOSKOS: Yes, sir. Second thing is, we've got one of the folks coming tomorrow is an expert witness to talk about safety, talk about the fact that it was a hazardous car, it is a hazardous car. And I just want to make sure that we're going to be able to put him up, because I want to put him up first thing in the morning.

Now, Mr. Walker has made an objection, saying one, it's cumulative; two, Mr. Ecklund has already talked about safety. The problem is, Mr. Walker has objected to Mr. Ecklund saying -- talking about safety and an opinion, and that he's not an expert. And if, by some chance, this case were appealed, and Mr. Walker were to make the argument that it was improper to allow Mr. Ecklund to talk about safety, now I don't have any evidence in the record; or -- or if he gets up and he argues that we had some lay-opinion and not an expert opinion, and therefore the case needs to be overruled, I don't have any expert evidence in the record, so, I need to have him testify.

THE COURT: And I understand that. You know, my issue in this case --

MR. MOSKOS: I mean, I'm going to have to proffer him anyway, so.

THE COURT: Well, you can -- I mean -- this car is -- and based on the facts in this case, has not been put back on the road in the flow of commerce. It's been sold at an auction, as-is, to another car dealer. If it had been sold to a consumer there, who was going to drive it on the road, that changes everything. Safety is a huge issue there.

In this point, the safety factor would be on your client. If your -- you know, your client puts it back on the road, then that's the safety issue. He has an obligation to inspect it, and be sure it's safe. He inspects it and it's not safe, then his right to go back to the auction, and either get his money back if he thinks the rules were not followed at the auction, but, you know, if -- if this sale had put it back on the road, i.e. in an unsafe condition to the consumer, then safety is a ---

MR. MOSKOS: What --

THE COURT: --- far more important factor than it is in this.

MR. MOSKOS: Well, I disagree, your Honor. I mean, it did put this -- the way they conducted themselves did put this car back on the road, and put it in the hands of a sixteen-year-old girl. And --

THE COURT: Yeah, but your client did that. They

didn't do that.

MR. MOSKOS: Well --

THE COURT: Sold it to the sixteen-year-old girl.

MR. MOSKOS: My -- my client did sell the car, based on the representations that they received from Midlands Honda.

THE COURT: He had less representation because he bought it at a red-light sale. He had -- I mean, that should put him on notice then that he needed to go inspect the car before he sold it.

MR. MOSKOS: Well, he did inspect the car, and it drove fine. He was all right. And besides, as -- as -- the bottom line is, there's a door that's damaged. That's -- you know, nobody repaired it. That would lead a reasonable person to assume that that's the reason it's under a red-light sale. It's obviously not going under a green-light sale. There's a damaged -- there's damage to the side of the car, and the car drives fine. No problem with the transmission or engine. It looks okay, and he's going to buy it.

There's nothing -- and he did inspect it. He checked the oil, he checked the transmission fluid, and there is absolutely nothing that put him on notice that, you know, that this was a clipped car, when, in fact, they had a mandatory obligation to do so, both under three different

sets of rules: the state law, the terms and conditions of the auction, and the North Carolina Common Law.

THE COURT: Well, I mean, under the common law, it's over five years old, he didn't have to do that, did he?

MR. MOSKOS: It's not -- Under the common law, yes, he did. Under the state law, he did not have to -- they -- if this was a private sale between, you know, two people on the street, you're one hundred percent right. They could have gone, taken the MVR-181, skipped right over the first four. You're one hundred percent right. They still have to deal with number five. There is no statutory age limitation on number five.

THE COURT: Okay.

MR. MOSKOS: The problem that Midlands Honda has is, the affirmative misrepresentation. When this gets checked, based on the fact that they did not provide the auction any information about the prior wreck damage, which they knew, and frankly, it's amazing that these gentlemen talk about the willful blindness at the dealership. I'm not going to inspect that car; I'm not going to look. If I look I know, and then, I might have to say something. I didn't have to tell them about twenty-five percent, because I didn't even know.

THE COURT: And I understand your argument. But your next question about safety.

MR. MOSKOS: Yes.

THE COURT: So you're saying they're a car dealer., they should have inspected it. They didn't inspect it. But your client is a car dealer, and he should have inspected it before he sold it to a sixteen-year-old girl. So, the safety issue is with -- at that point he puts it on the street. And he had just as much obligation to look underneath it to see if it had been clipped as they did doesn't he?

MR. MOSKOS: No. They had more of an obligation, because they were -- they were told about this. They knew it. They knew it back in 2008 when they bought it, and they did the 159-point inspection. They knew it when Mr. Ecklund brought it back. You've got, amazingly, a note that says the car is unsafe, dangerous, it's two cars cut in half, and they do absolutely nothing. They conceal it.

THE COURT: And I understand your argument. And they may owe -- but that all goes to your client, and not necessarily to the safety issue, because your client -- if your client was a consumer, who had bought the car with the intent of driving it on the road, safety is a huge factor. But the fact that your car is -- A car dealer, who buys it at a red-light sale, you're saying that he's not going to -- you know, the safety of the consumer also falls on him, just as much as it does them.

MR. MOSKOS: And that's a huge problem with this case. That's exactly right. The fact that they have now exposed him to huge liability at this -- and fortunately, this young girl didn't get in a wreck -- but yes, the liability was there, and obviously, they would have -- if somebody got hurt in this car because of the defective nature of the car, somebody would have been suing Mr. Whitley. One hundred percent right, I agree. That's the way it would have -- it would have happened.

THE COURT: And they could a sued them, too, I guess. I mean this is the same way. But he had an obligation to inspect it as much as they did. And if -- and he should have been able to -- I mean, you're trying to hole them and they should have known it was clipped. He should have known it was clipped. When they found out it was clipped, they took it out of consumer, and went and sold it at an auction at a red light.

And normally, you know, if the person who bought it realizes it was clipped, they could have bought it for parts, or you know, and sold it at that, but not put it back on the road. I mean. I don't know. I had some concerns with, you know, with the safety issues. You certainly have. You've got a right to proffer that, I guess. But I don't know that, you know, it's the safety situation. That cuts both ways to the jury. Now, how are

we going to -- I'm going to -- if I let it in, how we gonna explain that to the jury, because your guy has just as much obligation on the safety factor as they did.

MR. MOSKOS: Well, the other side goes to the potential harm to my client. Not disclosing this -- this safety issue plays into what Mr. Walker was talking about at the beginning of the day, when he handed you the *Phillip Morris versus Williams* case, and the *State Farm* case. In them, in the *Phillip Morris* case, the Court specifically says that we have said that it may be appropriate to consider the reasonableness of a punitive damages award, in light of the potential harm the defendant's conduct could have had.

Now, in this case, their conduct put this dangerous car back on the road. They didn't let anybody know about it. It winds up with this young girl, and the potential harm to her, to other people, to -- and Mr. Whitley's business, reputation, everything else.

THE COURT: I understand that. But ---

MR. MOSKOS: This --

THE COURT: --- they put it back on the road. If it hadn't been on the road, that would've been -- you'd been absolutely right. If they had sold it to a customer, then they put it on the road but they -- but ultimately, your client put it on the road, so we got one --

MR. MOSKOS: But these gentlemen testified that they knew that these cars wind up going to retail customers. And --

THE COURT: No, no, they didn't testify to that in my presence ---

MR. MOSKOS: Yes, sir.

THE COURT: --- it was a --

MR. MOSKOS: Yeah. They testified that these wholesalers go out there, and they buy these cars, and they believe that the wholesale dealers take these cars, and they eventually wind up with retail customers. That's what they testified to.

THE COURT: And they got to fix them to some degree when it's a safety issues. The person who -- The person that buys them on a red-light sale, they may be wore out or they may be wore out and may have other issues but they from the safety factors they got to fix them before they can sell them. If they go to a customer if they've got safety issues -- I mean, you do this for a living.

MR. MOSKOS: Yes, sir. But the bottom line is, you know, as Mr. Ferrell said, you don't see the damage when you're looking at a car. It's not -- He didn't notice it when he was buying it from Ms. Watkins. He -- he says it wasn't visible. And he did the inspection the same way that my clients did -- my client did. And at the end of

the day, you know, it was a reasonable inspection, and had -- Now, had they not concealed the damage, that's -- that's part of the -- that's part of the problem. They had an affirmative obligation to disclose this information. They didn't. They concealed it.

THE COURT: And assuming everything you say is correct, that gives you cause of action against them. And the fact -- and so, your client is entitled, assuming all that's correct, to get his money back. But, you know, as far as potential future damages to a sixteen-year-old girl, I mean, you know, that's somewhat speculative. I don't -- you know, that deals with the punitive damage aspects of it because that's not actual damages on your part, right?

MR. MOSKOS: That is correct.

THE COURT: So, that whole issue rides on punitive damages. And --

MR. MOSKOS: Still -- Excuse me. Still, I think that the jury needs to understand how dangerous this car is.

MR. WALKER: Your Honor, he sued me for a breach of contract. You can cut through all fifteen pages. It doesn't talk about safety in those auction rules. It's not part of the contract. The obligation against me is, we didn't disclose wreck history, yada, yada. There is no allegation we affirmatively represented this vehicle was safe.

MR. MOSKOS: The folks in the *Stokes* case thought this was a breach of contract case, too.

THE COURT: Well --

MR. WALKER: Your Honor --

MR. MOSKOS: When it was a fraud case.

MR. WALKER: Your Honor, I --

THE COURT: This is totally --

MR. MOSKOS: This is a fraud case.

THE COURT: Totally different factual situation in the *Stokes* case. I mean, you -- The facts, you are dealing with the consumer the whole time and in the *Stokes* case, there was consciousness misrepresentation that --

MR. MOSKOS: Are you saying that there isn't conscious misrepresentation here?

THE COURT: They said it wasn't. I mean, they did admit they didn't read the rules. In fact it was different in not reading the rules and not knowing what the rules were. I mean if they said, yeah, we read the rules and they just ignored them. They haven't testified that it was consciousness like they did in the *Stokes* Case.

And, you know, the conduct in the *Stokes* case, the Supreme Court said, was ir-reprehensible and they went through the whole nine yards and because of what they did and he he wanted his money back, they didn't give him his money back. They even forged a --

MR. MOSKOS: I mean, we don't have a forgery now, but we have -- my clients requests -- we'll have to hear him tomorrow. My client requested his money back, and they didn't give it back to him.

THE COURT: Well, I hadn't heard that now. It's just -- I see a huge difference in as far as the -- especially in the punitive aspects.

MR. WALKER: I,e.

THE COURT: He wanted his money back, it was Twenty-six thousand, six hundred and sixty dollars, or whatever. Craven didn't give it back to him. In hindsight, they didn't take the case very seriously, and it was life changing for them. I understand that. But I -- This case seems to be different. I don't know.

MR. MOSKOS: Well, I think it's about as clear a case of willful blindness and fraudulent concealment as you can get. This case is stunning to me, that a dealership would take a car that they have been informed -- I mean, this isn't just like a salesman. I mean, this isn't the -- the detail guy in the back lot. This is the general manager, knowing that the car has been welded, two cars welded together, just takes the cavalier attitude of, oh, we just sell it to somebody else; it's their responsibility.

THE COURT: Yeah, but he sold it under a red light. If he'd have sold it under green light, I'd agreed with

you.

MR. MOSKOS: And he lied about it under the red light.

THE COURT: Well, I mean, I -- I mean, I understand you say he lied about it, but he hadn't admitted he lied about it. He didn't know, and he hadn't read the rules. That's -- I guess the jury's got to decide. I mean that's an issue whether they decide whether he lied or not and he was just ignorant, or didn't pay any attention to the change in the rules. I don't know. I mean, that's why they've got to figure all that out. Anyway.

Where is your expert coming from?

MR. MOSKOS: Charlotte.

MR. WALKER: Well, he's got to come, anyway, to make a proffer.

THE COURT: Okay. And let me -- I -- you know, I'll sleep on it tonight, and we'll see.

MR. MOSKOS: Yes, sir.

THE COURT: Bring it.

MR. MOSKOS: Thank you.

THE COURT: It may come in or not. I just as soon let's get it right, and not have to let the Supreme Court decide the rules. Let me talk to y'all briefly in chambers real quick, too, about some other scheduling issues.

(COURT IN EVENING RECESS AT 05:30 PM.)

(COURT BACK IN SESSION WEDNESDAY, APRIL 20, 2016 09:35

AM.)

THE COURT: Okay. Do you all from a scheduling standpoint do you anticipate we'll get it to the jury today?

MR. MOSKOS: Maybe.

THE COURT: You think?

MR. WALKER: Your Honor, he said he had three witnesses, one of whom is this safety person. I think that's just a proffer unless you've changed your mind. And then he said he had two more witnesses and I would hope we ought to get most of the testimony in by lunch.

THE COURT: Okay. I didn't know whether you were gonna put up any witnesses.

MR. WALKER: He's called my employees and if he's got two more witnesses, if he doesn't call Mr. Nalewaja then that would be a real short direct.

THE COURT: Okay. All right then I guess we need to talk about charges, you know, and the verdict form.

MR. WALKER: I've got a proposed form I'll be glad to hand up.

THE COURT: Okay.

(DOCUMENTS RECEIVED UP BY THE COURT.)

MR. MOSKOS: I'm sorry, your Honor, I didn't hear what Mr. Walker said.

MR. WALKER: I got a proposed verdict form I'm just

going to hand one to you and one to him.

MR. MOSKOS: Your Honor, I would like to hand up to the court a couple of things ---

THE COURT: Okay.

MR. MOSKOS: --- at this point. The first is three request for the charge as well as the case of Huff versus Auto Zone Limited which is a North Carolina case dealing with the sale of a car ---

THE COURT: Okay.

MR. MOSKOS: --- under the North Carolina UTPA. And then the next thing is - and I apologize to the court - I had not made my motion because this came up last week. I had made a motion to amend my complaint and - Excuse me. I did not make the motion. I ask Mr. Walker if he would agree or consent to me amending the complaint. It would be a second amended complaint. He has consented. So I'd like to submit that to the court now.

THE COURT: Okay.

MR. MOSKOS: Now, your Honor, one of the - my next witness is Brian Allen. He is a body shop repair man from North Carolina. He is - Excuse me, he is being offered to show how unsafe this vehicle is and that it is dangerous. As we talked about yesterday and Monday, Mr. Walker has objected to Mr. Ecklund's testimony as far as any sort of expert opinion by him as to the car being unsafe. The

fellows yesterday testified anyway that they didn't inspect it so they don't know whether it's safe or not and - which could raise an issue. The second thing is if Mr. Walker appeal this case and he makes an argument that Mr. Ecklund could not testify as to the dangerous condition of this vehicle, that it was unsafe, and the Supreme Court or the Court of Appeals agrees with him, then I can see the Supreme Court going, well, there's no evidence in the record that this car is unsafe and as a result, you know, whatever the result of this trial is, needs to be over turned.

Mr. Walker has been saying since Monday that there's no allegation that this car is unsafe. That is incorrect. In the prior complaint and in the second amended complaint I have alleged and actually it's in the Breach of Contract Claim that the defendant did not sell a safe vehicle that could be operated on the streets of North and South Carolina.

The issue is, one, in the pleadings and it is a part of this case. It's part of this case because it goes to damages also. A car that has a fender replaced or fixed after an accident, is gonna have one value. But if a car is involved in a substantial wreck like this one, and winds up being clipped, and not - and the welding is not done very well, people in the market place aren't gonna pay much

money for that car. It goes to the value of the car and we need to put up Mr. Allen so he can testify as to his findings of the inferior quality of the repairs and the dangerous condition of this vehicle. And not to do so prejudices my client.

THE COURT: Okay. You want to start?

MR. WALKER: Your Honor, as to the Breach of Contract, the contract's in the record; it's Exhibit Fifty-two. There's a Bill of Sale that goes with it; the word safety isn't in there anywhere. I've said that over and over. It's not part of the contract. There is no - no allegation that we affirmatively told these people this was a safe car. This is red herring. Again, punitive damages putting that aside, you've seen the vigor with which he's tried to get this in. It's because it is highly prejudicial to my client and not probative of any element of the contract that's in the record.

THE COURT: Well his cause - He has one cause of action to the contract and that may not - Well, what about other causes of action?

MR. WALKER: There'S no allegation that we affirmatively told these people this was a safe car. All you've gotten in the record and all you'll hear from his client is he talked to someone at the auction to exchange pricing information with us. We made no representation

this was a safe car.

MR. MOSKOS: Your Honor, this - that's totally wrong. The terms and conditions of the auction are incorporated in every sale at the auction. Those terms required disclosure. Not telling somebody a required term, the anybody damage, state law requirements, that is - that is an affirmative misrepresentation of a condition of the vehicle. Additionally - -

MR. WALKER: And I don't dispute it's been clipped.

But this safety issue is a whole different kettle of fish.

THE COURT: Well, you know, and I'm certainly familiar with that but --

MR. MOSKOS: The damage disclosure statement and - -

MR. WALKER: Where is the word safety?

THE COURT: Well, my issue is though that if he's offering testimony that the car is unsafe goes to the value of the car. If - Right now he's bought a car at an auction and I, e, it had a door or at least it was apparent at the auction based on the testimony that it had door damage, you know, somebody backed into it in a parking lot. Of course and then it was sold on a red light and that goes to the weight of whatever the jury's gonna give him. Then the next question though as far as safety is concerned, my understanding that he brought the car back when he sold it

to someone else; brought it back in and realized it had been clipped and they took it off, took it off the market. So safety becomes as to value as to whether the car is worth nothing or Six Thousand Dollars or Four Thousand Dollars or Five Thousand Dollars. So I at least think, you know, the safety issue of the car whether it's usable on the road or not is relevant to the value of the car.

Now, understanding that, you know, it had been a situation that your client's put an unsafe car on the road, your allegations are you sold it under a red light as is but it goes to - the safety of the car is undriveable on the road that goes to the value of the car doesn't it?

MR. MOSKOS: Yes, sir.

MR. WALKER: And his client is the guy who values cars and he can put in his proof on the value.

MR. MOSKOS: And that goes to the weigh of the evidence and not the admissibility.

THE COURT: I know that. I agree it does go to the weight and not the admissibility. And then you all can certainly argue that to the jury and they jury's gonna have to make a determination ---

MR. MOSKOS: Yes, sir.

THE COURT: --- as to whether in fact and the damages, you know, what value they gonna give it. Okay.

Anything else we need to deal with?

MR. MOSKOS: Just so I'm clear, your Honor. Mr. Allen gets to testify?

THE COURT: Yes. I mean - He gets to testify about safety because if the car's unsafe to put on the road it goes to the value of the car.

MR. MOSKOS: Yes, sir.

THE COURT: And the value of the car is an issue here.

MR. MOSKOS: Yes, sir.

THE COURT: So are we ready for the jury?

MR. MOSKOS: Yes, sir. Your Honor, I'm gonna hand up - I don't want to introduce all of these but we will go through - these are photographs that Mr. Allen has taken of the car and just want to pick out some, but I wanted you to have a full set.

THE COURT: Okay.

MR. WALKER: I've ask that those be removed from in front of the jury. That is not part of the testimony now and I would like them removed.

THE COURT: Okay. Do you have any objection to that?

MR. MOSKOS: No, sir.

THE COURT: Are we ready for the jury now?

MR. MOSKOS: Oh, I'm sorry. Yes, sir. I apologize. I'm sorry.

THE COURT: Bring me the jury please, ma'am.

MR. WALKER: Please remove those.

MR. MOSKOS: I'm sorry.

(EXHIBITS REMOVED BY ATTORNEY MOSKOS.)

(JURY REENTERS COURTROOM AT 09:53 AM.)

THE BAILIFF: Your Honor, the jury is present.

THE COURT: Thank you.

MR. MOSKOS: Thank you, your Honor. At this time I'd called Brian Allen to the stand please.

THE COURT: Will you come around please, sir, and place your left hand on the Bible and raise your right.

(WHEREUPON, BRIAN PHILLIP ALLEN, BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

MADAM CLERK: Thank you. Have a seat in the witness stand please. State your name for the record.

A. My name is Brian Phillip Allen.

DIRECT EXAMINATION

BRIAN ALLEN BY MR. MOSKOS:

Q. Mr. Allen, where do you work?

A. I work at Pack Brother's Collision Center in Belmont, North Carolina.

Q. And what do you do for Pack Brothers?

A. I am the shop manager at the present time but I have done everything there that possibly can be done.

Q. What kind of things are there have you done?

A. I repair vehicles; I write estimates; I inspect cars.