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SC Court of Appeals

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)

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 II OF VI

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OTHER ORDERS, JUDGMENTS, AND DECISIONS

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

TRANSCRIPTS AND ASSOCIATED MATERIALS

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POST-TRIAL

We do post-repair inspections. I deal with insurance companies, deal with the customers. I train all new employees and I'm responsible for our quality control. And as well as keeping up to date on the industry standards and the vehicle manufacturer's recommendations on repairs.

Q. What is a post-repair inspection?

A. That's where we go in if somebody has trouble with a car or their trying to collect their diminished value after having an accident and the vehicle was repaired at our shop or another shop. I inspect the car, I look at the estimate; the damage that was done. And one, I make sure that the car was repaired correctly according to vehicle manufacturer's recommendations. I look at it and make sure it's cosmetically sound; structurally sound, and was repaired the way the shop or shops were paid to repair it; all the parts were put on it and they got paid to put on. It looks good and to make sure they got a quality product cause that all effects the value of the vehicle and the value of - the diminished value which the diminished value is the loss of value. Anytime your vehicle is involved in an accident you loose value. And, you know, in North Carolina, I'm not sure about South Carolina, you can recoup that so we help people recoup their diminished value.

Q. Yes, sir. Now, you talked about vehicle - the manufacturer's recommendations and all that. How do you get that information?

A. I currently use a system called ALLDATA which is actually a compilation of all the vehicle manufacturer's recommendations. For every vehicle out there --

Q. Excuse me a second. When you say recommendations, I does that mean specifications?

A. Specifications. The recommendations on repairs that should or should not be performed on the vehicle; how they want you to perform the repairs. If you have to cut or weld a panel where you should cut it; where you should section it or if it can be sectioned at all. And it's a large data base. It really helped out when it came out about ten years ago too. It made it a lot easier, a lot more accessible. Other than that we'd have to keep a manual on every car from every manufacturer.

Q. How long have you been in the auto body-repair business?

A. For about thirty years. I started when I was about thirteen years old.

Q. And have you testified in any other trials?

A. Several yes, sir.

Q. Okay. And have you ever been admitted as an expert witness in those trials as an auto body-repairman?

A. Yes, sir.

MR. MOSKOS: Your Honor, at this time I'd move to introduce Mr. Allen as an expert in auto-body repair.

MR. WALKER: In the auto-body repair, no objection.

THE COURT: Okay.

BY MR. MOSKOS:

Q. Let's talk about a 2003 Honda Civic. What kind of frame does it have?

A. This vehicle is what's called a unibody.

Q. Explain that to us. What does it mean to be a unibody frame?

A. It is - If you remember a lot of people - and some trucks still do have it - they have what's called a chassis frame where you have a body separate from a frame that bolts together. That's a chassis vehicle. It's a unitized body sitting on top of a chassis frame. And actually a unibody car which ninety-five percent of the cars today are unibody cars, the frame is actually built into the structure. It's all - It's several small components welded together to make it strong and durable.

Q. And what's the purpose of a anybody frame as opposed to a - the other frame?

A. It's actually - It's actually built better. It's lighter. It absorbs energy from a crash or accident a lot better. It's all designed around occupancy safety.

Q. How so? Can you explain that to us?

A. Every car out there is designed, you know they got several safety features. You don't hear about people in the front end crash flying through the windshield any more like you used to hear in the seventies and eighties. You know they get hit head on. Hey, he flew through the windshield. They don't do that any more. They have crumple zones. They have energy absorbing - say impact bars; frame rails, upper frame rails, your quarter panels, floor pans; everything is made to absorb that energy and it collects that energy from the crash as it travels further into the car hoping to I guess disrupt the energy and disrupt the actual folding up of the car before it reaches the occupants of the car. It also effects the air bag deployment; seat belts, all safety features designed to help protect the occupants of the car.

Q. And are all parts on a car structural? Are they all part of a unibody design?

A. No, sir. No, sir. You have cosmetic and you have structural. Honda however - I would consider fenders, the door skins, your hood, stuff like that's your cosmetic panels. In behind there is your main structure. And I always try to explain it to people it's about like a house. You ever see a house being built? You've got your foundation which is your frame. You've got your studs on the wall which is your inner structure which really holds the car together. And then you got your sheet rock and sheet rock is your cosmetic. Although when it's screwed on it helps stabilize it it's still it's your cosmetic to hide the structure and it's the same thing much with a car. Here your bumper covers. They're all plastic now. You're door skins. Not the door frame but the door skins. Most of the time your quarter skins, your fenders, things like that that's your cosmetic to dress it up and make it look good and make it aerodynamic and make you want to buy the car. But what's in behind it is your main structure, your safety, and what's made to really protect you.

Q. Are the components that are the structural part of the car made of anything in particular?

A. All cars are made of several different materials. I mean you got several different plastics and you got your bumpers, urothenes, your PPO's; PPO, several different types of plastic and several different types of steel. You've got mild steel. You got high-strength steel. You got a little alloy high-strength steel. You've got ultra-high strength steel. Advances high-strength steel; laminated steel and, you know, and so forth. And they're all integrated. They put your strong parts in certain areas where they know it's more - more likely to absorb in an accident and then your outer areas are more of your mild steels and stuff.

Q. And why is it important to know what kind of metal is in a 2003 Honda Civic?

A. Every steel has to be repaired in several ways. Mild steel I can hammer it out, grind it down and put bondo in it if I need to. If its beyond repair I replace the panels. It's usually your fenders, your door skins and such. And when you start getting your little alloy high-strength steels you're ultra high-strength steels and especially your advanced high strength steels like boron steel you can't repair it. It's - Nobody lets you repair its. Its very very light weight but extremely strong. Once it bends and you try to pull it back out it cracks, it breaks. If you try to heat it it weakens the metal. It doesn't respond the way it's designed to. It will tear, bend, most likely crack if you try to repair it. These are panels that are required to be replaced if damaged. Even after I pull it back to factory specs on a frame machine and it looks good, if it has any kind of damage still present I must replace that panel.

Q. And I apologize if you've already mentioned this. But - On some other metals do you have - can you weld the other metals?

A. All your metals are weld - they most spot weld. Well they're all spot welded from the factory what they call a resistance welder. It's a Mig welder and it has two points that come down in between a couple of pieces and it welds them together. And it's very contained whereas what they call Mig welding where you have a gun and you have gas. You put your mask on and you weld across causes a lot of heat. On your structural panels they want you to use resistance welding more than Mig welding because the Mig welding does heat it up more than it needs to be.

Q. Can all metals be heated to the same temperature?

A. No, sir. No, sir.

Q. What will happen if they're not or if they are?

A. Several years ago like frames on trucks we used to be able to heat to get 'em straightened back out and they allowed you to use a acetylene torch; you could heat it up. You had to use a heat temperature crayon. You marked the frame and once that crayon turns a certain color you had to pull the heat away. You had a tape that did the same thing. Now a days there's not many manufacturers that allows you to use any kind of heat to straighten frames or structural pieces.

Q. Why is that?

A. It weakens the metal.

Q. And does that create a safety issue?

A. Most definitely. It's cold stroke - cold straightened only. If the damage is like I said still present after you repair the panel or after you get it pulled back if the damage is still present and you're supposed to replace that panel.

Q. Now what function does a pillar serve in a car?

A. Your pillars are your main - main main structure. You got a main structure like a looks like a skeleton of a car. You got a A pillar which is right up front where your front doors mount that protect right there at the dash. Somebody gets hit here that's - A pillar and B pillars are where your strongest metals are. That's where you're really - your ultra high strength or advanced high strength steels are. And you got a C pillar which is back at the quarter panels where the quarter panels comes down and your rear doors. If it's a two door your front door closes on where your striker is or the rear door where the striker is there is an inner structural panel there and it's usually ultra high-strength steel if not more of a higher grade steel. And that's your main pillars that - and they design it to where they know they've done, you know, these manufacturer's they're done their crash test; they've gone over it and they know where these vehicles are most likely to get hit in an accident.

Q. Okay. Have you provided me with some diagrams of cars?

A. Yes, sir.

Q. And would those help you to be able to explain what's going - what we're gonna be talking about?

A. Yes, sir.

Q. All right.

MR. MOSKOS: Your Honor, if I may put these up?

THE COURT: Okay.

(DIAGRAMS PUBLISHED TO THE JURY.)

MR. MOSKOS: Your Honor, may I have Mr. Allen come down so he can show the jury. It would be easier.

THE COURT: Yes, sir. Be sure you keep your voice up and the jury and my court reporter can hear you.

A. Okay.

MR. WALKER: And, your Honor, I got to get over here to see it.

THE COURT: No problem.

MR. MOSKOS: Yeah, come on down.

(WITNESS LEAVES WITNESS STAND.)

A. Okay. This is the inner structure. This is a computer screen shot of my estimate program that shows me the panels that are available in a 2003 Honda Civic.

Q. Which end is the front and which end is the back?

A. This is the front. This is the rear. This is what's called the A pillar. This is where your front door mounts. That's actually the holes where the front door hinges would mount. Now this is your inner structure. You're not seeing the quarter panels or the doors of the fenders. This is actually the inner structure. There is another skin, a unibody skin that goes up to the top of this. Once again, I consider the skin to be cosmetic. It hides the structure.

This is your B pillar which is where your rear door mounts and your front door closes through the rear door mounts. The rear door hinges would bolt right here and they go in. You see I've got outer skin that goes over the top of this. Then I've got a middle panel. This is advanced high-strength steel; it's very very strong. It must be replaced if anything was ever damaged on it.

And then I got another panel right here that welds to it. So I've got three panels that weld together that form the pillar and post. The same thing on the front. I got one behind it and one in the middle which is your strongest. You've also got your rocker panel that goes over the top of it and then once again the skin goes over it.

The same thing on the quarter panel. This is what's called the quarter panel reenforcement or outer wheel house. This is the inner wheel house that welds to it. It goes in right here at the roof panel. This is your roof rail which is also an advanced or ultra high strength steel. Right here is where your quarter panel around your wheel where the quarter panel welds to it. This is the door edge. And down here is where your back window glass goes. And right here is where your truck lid fits. And on back here where it's open a quarter panel comes on out and the bumper goes across here. This is your actual frame rail. All these panels weld together and form the whole side of that car. And you've got a skin that sits on top there that also welds to it and forms the nice thing you see. When you buy a car you got your car out there. And this is what you don't see.

Q. Did you inspect the 2003 Civic?

A. Yes I did.

Q. That Mr. Whitley has?

A. Yes.

Q. And as a result of your inspection did you arrive at certain opinions; conclusions?

A. I did. I don't - I don't know - I usually know who repairs the vehicles that I look at. When I looked at this one I did not know who repaired it. But I immediately saw several issues with it. And usually when I do an inspection --

Q. Excuse me, one second. I got another question for you go into all that.

A. That's good. That's good.

Q. And the opinions and conclusions that you're gonna give together are they based on a reasonable degree of certainty in the automotive field? You're reasonably certain that this is the opinions that you're giving today they are correct?

A. Oh, yes, sir.

Q. All right. So tell us about your inspection of the 2003 Honda Civic.

A. Well as with any inspection that when the car is brought back to me I do a visual inspection. I walk around the outside of the vehicle. I look for telltale signs that there's something going on. I look for bad paint, paint that doesn't look good on a vehicle that doesn't - isn't consistent with the factory. I'm looking for the door cracks if they crack; the trunk lid cracks to make sure that everything is uniform as it should be. And especially on a Honda, Toyota, Nissan, vehicles of that nature. Chevrolet's and Fords they've gotten a lot better. It used to, you know, you had a wide crack on one side and a skinny crack on the other. But they should all be uniform. So when you see a door crack that's not quite matching the other side where if you've got a rear door crack and a front door crack and one's extremely wide and one's extremely tight you've got an issue. There's something going on there that should not be happening. And usually when you have a crack that's closed up it's because the inner structures like this have moved. Not necessarily the outer but the inner has moved. You can make the outer look good. You can make the outer go where you want it but if it's still sitting after you put a outer panel on it's still sitting crocked. That means that the inner structure has moved or has something wrong with it.

Q. When did you inspect this car?

A. I inspected it a year or so ago. And then I had you bring it back so I could familiarize myself with it ---

Q. Okay.

A. --- in respect to the car.

Q. So 2015?

A. Yes, sir.

Q. All right. Had you seen it before 2015?

A. No, sir.

Q. All right. So you don't know what it looked like when Roger bought it?

A. No, sir.

Q. All right. So when you - So where did you inspect it?

A. At my shop.

Q. Tell us what you did.

A. Once again I walked around the car and looked for it. Immediately I saw several issues that kind of threw up a red flag as I do in any case it makes me want to dig deeper. And I dig a little deeper I find a little more. So it makes you want to dig a little deeper. And the next thing you know I've got everything out of the car. I got the seats out, the interior trim panels out. I find out everything that's been done to this vehicle that's been repaired which is the case in this. And upon removing the inner trim panels on your back glass down the quarter panels you got - you got trim panels back there; I pop those down.

I took the rear seats out; took what's called the back dash out. I immediately noticed that this structural panel right here had been cut in half right here and had been welded on the inside and I questioned. You'll see right here you got another panel that comes across and goes up through here. That's a piece of a structure that I cannot ----- it comes with this panel that I put in. So it has to be put in at factory seam. Honda requires all structural panels be put in at factory seam. They cannot be sectioned. They cannot be cut and welded together at all. They must be put in at factory seam. You will see this is your factory seam here. They sell it like that and they want you to put it like that. I had another case same scenario. Someone had an -

(SOMEONE COUGHED LOUD OBSTRUCTING WITNESS TESTIMONY.)

MADAM COURT REPORTER: I'm sorry, somebody coughed and I did not get that last part.

A. In another case someone had actually sectioned a rocker panel piece that they were not supposed to section.

And it all goes to Honda sells this as one unit for a reason because you cannot get in there and weld it back correctly the way it's designed to be weld. If I got two panels here and I weld it and I still got the outer skin of it and I cut it here I got three panels there so I can weld the inside panel I can weld the outside panel but there is no way to get into weld that middle panel. And I found that in this case. I ran a bore scope down through an access hole, and I have several photos showing there is almost a half to three quarters inch gap between on this structure panel here that's not even welded in this one.

Q. Do you have that picture available now?

A. I do.

(WITNESS RETRIEVED PHOTO FROM WITNESS STAND.)

Q. And is this - Are these the pictures that you took?

A. Yes.

Q. And is this the way the car looked at the time of taking the pictures?

A. Yes, sir.

Q. Do you mind if I make this an exhibit?

A. You're fine.

MR. MOSKOS: I'll make this an exhibit.

Your Honor, I move to introduce --

THE COURT: Any objection?

MR. WALKER: No, sir.

THE COURT: Okay. Its in without objection.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER SEVENTY-ONE, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

MR. MOSKOS: Thank you. Seventy-one.

Q. Can you all see that?

(PLAINTIFF'S EXHIBIT NUMBER SEVENTY-ONE, PUBLISHED TO THE JURY.)

Q. All you got to do is press that little button right there.

A. I'm not good with these things. Okay. So this is actually taken with a bore scope much like a doctor used if you've ever had it - or anything else. It's a bore scope. I've got about a three foot - I got several different I guess camera extensions I can put on it and I run it down there and through access holes and I'm looking around and I'm looking. Mainly I'm looking for to make sure that it's welded correctly and that corrosion protection has been applied the way it's supposed to be because it doesn't matter how good you cover up the outside, if you don't coat the inside moisture when a change in temperature and everything will cause it to rust. As we see I do already have rust here.

But I was more concerned with the way it was welded and where it was welded. Once again it is welded right here instead at the factory seam with that little panel.

That's your ultra-high strength steel being cut and not welded back and this confirms that that right here that black is the outer skin. That's your actual quarter panel; the back side of the quarter panel. And you can see right here a weld. That's where they welded it across. And I'll show a picture later on that shows the inside of the same panel being welded also. But as you can see where this metal is ripped apart here, and right here, it's not welded back. That is this little panel right here a part of the structure.

And that's what all these pictures are just different angles of it. The same thing here. You see, you know, it's a good half inch. There's actually a

Q. I'm not very good with this. Hold on just a second.

A. You're fine. Actually a sharp edge of the metal protruding out right there. And it's just basically where they went in and they cut it. To me it doesn't look like they cut it with a saw. It looks like they cut it with something called panel cutter which is more for a rough cut. You rough cut it and then you go out here and fine - fine tune it. But this was obviously not, you know, fine tuned. It's literally ripped apart. On this panel right here, or this picture right here, you can see the weld. That's to the outer quarter panel right here. That is your outer quarter panel and that's that inner structure with a good chunk of it missing. And so - And here goes. I've got anywhere from a half inch to three quarters of an inch of structural metal missing and not connected. So these three panels are supposed to work together. Well if I've only got two of 'em working it's just like anything else all the components aren't working together and it's not going to respond the way it's designed to respond if you ever got in a subsequent accident.

That in turn could effect numerous things. It could effect air bag deployment; seat belts, the way it was designed to pump 'em or collapse in an accident. It's definitely gonna collapse this way. There's no structure there.

Q. You brought another diagram here. Does this help explain what we're talking about?

A. Yes.

Q. How so.

A. I'm gonna sit this one back up here.

Q. Sure.

A. Once again this is the outside view. This is the same panel right here sold as one unit. You can buy the inner wheel house separate but you can buy this as one unit, six being the right side; thirteen being the left side. This is the back side of the panel. When I'm sitting in a seat and I have the panel removed and I'm looking outside the vehicle, this is what I see. This is - If I'm outside the vehicle and have the quarter removed this is what I see and these are the same panels. These are all structural panels. This is actually a blow up I got from Honda. Just because mine showed the outside I wanted to show the inside. Your B pillar, A pillar, C pillar. Or course your rear body panel, your floor pan, your middle floor pan, your inner rockers.

MADAM COURT REPORTER: I'm sorry, sir, you're moving away from me and I'm having a hard time hearing you.

A. It's okay. I'll try.

Q. Say that again so that she can make sure she gets it anyway.

A. This is just the same diagram but on a reverse side basically showing the inner structure of a car.

Q. And these three parts that are in what you said six, they all have to be actually replaced. They can't be repaired; is that right?

A. That's correct, when damaged.

Q. When damaged. Right.

A. Yes.

Q. And are there certain places where they have to be welded?

A. They have to be put in with them being structural panels and I've got it from Honda, I brought it with me, it says that all structural panels must be put in at factory seam it cannot be sectioned. Outer quarter panels, the piece that covers over this, yes it can be sectioned right along about where they cut it the outer panel can.

But they don't want you to section the inner quarter panel obviously because you can't get in and weld all the panels together. There's actually - and I'm gonna correct myself here - there's actually a third panel on this one that comes down all the way down and it actually goes right here. And I've got another diagram showing that from ALL DATA. But you've got this little panel here and this third panel here cause there was a whole structure here.

Q. This one?

A. Yes. That is what's called your rear damper stiffler that comes down right through here. This is ALL DATA. That's what we use and it tells us what we can and cannot do to this vehicle. It tells me where I can and can't section the outer quarter panel. It tells me exactly how many welds I'm supposed to put on it, around the taillight pocket, the rear gutter up through here. If I want to replace a cut out pocket or not replace it. It has writing with it also that it counts the welds, it tells me what glue to use around the wheel house, how to seal it around the gas pocket and everything. It gives me an exact measurement and where to measure down to cut the outer panel. However, if the damage, when you remove the outer panel, you have damage to the inner structure, it does not give me a section for this inner structure. There is no manufacturer out there that lets you section structural panels. That means that I would have to take the quarter panel on up into the roof panel, up here, which is also allowed and just so I can put the inner structure in which goes further on up.

Q. So the rear dampner - damper stiffener cannot be sectioned either?

A. No. It's not even sold separately. You've got to buy it. It's sold as a complete unit with the infrastructure.

Q. All right. So, do you need to explain any more of this to us?

A. Maybe later but not right now.

Q. All right. Well let's talk about some of your findings and what you - and your opinions. Go ahead and have a seat for us.

(WITNESS RETURNS TO WITNESS STAND.)

Q. I'm sorry, on this screen shot that you did, this red line indicates where the --

A. The right - where the right side was actually cut and put in. And that's --

Q. And are those the pictures we're looking at?

A. Yes. And there are more.
Q. All right, let's talk about some of those pictures.
A. Okay.
Q. I have - You have supplied me with pictures. How about taking a look at 'em. I think the first four are actually the four you have up there so let me get those out of the way.
A. Should I go through - -
Q. Well, what I would like for you to do tell us, is - What are some of the more significant pictures at this time that you can talk to us about?
A. Well when I first said that I'd do a visual inspection of the - outside the vehicle before I go inside and look at structural stuff, several of the pictures show what I saw on the outside of the vehicle such as this picture is the rocker, the bottom of the rocker panel which can be seen, not on a lift, or anything. It's just the outside of the vehicle. This is where the rocker panel was cut and sectioned.
Q. Hold on. Hold on just a second.
MR. MOSKOS: Do you have any objection?
MR. WALKER: No. May I ask what exhibit that is, ma'am?
MADAM COURT REPORTER: Seventy-two, sir.
MR. WALKER: Thank you.

MADAM COURT REPORTER: Yes, Sir.

MR. MOSKOS: I'm gonna hand you the pointer here. Are you gonna have any objection to any of these photographs or do you want me to show them to you?

MR. WALKER: I - As long as - I've got a set and as long as nothing is cumulative probably not.

MR. MOSKOS: Very good.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER SEVENTY-TWO, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

MR. MOSKOS: Okay.

Q. Let's take a look at Plaintiff's Exhibit Number Seventy-two.

A. And this is the bottom half of the rocker panel. I've got another photo here that shows a far off shot of it so you know exactly what I'm talking about. But you can actually see where the panel was cut and rewelded together. One, you can see at the bottom which is this is called the pinch welder right here, and the very bottom you can see it doesn't even line up. Right here is where they cut it and welded it back. It's extremely poor quality work. You see holes in the welds right here. It's not complete. It has - it's obviously not covered up. It's rusting. This is on the bottom side of the rocker. Not the back side but the actual bottom side that you can see.

It's - It's just - I've seen a lot of bad repairs and this gets on up there with it.

Q. And this is underneath the car?

A. This is actually on the outside of the car right under the passenger's rear door.

Q. All right.

A. Like I said I've got a far off shot of it. You can actually see the door, the rocker, and there's what we're looking at a close-up of.

Q. Right.

A. If it helps.

Q. Okay. Let's go to the next photograph. I'm trying to move things along.

A. I understand. Some of 'em underneath are blurry.

After placing the vehicle on the lift I got to looking underneath and I could see where they sectioned the bottom of the floor pan. This is a little fuzzy but . . .

Q. These here are the next three exhibits, or four.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER SEVENTY-THREE THROUGH SEVENTY-SIX, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

MR. MOSKOS: Thank you.

Q. I'm gonna get the hang of this before I finish.

There we go.

A. This photograph and a couple of following are actually on the bottom side of the car. I put the car on a lift.

It's at this point in time I start to suspect that the car had actually been what's called clipped. That's where instead of putting the panels on it individually they basically cut the car in half. They find a car that's been wrecked in the front; they cut the rear end off of it and they join the pieces and they weld up the outer and inner panels.

Once again they can't get to those third and fourth panels that are in there. It's a procedure that is not recognized in auto body repair any more. It used to be a wide practice in the seventies and eighties and even in the sixties. It's not allowed any more. No manufacturer out there will allow it. I think I brought several things showing that Honda, Ford, Toyota, Nissan, Volkswagen, Chrysler, those are the ones I could find they all recommend against it.

I-CAR which is a training facility across the nation they do have a class on rear body sectioning. I contacted I-CAR and got a response that they do not recognize clipping nor do they recommend against it. They were in response and I-CAR is really good. They train - Like I said, it's training. They train the tech's to industry standards. Not necessarily to vehicle manufacturer recommendations but to industry standards. It's about eight years ago I started seeing a trend in I-CAR classes at the very end of all classes and at the very end of all their training books - -

MR. WALKER: Your Honor, I understand he's here to give opinions so I've allowed a lot of hearsay go but right now he's just telling what other people told him.

THE COURT: That's correct.

MR. MOSKOS: We'll get back to the photographs.

Q. What's in this photograph that's of importance to us right now?

A. This is the bottom of the car. This is where the floor panel's actually cut across and welded. You can see what I call gobs of weld here and through here. They did spray black undercoating on it but it's not been, one, welded correctly; two, it hasn't been corrosion protected correctly and three, it was in a location that's allowed by Honda.

Q. Let me show you what's marked as Plaintiff's Exhibit Number Seventy-six. And what is this picture that you took?

A. That is actually the floor pan going across. This is a support brace, the floor pan, and the front floor pan. And this is where they welded across and right here blown up you can actually see a chunk of metal missing right here. You see welds, I can see welds across through here. It's extremely poor quality. Somebody was in a hurry.

Q. Tell us what - When you say floor pan what do you mean by that?
A. According to the - Yes. The floor pan is actually - Right here is your rear floor pan. That's where the spare tire sits. It comes on down and right here is where your rear seat sit. That's your floor pan. They actually cut ir right - I don't know why they cut it at about eight inches behind that right here so they sectioned that floor pan across and just basically butt welded it together.
Q. Where do you mean by butt welded?
A. Two pieces of metal instead of over lapping two pieces of metal together and just - they did not weld it - the inner braces or anything. They just basically went across the borrow.
Q. Is the floor pan a structural component?
A. It's all part of the structure yes, sir.
Q. And - Okay. So what's the next photograph that you have there that you want to show us?
A. After I got done looking at the outside of the vehicle I immediately went inside and started taking down the trim panels and the rear seats. There are several things we can go through quickly.
Q. This one too?
A. Yes.
MR. MOSKOS: Your Honor, I think we're up to Seventy-

seven.

There are a total of seven yes, ma'am.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBERS SEVENTY-SEVEN THROUGH EIGHTY-THREE IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

MADAM COURT REPORTER: Seventy-seven through Eighty-three.

MR. WALKER: Thank you, ma'am.

BY MR. MOSKOS:

Q. Here is Exhibit Number Seventy-seven. What are we looking at?

A. That is the inner structure as we discussed here but this is on the left hand side.

Q. The driver's side?

A. The driver's side yes, sir. There is the back glass. There is the door opening. You can see - Well it would be hard to see but this actually white. Whatever car they pulled it off of was a white car and the rest of it is silver. This is where they came up and welded. You can see it's not coated or covered or anything. They welded it down through here solid. Now, this is where the factory seam is so they did put this side in on the factory seam. However, it's extremely poor quality. And just God awful to tell you the truth. You can go to the next picture.

And I get close up and show you.

Q. This is Seventy-eight.
A. That is the weld going across. Now what makes this interesting is they welded it completely solid across with a weld there.
Q. Do I have it in the orientation or is it upside down?
A. There is the back glass. That's me. This is the - you can actually turn it a little bit.
Q. Is this the right orientation?
A. Yes, sir. There you go.
Q. Okay.
A. Okay. You can see that this is the factory seam. They welded it solid across.
Q. How is it supposed to be welded?
A. There's three spot welds supposed to be right - should be one here, two - I'm sorry, four. One here, two here, and one down here. They welded it solid. Well spot welds are generally a inch and a half apart. Honda is two inches. They want their spot welds two inches apart. And the reason they want their spot welds two inches apart if it gets hit and it collapses between those welds it's a crumple zone. It absorbs energy. Well when one's welded solid like that its not gonna collapse the way it's designed to collapse. So it's what they call stitch welding. Solid welding across is not acceptable.
Q. Anyway to tell how this car is gonna operate or

perform if it is in a crash with this kind of weld?

MR. WALKER: And, your Honor, I'll object. That's an engineering question and not a body shop question.

THE COURT: And I don't know if he's qualified to answer that is he? I mean . . .

MR. MOSKOS: Based on --

THE COURT: I sustain that objection.

BY MR. MOSKOS:

Q. Based on your education, your experience in the automotive field, your dealing with the manufacturers and the various things that you've seen over the years, can you render an opinion based on a reasonable degree of certainty as to how this particular weld might react in a crash?

MR. WALKER: And, your Honor, again, body shop experts saying it's a poor weld he's qualified. But to talk about how a metal's going to respond to the application of force in an accident that's for an engineer and you've tried lots of cases with reconstruction experts; this is their turf not his.

BY MR. MOSKOS:

Q. Have you had any --

THE COURT: You know --

MR. MOSKOS: Excuse me, your Honor, I apologize.

THE COURT: You know he can testify as to his vehicle expertise and what he's seen, you know, in the repair business, but I don't know if he's qualified -

BY MR. MOSKOS:

Q. Do you have any education, knowledge, training, as far as how cars may react after, you know, in a crash after they have been wrecked?

A. Yes, sir.

Q. You do?

A. Yes, sir.

Q. What kind of training do you have?

A. I've had I-CAR training and car liner which is a uni-body structure training or frame systems to frame machines and measuring systems.

Q. And what kind things did they teach you in order for you to understand how a rebuilt car after it's repaired may react in a crash?

A. Well in the I-CAR structural class that's one of the things that we discussed was why it's important to repair a car correctly. Why it's important to follow vehicle manufacturer recommendations cause they have done the research and engineering on it. If you don't repair the vehicle the way you're supposed to repair it it's not gonna respond the way it was designed to respond in a subsequent accident.

MR. MOSKOS: And I would ask, your Honor, that he be allowed to provide that opinion, your Honor.

THE COURT: He just gave that opinion didn't he?

MR. WALKER: Correct. And that --

THE COURT: He just gave his opinion based on what he, you know, and it was not gonna respond ---

MR. MOSKOS: Yes, sir.

THE COURT: --- as it's designed to do.

MR. MOSKOS: Thank you. Okay.

Q. Are we finished with this picture?

A. Yes, sir.

Q. All right. Let's take a look at Seventy-nine.

What are we looking at there?

A. That is the same location but a little bit to the left. There's the rear glass; the corner of the top of the left rear glass. This is the roof rail going across. You see the roof rail is still heavily damaged right here which is a structural piece. It was welded in right here and here is actually where the two spot welds were. But once again it's of poor quality and there's still damage still present there.

This is actually of the original vehicle's. It's silver; this is white. This is damage from whatever damage the roof on this vehicle.

Q. I don't know if I have the proper orientation.

A. Yes, sir.

Q. Okay. Go ahead.

A. That's just a close up of the previous - two pictures ago we saw a weld coming across. But also the spot welds where they Mig welded it. They didn't spot weld it but you can see the rust has already started and everybody knows once - Well, I'm not gonna say everybody knows, but once rust starts you can't stop it. It starts to deteriorate the metal and weaken the weld and the structure.

Here you go.

Q. We'll look at Eighty-one.

A. That is that roof rail we just discussed. It's damaged. I just was able to get up closer to show how it was actually wrinkled. That was supposed to be straight across. And you see it's wrinkled there. This is the replacement panel which is put in as - like I said as a clip. You can see it's actually got some damage. It should be straight across.

Q. Eighty-two.

A. This is an access hole in that panel we were just showing but this is the inner structure as you saw those two middle pieces. That's actually one of 'em right there that's supposed to be welded. There is the old one; there is the new one. I've actually got about a quarter inch to almost I guess three eights of an inch difference between 'em. They are definitely not lining up, lined up, and they're not welded. That's also where the outer panel -

I'm sorry, not the outer panel, the small panel before you get to the outer panel was welded in but they weren't connected.

Q. And what is that center hole there? Is that supposed to be there?

A. That was a spot weld that somebody drilled out. Once again they didn't weld it back up cause they couldn't get it lined up. And that's exactly why you're not supposed to clip cars cause you can't get into weld the inner panels properly.

That's the same shot just a far off shot of it.

Q. And is this the old spot?

A. That's the old. That's the replacement new.

Q. Any other photographs that you want to discuss?

A. I don't know. Its up to y'all. This is the right side. That shows where they actually sectioned.

Q. Is this gonna be the same as this?

A. Yes. That's just a close up of it.

Q. Okay.

MR. MOSKOS: I think there's six.

MR. WALKER: No objection, Judge.

THE COURT: Okay.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBERS EIGHTY-FOUR THROUGH EIGHTY-NINE, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

MADAM COURT REPORTER: Eighty-four through Eighty-nine.

MR. WALKER: Thank you.

BY MR. MOSKOS:

Q. Mr. Allen, take a look at Exhibit Eighty-six real quick.

A. Okay. This is the right side of the vehicle. What we were looking at before was the left side; this is the right side. This is the inner structure that we were discussing on the two big panels. This is where they cut and welded on the inside. The factory seams are up here about eight inches to ten inches away. I didn't take an exact measurement. But you can see where they actually cut the inner panel and welded it across. This side concerns me more than the other side.

Q. Why is that?

A. You're not supposed to cut that panel at all. Not to mention this is the one that shows where I run the bore scope down and the inner panels are - have the inch gap that we showed with the bore scope pictures.

Q. So some of the structural parts in this picture are welded together but some are not. And you can't see 'em but some ---

A. Correct.

Q. --- are behind that panel or not?

A. I could see them with the bore scope but not with the eye.

Q. Let's take a look at Eighty-five.

A. That is the same panel - the same panel. Its just a close-up of it. I want to show the importance and quality of the welds. They've gummed it up. They did not get good burn in. I've got holes in the weld. This is your back glass as you can see. It's a weld section you can actually see where the new panel did not line up with the old panel right here.

Q. What do you mean by they didn't have good burn in? What does that mean?

A. When you weld you want to - When you're welding two pieces of metal together if you get a lot of build up on the outside you're not getting good penetration. You penetrate - A good welder, someone that knows what they're doing and has been trained properly, can burn that weld in and have little rise to it at all. When you've got what we call as we call it a shot bubble gum weld like that its not penetrating into the metal good. It's welded together but it's not welded good. It's not melted together like it should be. You want to see when you're wearing your helmet and you're welding you want to see that weld stick pushing back into the metal. It's not doing that in this case. I know because when I first started welding that's what mine looked like. It takes practice. That's not - that's not a good weld.

Q. Let's take a look at this one which is Eighty-four.

A. Okay. That's the same panel coming across coming from this direction right here and down. This is actually the door jam. This is where the rubber gasket slides the pinch weld. At the door the rubber gasket slides at the door seals up against. You can see a large hole here that was left unwelded and they ground it down and it's already starting to rust and deteriorate here. It's just to show how improper it was.

Q. Eighty-seven.

A. That's the same. You can see once again they're not getting good penetration. Its rusting. They half way sand it but still got incomplete welds here and it's just extreme poor quality.

Q. I just want to make sure that we're clear though.

The last couple of pictures that show the seat pillar, would those be visible to the ordinary person if you saw this car on the street? In it's normal condition would you be able to see those portions of the car?

A. No, sir, not with - unless you remove the interior trim panels.

Q. Okay. And that's what you had to do to find this?

A. Yes, sir.

Q. And where is this on the car?

A. That's actually the right side seat pillar inner structure. This - this thing, that piece right there, that's where they sectioned it.

Q. Okay. Let's talk about Eighty-eight.

A. This is underneath the car. This is right in the area where they actually clipped the car and they cut the car in half. These are your brake lines and your fuel lines. Instead of removing the brake lines like they should have done they actually just cut 'em. They cut your brake lines and then they bought these connectors from some place like Auto Zone or something like that and they sectioned your brake lines back together. It's - To me it's a safety issue.

Q. And if you're standing outside the car can you see that?

A. No, sir.

Q. All right.

A. That's just a far off shot because they were complete and there's four of 'em. One, two, three, four. Two of 'em are brake lines and two of 'em are fuel lines.

Q. So tell us the conclusions you've reached about this car.

A. The vehicle was heavily damaged. It was repaired with a procedure that's called clipping where you basically join two sections and two different cars. It's repaired incorrectly. It's repaired poorly. It is in my opinion that it will not respond the way it's designed to respond if it's in a subsequent accident thus in my opinion rendering the car unsafe to drive. It's one of the vehicles that I look at and I've looked at several and I've deemed several of them unsafe to drive for the simple fact that you don't know what's gonna happen. And I don't want to be the one to find out. Several times in my inspections I find cars that are --

MR. WALKER: Your Honor, I'm going to object to him talking about other inspections. He's already given his opinion.

THE COURT: I'm - Tell me, give me your opinion about this here if you can and not other damage.

A. It's my opinion this vehicle shouldn't be driven. Shouldn't be allowed on the road. Vehicles like this should - Its gonna take some sort of government regulations or something to prevent this from happening.

Q. So this vehicle can it be repaired?

A. Its not cost effective. There's a reason why it was a total loss. It's because it wasn't cost effective to fix it so no, sir. Anything can be repaired it just depends on how deep your pocket is. But is it worth being fixed? No, sir.

Q. And are the conclusions that you've reached today based on a reasonable degree of certainty in your field of expertise?

A. Yes, sir.

Q. And is there anything else that we need to cover before you leave?

A. I could go all day but, you know, it's up to you guys.

MR. MOSKOS: Thank you very much, Mr. Allen. If you'd answer any questions Mr. Walker has for you.

CROSS-EXAMINATION

BRIAN ALLEN BY MR. WALKER:

Q. And I'm sorry, Mr. Allen, we won't talk all that long.

Anyway you can find Number Seventy-two?

MADAM COURT REPORTER: He's got 'em.

Q. I'm looking for Seventy-two, not Seventy-three.

MR. MOSKOS: Oh, I'm sorry. I thought you said Seventy-three. I think its up here. There you go.

MR. WALKER: Thank you.

Q. We'll talk about that in a second.

A. Okay.

Q. Please go ahead. Mr. Allen, our chat will be real clear. I handed you Exhibit Seventy-two which is one of the first things we looked at. Do you remember talking about that?

A. Yes, sir.

Q. And as I understand it that's a welded seam. Is that the rocker panel you call it?

A. Yes, sir, that's the bottom of the rocker panel.

Q. And that's on the passenger side of the car?

A. Yes, sir.

Q. Down underneath the door?

A. Yes, sir.

Q. And if you're standing outside the car I'm assuming you're standing outside the car when you took that picture?

A. I was - It was on the lift and I was looking up at it yes, sir.

Q. Okay. It's visible from outside the vehicle?

A. Yes, sir.

Q. You showed us some other welds that were underneath the vehicle and I'm assuming it was up on a lift when you took those pictures?

A. Yes, sir.

Q. And they were - All three of these welds, all this was clearly visible to the naked eye. Right?

A. Yes, sir.

Q. You didn't see any evidence of anybody tried to obscure or cover any of the welds underneath the vehicle?

A. All of 'em had been sprayed with a under coating which is, you know, it's a black rubberized coating but because they weren't properly prepared welding on that the undercoating had started to erode away and that's what you see here.

Q. Well, maybe I'm not indicating clearly. You didn't see any evidence somebody tried to hide or obscure the existence of the welds underneath the vehicle?

A. Yes, sir. They sprayed under coating over it.

Q. Undercoating is common in the car business?

A. Yes, sir.

Q. To you as a body repair guy looking at it on the lift it was very clear it had been welded.

A. Yes, sir.

Q. Right? Anybody in the car business would spot this when it got up on a lift. Right?

MR. MOSKOS: Objection. He's talking about anybody in the car business. That's guy with thirty seconds experience up to fifty years experience.

THE COURT: How about rephrase your question please?

MR. WALKER: Sure. I'll try to find another way to get to it.

Q. I understand you have no clue who made the repairs on this vehicle. Right?

A. Correct.

Q. Did - As a part of your investigation did you confer with a guy named Charles Ecklund who was the last

individual to own and operate the vehicle?
A. No, sir.
Q. Would it surprise you if he said it was a fantastic car for him to drive?
A. I can't - I can't testify to what he would say.
Q. I understand you looked at this car only from the body shop perspective. Right?
A. Yes, sir.
Q. You didn't look at the engine or any of the mechanical system?
A. Yes, sir.
Q. Other than the fuel lines and the brake line?
A. Correct.
Q. So you look at body shop stuff and not mechanical stuff?
A. Correct.
Q. I understood you give this kind of testimony pretty regular. Right?
A. Yes, sir.
Q. Mostly in North Carolina or some down here or?
A. This is the first time I've been to South Carolina with it, yes, sir.
Q. I'm assuming you're getting paid for your time?
A. I haven't been paid anything no, sir.
Q. So why are you doing it? Well, do you plan to send

a bill?

A. My boss might be planing on sending a bill but I get paid salary. It doesn't matter if I'm here or there emptying the trash can.

Q. So you don't have a clue what the financial arrangements are?

A. No, sir.

Q. Do you expect there are financial arrangements?

A. I'm not sure. I don't handle that part of it.

Q. Okay. Your company is not doing this for free though are they?

A. It's to my understanding we haven't been paid anything yet.

Q. You're not - Your company is not planning to do this for free are they?

A. As far as I know no, sir.

Q. Okay. When's the first time Mr. Moskos called you about testifying here?

A. I don't recall. I guess he when he initially brought the vehicle over he - we talked about it then and I guess that was back in 2015, 2014.

Q. So how many times you met with him?

A. Just once.

Q. How many times you all talk on the telephone?

A. About four or five.

MR. WALKER: Your Honor, if I can just check with my client real quick.

THE COURT: Sure.

(PAUSE.)

MR. WALKER: Your Honor, I am mercifully brief as I try to be. I'm done.

THE COURT: Okay.

REDIRECT EXAMINATION

BRIAN ALLEN BY MR. MOSKOS:

Q. Mr. Allen, did you meet with anybody from Mr. Walker's office?

A. I remember someone, I believe I did yes, sir. They came to the shop I put the car on the lift and began to show them and another - somebody they brought from their shop or another body shop guy and what I had found, yes, sir.

Q. Okay. And did you give them an opportunity to inspect the car?

A. Yes, sir.

Q. And did you stop them from doing any sort of inspection?

A. No, sir.

Q. Did you help them do any sort of inspection?

A. I had to let them do their own inspection.

Q. Okay. And so they had an opportunity to look at it as long as they wanted?

A. Yes, sir.

Q. And then they left?

A. Yes, sir.

MR. MOSKOS: No further questions.

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

(WITNESS LEAVES WITNESS STAND.)

THE COURT: Any reason we can't take a break?

MR. MOSKOS: No, sir. We can take a break.

THE COURT: All right. Ladies and gentlemen, we're going to take our morning break and please don't discuss the case yet.

(JURY EXITS COURTROOM ON RECESS AT 11:00 AM.)

(COURT IN RECESS AT 11:00 AM.)

(COURT BACK IN SESSION AT 11:12 AM.)

THE COURT: You all think we'll be through with the testimony?

MR. MOSKOS: I'm sorry?

THE COURT: Are we going to be able to get through the testimony before lunch?

MR. MOSKOS: No, sir.

THE COURT: Okay. We're ready. Are we ready for the jury?

MR. MOSKOS: Yes, sir.

THE COURT: Okay.

(JURY RE-ENTERS COURTROOM AT 11:16 AM.)

THE BAILIFF: All accounted for, your Honor.

THE COURT: Thank you, sir.

You may call your next witness.

MR. MOSKOS: Yes, sir, your Honor. At this time, I call Midlands Honda to the stand. My understanding is that's Mr. Nalewaja.

Did I say that right?

MR. NALEWAJA: Nalewaja, yes.

MR. MOSKOS: Nalewaja. Thank you, Greg. I'm sorry. I apologize.

THE COURT: All right. If you would please come around and place your left hand on that *Bible*, and raise your right.

(WHEREUPON, GREG NALEWAJA, BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

MADAM CLERK: Thank you. Have a seat in the witness stand. State your name for the record.

GREG NALEWAJA: My name is Greg Nalewaja.

MADAM CLERK: Can you spell that last name for me?

GREG NALEWAJA: It's N-a-l-e-w-a-j-a.

MADAM CLERK: Thank you.

DIRECT EXAMINATION

GREG NALEWAJA BY MR. MOSKOS:

Q. Mr. Nalewaja, how long have you been involved in the car business?

A. About twenty years.

Q. And you went up through the ranks just like everybody else, right? You started off selling cars?

A. That's correct.

Q. And then, you went to finance and insurance?

A. Yes.

Q. And then did you go to -- did you become a sales manager?

A. Yes.

Q. And a general sales manager?

A. Yes.

Q. And now, you're the general manager of Midlands Honda?

A. Yes.

Q. And how many employees do you have?

A. A little over a hundred.

Q. And you're responsible for the entire operation of that organization, right?

A. Yes.

Q. And the person most knowledgeable about what's going on at the dealership should be the general manager, correct?

A. Yes.

Q. Now, you've sat here the whole time during everybody's testimony, correct?

A. Correct.

Q. And you just sat here during Mr. Allen's testimony, right?

A. Yes.

Q. And you would agree with me that that's an unsafe car that was sold at the auction?

MR. WALKER: Your Honor, he's pitting one witness against another.

MR. MOSKOS: Yes, sir.

BY MR. MOSKOS:

Q. Do you believe that that's a safe car?

A. The car is definitely damaged. There's no doubt about it. Whether it's unsafe, I'm not an expert.

Q. But you just heard Mr. Allen. Does that not sway your opinion in any way?

A. The car is definitely damaged, there's no doubt. It was sold by Nationwide to somebody, welded two pieces together, and then put it back on the market.

Q. And you, being in the automobile business for twenty years, having sold cars, and dealt with cars, and head of the Midlands organization at this point, you know that this vehicle has no value, as far as a retail piece, don't you?

A. I can't say that. I mean, you would have to run it through an auction to see what it would bring. There's buyers for every vehicle.

Q. Well, I understand you're talking about an auction. What I'm talking about is a retail customer. If you put it on your lot and try to sell it, and you told people what you had, what you were offering for sale, you wouldn't be able to sell that car, would you?
A. Well, I can't answer that question, because first of all, I wasn't employed there at that time. The car came in to them. Randy traded the guy out immediately, within four days sent it to an auction, under a red light, which is where you dispose of problem cars. That's exactly what he did.
Q. Mr. Nalewaja, I appreciate you wanting to help Midlands Honda, but if you could answer my question, we could move this along. All right? The question is real simple. If the vehicle -- let's put it this way. If the vehicle was on Midlands Honda's lot in 2008, and Mr. Ecklund came in, and everybody knew the condition of this vehicle, and it was explained to the retail customers, Midlands wouldn't be able to sell that car, would it? To a retail customer, the average person.
A. You -- What you're saying is, let me just make sure I understand the question, because that's not what happened. But you're saying if it came in and everybody knew this was a clipped car, we would not retail that car.
Q. What I'm -- That's not my question, though. What my

question is, is, would you expect to be able to sell that car to a retail customer, knowing about all the problems that you heard about today, would a retail customer, if he learned about all these problems that we've talked about, would you be able to sell it?
A. We would not sell it.
Q. It wouldn't have any value, would it?
A. Well, every vehicle has value. You could sell those cars for parts. That's typically what they do when they sell them through a red-light auction, because they're problem cars.
Q. Well, wait a minute. You don't go to auctions and buy cars, do you?
A. I do go to auctions. I have been to auctions.
Q. Okay. But not too many?
A. No, a lot.
Q. Okay. But you don't go run a parts store, or you've never run a parts store, or bought cars to part out, or anything like that, have you?
A. No. When you are wholesaling cars at a wholesale auction, where wholesale dealers are going to, and you have a car that has structural damage, or is a problem car, electrical damage, or a smashed windshield on a car --
Q. Mr. Nalewaja, Mr. Nalewaja.
A. I'm trying to answer your question.

Q. No, no, sir. I'm just asking you a very specific question. Have you ever worked at a facility, at a car shop, where they brought in cars and parted them out? Instead of selling them to people as a car, they took it, and took it apart, and sold the parts.

A. Have I worked at a body shop that sell -- a parts department?

Q. Junk store, junkyard.

A. No.

Q. Anything like that?

A. No, I have not. I have not worked at a junk store, parts department.

Q. Okay. And you have never worked in just a little small lot. You've always been into franchise lots, right?

A. Correct.

Q. Okay.

A. We deal with wholesales.

Q. So, you don't know how they operate their business, do you?

A. I don't --

Q. You don't know how the little guys operate, do you?

A. I do.

Q. All right. Now, when -- Well, let me go back to my question, then. As I understood your testimony, as a retail piece, this 2003 Honda Civic, and let's say in 2010, all right? In 2010, if everybody knew about the problems with this vehicle, the seller and the buyer, a retail customer isn't going to buy that car, right?

A. Yeah, I can't speak for that. I just know that Randy did the right thing by sending to an auction and not retailing it. It was a damaged car.

Q. I haven't asked you anything about Randy, sir.

A. Okay.

Q. I'm asking you, in your experience in the retail market, if you explain to somebody that they got a car that's been chopped up, brake lines have been cut, and -- and -- and not welded back together, but pieced back together, and you explained all the chopping and all the way that Mr. Allen just explained this car, you would have no expectation that you would be able to sell this car to a retail customer, would you? You know that was going to sit on your lot.

A. Are you saying that if I explained that to a consumer?

Q. Yes, sir.

A. We wouldn't even consider it.

Q. What do you mean, you wouldn't even consider it?

A. We would sell it. We would sell it through an auction. We would dispose of the vehicle. We don't do business like that.

Q. And I appreciate that, but that's not my question. My

question is, if it was sitting on Midlands Honda's lot in 2010, and you explained all of the problems with this car to the retail people that were coming in to buy this car, you wouldn't be able to sell it, would you?
A. No. And we wouldn't. We wouldn't retail it.
Q. All right. And at best, you could take this car and maybe sell it to like, a junkyard, or someplace that would take the car apart and sell it for parts, right?
A. No. That's not the way we dispose of it. We would dispose of it through the auction, because that's the way you dispose of cars.
Q. Okay. Well, we'll get to that.
A. You make a decision ---
Q. We'll get to that in just a minute.
A. --- on whether it's retailable. Okay.
Q. We'll get to that in a minute. Now, you -- Midlands doesn't have any sort of written policies and procedures on how to handle stuff, right? They all just simply rely on the judgment of your managers and sales department?
A. And the condition of the car.
Q. Now, you're familiar with the file, right? You took over the dealership, and you are the person who is responsible for handling this case?
A. Yes, sir, in 2013.
Q. Okay. Since 2013, you have been involved in this

case?

A. I have seen the file.

Q. You've seen the file.

A. Yes.

Q. You haven't been involved in the case?

A. I wasn't there during the transaction. So, I mean, I've just been presented what you've been presenting and what my lawyer's been presenting, or our lawyer.

Q. Yeah. My question, though, is, since 2013, when you joined Midlands Honda, you have been involved in this case.

MR. WALKER: Your Honor, I'm going to object on relevance if you're gonna talk about the facts.

MR. MOSKOS: Well, I'm trying to get to that. I need to make sure he understands the case and the file, in order to be able to answer the questions.

THE COURT: All right. Go ahead.

BY MR. MOSKOS:

Q. Since 2013, when you started at Midlands Honda, you've been involved in this case?

A. Yes.

Q. Okay. And you came, actually, from Indian Trail, North Carolina?

A. That's correct.

Q. And how long were you running the Honda store up in Indian Trail?

A. Five years.
Q. Five years. Had you run any other dealerships up in North Carolina before that?
A. Yes, I did.
Q. And how long were you there?
A. Fifteen years.
Q. All right. So, for twenty years you were in North Carolina, selling cars in some capacity?
A. Correct.
Q. All right. So, you came down here, and you were -- because you were the man in charge, you wound up with this file. Did you review the file?
A. Yes.
Q. And when you went through the file, you found the invoice where Midlands Honda did a certified pre-owned inspection. 159-point inspection. You saw it?
A. I believe so.
Q. And being at the Honda stores for twenty, twenty-five years, thirty years, you know that the certified pre-owned inspection process is pretty rigorous, right?
A. It's a 159-point inspection.
Q. Right. And the car goes in the back, where the technician is, and they go around the car and in the car, and look it all over. And they've got a checklist that they've got to find everything, right?

A. That's correct.
Q. And part of that is making sure that there's a Carfax in the file?
A. Yes.
Q. And there -- The mechanic, after he's finished going over the car, takes that checklist, and that's supposed to go in the service file, also?
A. That's correct.
Q. Where is that checklist? Have you found it? You shrug -- you're kind of shrugging your shoulders, and holding your palms.
A. It's not in the -- it's not in the file.
Q. It wasn't in the file? What happened to it?
A. I have no idea. I wasn't there in 2010, or 2003.
Q. It's supposed to be in --
A. I can't speak for what happened then.
Q. It's supposed to be in the service file, right?
A. Correct. It's supposed to be in the file.
Q. What have you done to try to locate it?
A. We've had whoever, our office people, go through the files and look.
Q. Did you go through the file?
A. I did not.
Q. You agree that this particular car is dangerous, right?

A. I'm not an expert to say whether it's dangerous or not, but the car is damaged. Correct.

Q. Well, haven't you been to the -- haven't you been to -- doesn't Honda have classes that you all attend? The folks at various dealerships, you all go to weekend classes, and week-long classes, and Honda teaches you all --

A. When you say you all, are you talking about the techs, the salespeople, or who are you talking about?

Q. I'm talking about you.

A. Me?

Q. Yes.

A. Yeah. I mean, I have online training, but it's not involving whether a car is safe or not.

Q. And it doesn't involve repairing cars?

A. No.

Q. You don't learn anything about whether a car is operating, or how -- how to make sure cars are operating correctly, or anything like that?

A. No. We have technicians who are certified, master technicians. We have a service manager, a shop foreman. They have years of experience. They're very good.

Q. Do you consider them highly professional?

A. Yes, I do.

Q. Well you understand, though, through being at Honda, that Honda has certain specifications on how cars are supposed to be repaired, right?

A. Yes.

Q. And a lot of time and effort goes into the engineering of Honda cars, to make sure that people are safe?

A. Yes.

Q. And it's very important to make sure that these repair specifications are met, correct?

A. Correct.

Q. And the folks, at least in the service department of Midlands Honda, they know if cars aren't fixed to spec -- to Honda specifications, that those -- that those cars could not react properly in a wreck, and people could get hurt?

A. I can't speak for that.

MR. WALKER: Your Honor, I'll object. There's no personal injury in this case, and that's an improper question.

THE COURT: I sustain that.

BY MR. MOSKOS:

Q. Now, over the years you've been involved in taking in cars for trade, right?

A. Correct. Yes.

Q. And in all the various capacities that you've been in the dealerships, right?

A. Yes.

Q. And you know that some cars, the dealership will retain to sell cars on its lot as a used car, and some you all will send to an auction.

A. Yes.

Q. Now, all the cars that you send to the auction aren't wrecked and rebuilt, are they?

A. No.

Q. Some of them may have just some age on them, that you all don't think people want buy that age of a car, correct?

A. No, we don't base it on age.

Q. You base it on mileage, right?

A. No, we don't base it on mileage.

Q. So, the cars that go to the auction, they may have some mechanical problems?

A. Correct.

Q. Engine might -- there might be a knock in the engine, transmission might be slipping, something like that?

A. Correct. Yeah.

Q. And you take it up to an auction, like ADESA, and you sell it under a red light.

A. Not necessarily. It could be a green light. I mean, you can sell a car that has a dent through a green light. You can sell a car that has bald tires through a green light. When you sell a car through a red light, you're dealing with a car that is very, very -- it's junk.

Q. Okay.

A. It is a -- it is a -- something that a dealer will not retail, and they want to dispose of, and they don't want it going out into the community. They want to get it gone.

Q. So no dealer, ever, is going to buy a car under a red-light sale?

A. I can't speak for other dealers, but a dealer -- We would never go to a red-light sale, because you're buying cars that a dealer is saying, this I sold as-is. There is a major issue with this car, buyer beware. If you buy this car, you need to check it over very, very good; because dealers want to maximize the profits on the wholesale, and they're going to sell them green light. And in this case, they didn't. They said, we need to dispose of this car the way it is.

Q. All right.

A. And then, four days after they got the car, they sent it directly to a red-light sale to dispose of it the way they should.

Q. So, they did everything they were supposed to do?

A. Well ---

Q. Is that your testimony?

A. --- they -- they didn't make any --

MR. MOSKOS: Your Honor, --

Q. Is your test -- you're doing -- your -- Let me tell you, if you want to explain an answer, you're going to get your opportunity. What I would like is just an answer to my question.
A. Sure.
Q. Did Mr. Threatt and Mr. Ferrell handle this correctly, according to Midlands Honda? At the auction?
A. I can't make a decision for them back in 2010. But based on ---
Q. I'm talking about your corporation.
A. --- based on the information that they had or what they know, by sending it to a red-light auction was the best way for them to dispose of that car, and under what their decision was.
Q. Now, when you were at Indian Trail, you used to sell cars at ADESA, too, right?
A. Correct.
Q. And you knew, up there, that they had certain terms and conditions, right?
A. Yeah. You -- Absolutely. Yes.
Q. All right. And you were aware of rule changes on occasion.
A. I was not.
Q. You never knew about any kind of rules changes at ADESA -- at the ADESA Auto Auction of any kind?

A. No. What I'm referring to is, I didn't know. And I'll guarantee you, there's a bunch of dealers that didn't know four months earlier they changed a rule on a red-light sale, saying you have to disclose, according to that graph --
Q. Okay. So -- so --
A. -- anything --
Q. -- so, it's your testimony -- Now, how many -- how many cars did you -- how many red-light sales did you attend prior to 2010?
A. Would -- I've never bought a car, ever. We'd never consider buying a car at a red-light sale. That is -- there's a ---
Q. So, you don't know ---
A. --- nobody would.
Q. --- what the standard is. You don't know what the standard is? You don't know ---
A. What do you mean I don't know what the standard is?
Q. --- what happens at the red-light sale.
A. What do you mean?
Q. You don't know what happens at a red-light sale, because you don't go to them.
A. No, I've seen them. I've seen them. I mean, typically, they save red-light cars for the very end of the auction. So, the guys who are there to buy money and buy

cars are buying all green lights. And then, these guys who are going to shop the bottom-of-the-barrel cars that are edgy and cars you don't want to mess with, they're the ones buying those cars, because they buy them cheap; and typically, they look good, they drive good, just as in this case, and they can turn around and re-sell these cars, and they paid very little money for them, because they're edgy. But they should inspect those cars, because they're buying from a red-light sale for consumers, if that's what they're doing.

Q. So, you -- you know that some people are buying cars at the red-light sale, and I'm saying -- and when I say you, I'm talking about Midlands Honda. Midlands Honda is actually a sister dealership to the one were working at in Indian Trail, right?

A. That's -- that is -- yes.

Q. So, it was kind of a lateral move, as opposed to going from one company, one dealer group, to another dealer group, right?

A. I went to school in Winthrop College in Rock Hill, so I'm real familiar with South Carolina. That's one reason I wanted to come down to Columbia.

Q. Right. But you went from one dealership, owned by whomever, to another dealership owned by the same guys?

A. Correct. Yes.

Q. And you -- you being Midlands Honda -- knew that, if people, dealers, smaller lots, would go to red-light sales, and buy these cars to put back out on a lot, to sell to retail customers. You had an idea that somebody's doing that, right?
A. What happens --
Q. No, sir. I'm not asking what happens. I'm asking what you knew --
A. Well, I'm trying to tell you what I knew. What I do know is that wholesale licensed dealers go into a wholesale auction under a red light, buying a vehicle that a dealer has sent and chose not to retail and not to sell as a red-light, not to sell as a yellow-light, who sells it as a red-light, those cars are going to go cheap, because there is a major problem with them. And when you buy those cars, you better look at 'em.
Q. Okay.
A. You better -- And you should arbitrate it if there's an issue. You have every opportunity to do that.
Q. Okay.
A. We don't buy cars at a red-light. You don't. We --
Q. And can I ask you a question?
A. Sure.
Q. All right. Does Midlands Honda know that other dealers go to red-light sales and purchase vehicles to

retail to consumers.
A. I know, because I've been to the auction, and I've seen the lane. They usually have what's called an iron lane, where they sell nothing but red-light cars. They don't even mix them in with the other cars, and there are people there bidding on them. I'm assuming they're probably dealers, junk dealers, parts buyers, could be anything.
Q. So --
A. But that's what they're buying. I've never stood in the lane and bid on them, but they usually run them about a half an hour before the other auctions even run, and they put all those red-light cars, they call them an iron lane and their just red light.
Q. So, Midlands Honda knew that cars sold at a red-light sale could be put out for retail sale to consumers?
A. No. I -- I can't guarantee that that's what they were doing with their cars. I just know there are people that are bidding on them. I don't know what they're going to do with them. I would -- I would -- If I was them buying that car, I would consider very closely before I retailed anything, because that's why we're not retailing it. We have so --
Q. And you don't have any experience in selling cars that come out of a red-light sale, do you?

A. Of course not.

Q. And when the cars go through the red-light auction, y'all don't care how people use them, right? That's up to them.

A. No. We're just disposing of a vehicle. We can't determine who's going to buy it. It's an auction. There's a bunch of guys there buying it, and what they do with it, I don't know what they're going to do with it. But that's irrelevant.

Q. And you all don't -- you don't care what they do with it, right?

A. If I sold something on E-Bay, I don't know what the buyer's going to do with it. I mean, I don't know. We're just disposing of the car. If they want to use it for shoveling parts at a junkyard, or whatever they want to do.

Q. I understand ---

A. That's up to them.

Q. --- I understand you don't know what everybody's going to do with their cars. I get that. What I'm saying is, Midlands Honda doesn't care what those people do with the cars. Yes or no.

A. It's not part of the equation, no.

Q. Okay. Now, you know that when Midlands Honda deals with its own customers, it must let the customer know things that -- let me -- I'm trying to make sure I ask this

-- it's kind of a convoluted question. I apologize.

When Midlands Honda is dealing with customers, retail dealers, dealer's wholesale, bidders, Midlands Honda must let the customer know those things that would be important to the customer, but the customer can't tell are there?

A. And the things --

MR. WALKER: Your Honor, this calls for a legal conclusion by a legal obligation so I object.

MR. MOSKOS: I'm just asking if he understands what he's supposed to do.

MR. WALKER: And this is not a -- We're here about an auction sale, not a sale to a customer on his lot. It's irrelevant.

MR. MOSKOS: And I'm asking him about dealers, too, your Honor.

THE COURT: Well, I mean, repeat the question.

MR. MOSKOS: Yes, sir.

THE COURT: What he sells on his lot is irrelevant as far as this is concerned.

MR. MOSKOS: All right. Well, let me.

Q. So, Midlands' position in this case is that it didn't have any responsibility to tell anybody about this prior wreck damage, right?

MR. WALKER: That's -- I'll object. That's not his prior testimony.

MR. MOSKOS: I'm asking if that's their defense. That they didn't owe a duty or any responsibility to tell Mr. Whitley or anybody else that the car had been wrecked. And Mr. Walker's made that clear.

THE COURT: Okay. You can ask the question.

BY MR. MOSKOS:

Q. Is it your defense that y'all did everything y'all were supposed to do at the auction in selling this car to any bidder, especially Mr. Whitley?

A. I think that the way they proceeded at that time, they did it to the best of their knowledge, to make the best decision of --

Q. I didn't ask what they decision making; whether they did the right thing, based on their decision. I asked you if there was -- if -- if these guys did any -- excuse me. Did Mr. Ferrell -- excuse me. Did Mr. -- excuse me.

Did Midlands Honda sell this car properly in April of 2010, when it sold the car at the auction? Yes or no, did it do the right thing?

A. Yes.

Q. Is there anything in the ADESA rules that support that position? Is there anything in there that says you don't have to -- you don't have to tell us about prior wreck damage?

A. No.

Q. In fact, just the opposite, right?
A. Apparently, yes.
Q. And you knew that when you were in North Carolina at the other store.
A. No.
Q. You didn't know that, either?
A. I did not know that four months earlier that they had installed that.
Q. In fact ---
A. A red light --
Q. --- in fact, you heard Mr. Guyer the other day say that that matrix -- Okay. You heard the other day Mr. Guyer say that the matrix that talks about the disclosures was in place before 2010, right? You heard that?
A. I didn't hear that.
Q. Okay. Were you here for his testimony? The videotape of ADESA.
A. Yes, I was. But I didn't catch that.
Q. Is it Midlands' position that, because it was ignorant of the rules, it gets a pass?
A. No.
Q. It's still held to the same level of responsibility as everybody else at the dealership, whether you know the rules or not, right?
A. Correct.

Q. And if the rules say in three places that it has to be disclosed, it's supposed to be disclosed, right?
A. Correct.
Q. Now, when the car came back from Mr. Ecklund, Midlands should have inspected that car, right?
A. I don't know if they did or not.
Q. I'm not asking if they did. I'm asking -- I'm asking you if they should have.
A. You know, from what I've heard, that they were under the impression that it was a damaged car, and they disposed of it immediately, within four days. That's what they should have done.
Q. So, it's your position, or Midlands Honda position, that a car comes in, and it does not have to be inspected to find out the extent of the damage.
A. If a car comes in -- If a customer has a problem with a car, we're going to take a look at it. Just like, it sounds like he had it brought in and looked at it, and saw that it was damaged, and sent it away. So, that's exactly what we would do.
Q. Shouldn't Midlands Honda have inspected further to find out the extent of the damage?
A. No. If it's not a retailable car, there's no need to go further, and they didn't. They didn't make any changes. They just shipped the car off as-is. They didn't conceal

or hide or do anything. They got rid of the car.

Q. So, somebody comes in and says, I've got a clipped car, and Midlands decides we're not going to inspect it, how can Midlands accurately perform its responsibilities under the ADESA rules to disclose the damage, if it doesn't know the extent of the damage? How can it do that?

A. Well, if a customer comes in and says they have a clipped car, if a customer comes in and says they have a clipped car, like you're asking me, they would go to see if there's damage. If there's damage, I'm sure they would dispose of the vehicle through an auction, and not retail the vehicle.

Q. I understand that. But the obligation at the auction, before and after January 2010, was to disclose frame and unibody damage, reconstruction damage, and anything that the damage disclosure law required. How can Midlands make that deter -- how can they satisfy the rules if they don't inspect them? They turn a blind eye. How can they -- how can they comply with the rules?

A. Well, the -- you know, I don't know. From the testimony, it didn't seem like Randy -- they weren't aware of those rules. They disposed of the car the way they disposed of it. They did not retail it.

Q. What do you mean -- what do you mean, they didn't -- they weren't aware? They weren't aware that this was a clipped and damaged and dangerous car?

A. No. No, no, no. No. They weren't aware of these -- this grid that came out earlier.

Q. But you -- you agree that Mr. Ferrell examined the car after Mr. Ecklund returned it to the dealership, right?

A. I have no idea.

Q. Let me show you Midlands Honda's answers to Plaintiff's first interrogatories. You're -- you're aware that I sent over questions to the dealership to try to find out some information? Are you aware of that?

A. Yes.

Q. All right. And in question number thirteen, I ask, please identify the person or persons who inspected the subject vehicle from the time it was first purchased by the defendant, until the plaintiff purchased it. And the answer is, Midlands is informed, and believes that Brent Ferrell would have examined the vehicle when it was traded in at Midlands, prior to being sold to Plaintiff. So, he's the one that inspected it, right?

A. Yes.

Q. Very good.

A. Stuff that you would assume.

Q. Midlands no longer sells cars at ADESA, right?

A. No, we don't.

Q. And North Carolina has a damage disclosure form, right?

A. Yes.

Q. Statement? And you're real familiar with that, because you were dealing with it for fifteen years up there, right?

A. Yes.

Q. All right. South Carolina doesn't have a damage disclosure law, does it?

A. That's correct.

Q. And that's where you all now send all your red-light sale cars, to Rawl's Auto Auction?

A. No. We are now sending everything to Manheim in Concord.

Q. Concord?

A. North Carolina.

Q. All right. But for a time period there, you were only selling them in South Carolina, right?

A. It was closer, yes. We were selling cars at multiple places, and that was one.

Q. So, since you've been over there, since 2013, you all now inspect the cars to make sure that you all can satisfy whatever the auction rules are, and the North Carolina damage disclosure laws, right?

A. We don't inspect every single car. We -- if a car has an issue, we'll -- if a car is rough, damaged, or you know, we'll park it aside, and we'll ship it off to an auction.

Q. Well, how about previously-wrecked cars that you become aware of, either the customer tells you, hey, it's been in an accident, or a used car manager spots the -- the damage, you all inspect those now, and -- and make sure that you all satisfy the terms and conditions of North Carolina law and the auction, right?

A. If the car is not a salvage car on the title, or a problem car. I mean, cars are sold every single day, retail and wholesale, that have fender-benders and things like that. So, this is asking for unibody damage, things like that.

Q. So, unless a car has salvage written on the title, y'all don't do any of those -- y'all don't do any of those disclosures, right?

A. We disclose them through the auction.

Q. You don't do any disclosures, right?

A. Yeah, I mean, if it's over five years, they'll do a disclosure. I mean, if it's less than five years.

Q. And -- Well, my question to you is, you said you only tell people -- you only tell the auction about the prior wreck damage if there's salvage on the title. right?

A. No, no, no, no. I mean, it's -- it's based on what the situation is with a particular car.

Q. Okay. So, now, Midlands complies with North Carolina law and the auction rules?

A. Yes.

Q. Okay. Isn't it actually true that your used car manager simply tells the auction the car is being sold as-is? Like it did with the Civic, it doesn't make those disclosures?

A. No.

Q. It is -- It is your position that it's actually up to the -- it's the responsibility of the buyer to check out the car before he buys it, right?

MR. WALKER: Your Honor, are we talking about 2010, or are we talking about now because 2010 is what's relevant.

BY MR. MOSKOS:

Q. Well, back in 2010, don't you think it was -- wasn't it your position that it was up to the buyer to find out what he was buying, not up to you all to disclose it?

MR. WALKER: And I'll object. Are we talking about a red-light sale, or?

THE COURT: All right. You need to clarify. Ask the question again.

MR. MOSKOS: I'll just move on, your Honor.

Q. It's -- You would agree with me it's unfair to misrepresent a vehicle that's sold at the auction, right?

A. Yes.

Q. And it was unfair to misrepresent this Civic at the auction, wasn't it?

A. Yes.

Q. And Midlands doesn't think it owed Roger and Dan O'Shields a duty to disclose the damage done to the Civic, does it? Back in 2010.

A. No, they were selling it -- I mean, from what they were saying, they sold it as a red-light. They sold it as-is.

Q. And the dealership didn't have any responsibility to disclose it? That's your -- that's Midlands' position, right?

A. No, the -- apparently, now, yes, they did. They should have disclosed that.

Q. But until today, your -- Midlands' position was, they didn't have any duty to tell Roger about this damage, right? Prior to today?

A. I can't speak for what those guys did then.

Q. Well, I'm talking about your testimony. The testimony your -- you already provided. You don't remember that?

A. We would now disclose it, for sure. Because that's part of the rules. I mean --

Q. I understand that. But when I took your deposition last year, it was your -- it was Midlands' position that Midlands didn't owe any duty to Roger. Isn't that true?

A. Didn't owe any duty?

Q. Yeah, to disclose the damage.

A. At that time, if it was sold as-is at a red-light sale, there is a run list they give out days before the cars are run in. There's a pre-sale event. The cars are parked. They're on-lot. He have every opportunity to look the car over; had every opportunity to arbitrate it. He have every opportunity to inspect it.

Q. Last year, when I asked you a very simple question, did Midlands have a duty to tell Roger and everybody else that was bidding on this car if it had been wrecked, rebuilt, clipped, your answer was no ---

A. Well, according to the rules --

Q. --- it did not.

A. Well, then, I mis-spoke. According to the rules, yes.

Q. I understand that. But the position Midlands had last year was it didn't have any duty, right?

A. Well, then, I mis-spoke. We were together ten hours in a room. Being it was my first deposition and it was ten hours long, and I wasn't there, and I probably was -- I was very tired, and maybe mis-spoke on that. But no, according to this, yes, they should have disclosed that.

Q. And you all don't send Carfaxes with these cars that you all send to the auctions, do you?

A. No.

Q. And you know in South Carolina, you cannot register an unsafe vehicle for use on the road, right?

MR. WALKER: Your Honor, that's not relevant. This vehicle was sold in North Carolina at an auction.

MR. MOSKOS: Okay. All right.

Q. You know in North Carolina you can't register an unsafe vehicle for use on the road. True?

A. True.

Q. And isn't it your testimony that Mr. Whitley hasn't done anything wrong in regards to the purchase of this car? Right?

A. Yes.

Q. He didn't do anything wrong. I'm sorry, I talked over you. Did Mr. Whitley do anything wrong in purchasing this car ---

A. Did he --

Q. --- the way he did?

A. Did he purchase it correctly at the auction? Yes.

Q. And Midlands Honda doesn't have any evidence that Roger did anything wrong when he bought this Civic; is that correct?

A. And I can't speak for him.

Q. No, no. I'm asking Midlands Honda. You don't have any evidence. You're not going to come in here with any evidence, and show oh, this is what Mr. Whitley did incorrectly in buying this car. You don't have any

evidence like that, do you?
A. No.
Q. And you know when you're dealing with the folks at the auction, you have to deal in good faith, right?
A. Of course.
Q. And that's -- that's what business is based on, people dealing fairly with each other?
A. And reputation. Absolutely.
Q. And -- but it's Midlands' position that it didn't do anything wrong in dealing with Roger?
MR. WALKER: Your Honor -- asked -- asked and answered multiple times.
MR. MOSKOS: Okay.
Q. And as of last year, there haven't been any changes to the policies and procedures at Midlands Honda as a result in this lawsuit, have there?
A. No.
MR. MOSKOS: I think I'm done, your Honor. Thank you.
THE COURT: Okay.
MR. WALKER: Your Honor, it takes me a minute to navigate all that.

CROSS-EXAMINATION

GREG NALEWAJA BY MR. WALKER:
Q. Mr. Nalewaja, we don't have a whole lot of things to talk about. I just want to be sure we're clear on a few

things. There's been some discussion about what happened in 2008. You've heard the name Terry Smith mentioned yesterday. Was Terry Smith a technician at Midlands Honda?

A. Terry Smith was a long-term technician. He developed cancer. Died a year later. He's married to Kathy Smith. We call her Ms. Kathy. She's been a long-term employee there in our accounting office. She's a really good member of the community. He was a good tech, and --

Q. Is he -- is he the guy who ---

A. He is --

Q. --- looked at this car in 2010?

A. He is the guy, yes.

Q. And we heard yesterday, he passed in 2011. Any,way we could develop any evidence about what happened when he saw it?

A. Unfortunately, no. No.

Q. You've talked some with Mr. Moskos about the January 2010 rules that applied to the sale in April, right?

A. Yes.

Q. Okay. Has Midlands Honda tried to find a copy of the rules at the store?

A. Yeah. There is none there. It's like they're obscure.

Q. Well, I didn't -- was there a copy at the store or not?

A. No. No.
Q. When your deposition was taken, did we have a copy then?
A. I don't think so. I don't recall.
Q. Did we first get a copy when that Guyer guy got deposed in Charleston?
A. Yeah.
Q. And I apologize, we're kind of skipping around.
A. That's okay.
Q. We've all had a pretty long chat.
A. No problem.
Q. You saw yesterday where we -- what got produced was the pink slip, where Mr. Ecklund called. Do you remember that?
A. Yes.
Q. Is there any pink slip in any of our records showing that Mr. Whitley and Mr. O'Shields called the store?
A. I believe after he bought that car at the red-light auction, an as-is ---
Q. Well, I --
A. --- I don't think we heard from him at all.
Q. Well, we don't have any pink slip?
A. We have nothing.
Q. And you've looked at the repair records on this vehicle. In March or April, was there any repair record

showing any work was done on the car by Midlands?

A. No. They immediately -- they didn't take dents out and hide it, and try to run it through a green-light auction and make more money on it. They simply took the car as it was and disposed of it through a red-light auction, the way you dispose of the vehicle. They did nothing but just dispose of the vehicle. They did not service it. They did not paint it. They did not do anything but dispose of the vehicle the way they should have. And they did it immediately.

Q. Shifting gears, a short chat about Carfax. And I want to talk about 2010 and Carfax. Okay?

A. Okay. Yes.

Q. In 2010, could you pull up a Carfax on a vehicle if you had identifying information on it?

A. I believe so, yes.

Q. Could you have done it on your phone, or Tablet, or whatever?

A. Yes.

Q. If -- You understand that this vehicle, when it got to the auction at ADESA, was actually sold sitting out on the lot, and not in the lane?

A. Yes. It wasn't sold in the lane.

Q. If you were a car person standing there, out in the lot, looking at a car like this one in 2010, could you have pulled up Carfax on your phone and got it?

A. Absolutely. Let me tell you what I would have done, if I was a car person buying that car. Any car. Most of the guys buying used cars at auctions get pre-run lists. And they go through the list, and they pick out the cars they're interested in. They arrive early ---

MR. MOSKOS: Your Honor, I would object.

A. --- at the auction, and they start --

MR. MOSKOS: I'm going to object.

THE COURT: Hold on a second.

THE WITNESS: I'm sorry.

MR. MOSKOS: The -- He starts off saying, this is what I would do, and now, he's talking about what all these other dealers do. If he's going to talk about what he has done, fine. But if he's going to talk about what all the other dealers do, I don't think he's qualified to say that. I'll object.

THE COURT: I'll -- if you -- of course, the question was, you asked him what he would do and I don't remember the question now.

MR. WALKER: Actually, he just kind of took off on it, Judge.

THE COURT: Okay. Well, ask him what his knowledge and what he would do.

BY MR. WALKER:

Q. If you were buying a car -- what? If you were buying -- Explain what you would do in the auction situation you were trying to discuss.

A. Okay. What I would do is what we're trained to do when you're in a used car. You want to find the best quality cars for your customers with the least amount of recon. And recon is fixing those cars up once they come to you. You want to find the best condition of the cars. So, each auction, before they run those cars, provide through their website, they'll email them to you, they have -- when you walk in the auction, they have what's called a run list and a run list shows a list of cars that are coming through the auction.

And you get there early, you get the run list, and you check out the cars you're interested in, in the price range and in the condition, and you go out, and you walk those cars and inspect them. You start them up. All the doors are open, the keys are in them. You start them up. You check them out. You make sure those cars are very good.

A lot of guys bring technicians with them and the technicians will look at the cars and everything before they bid on them in the auction, because you don't have time, when that car's running through the lane, to inspect that car. That's why you're -- you're -- it's suggested to get there early and look those cars over and do your investigation on them. Check your Carfax. Run a car history on it. Know what kind of condition it is. Does it show it's been in an accident? Does it show it's been, you know, odometer changed; is it a grey market car? Check that car out.

Once the car runs, you know, based on the condition and how much you're going to have to do to get that car up to par, what you should bid on it as it runs through. You don't even look at the car, other than you're waiting on your number. You've already looked at it, and you make your bid.

In this particular case, on a red-light sale, when you're buying cars that are dangerous, red light, dealers and people have chosen not to retail this car to consumers, and they've chosen not even to sell it to dealers under a green light or a yellow light. They're selling it under red light. It is a problem car, dispose of this car. If you are in that lane, and you're going to buy that car, and you're going to retail it, you should -- I would definitely take a mechanic, look that car over thoroughly, if my intentions are to retail that to a consumer. Inspect it fully before I even bid on that car, especially knowing I'm in a red-light lane, where dealers have chosen not to sell this car.

And why do people go to red-light lanes? Because they are nice cars. They look good, but they have serious issues. It could be a clipped car. It could be electronic. It could be flood damage. You don't know. But it's there for a reason, and that's why it's cheap and inexpensive. It could be a twenty-thousand-dollar car for ten thousand dollars.

If you've ever been on E-Bay, and you're looking at an item and all of a sudden one item's really low, well, there's probably something wrong with that item. Read the descriptions. Read what's going on with it. Find out the fine print, and see what's going on with that car. Do your due diligence when you buy it, and make sure it's right.

But he didn't buy it in the lane. He didn't even buy it in the lane. He came up afterwards and called the dealer, and said, hey, I'm interested in buying this car, will you take this for it. And then, after that, I'm assuming, from what I understand, he had the car for several days, never inspected it. Never ---

MR. MOSKOS: Your Honor, I would object.

A. --- never arbitrated it.

MR. MOSKOS: He's testifying for my client. My client's going to testify as to what he did. Mr. Nalewaja shouldn't -- he has no experience, and he says he's -- he's -- he wasn't at the dealership before 2013. He doesn't know what happened.

THE COURT: He can testify as to what his knowledge is, but not necessarily what the plaintiff knows.

A. So, according to my knowledge, is, it doesn't matter the value of the car. You've heard the term market. It's this market. It's not this market. You can have a twenty-thousand-dollar car run through a red light, you can have a four-thousand-dollar car ran through a red light. It's a problem car. It is a problem car that's being disposed of, and a lot of those cars are sold for junk, parts. They're sold for somebody to use on their farm, something like that.

But to buy a car in a red-light lane, where they're selling nothing but red-light cars, and take that and sell to a consumer, most of these guys who do that are buying them because they're cheap, and they can -- they put them on their lot, and they can get full retail for them, because the condition looks good and they have a lot of market in them. And then, they'll start throwing things in. They'll say, hey, buy this car, I'll give you a new set of tires with it. You know, it's a great car. You come back, we'll give you your next year's service free because they're making so much money on the cars.

Because they buy them cheap, but they -- they just stick them out there. So, it's -- that's the buyer-beware with those type of people buying those cars in a red-light lane. And it's -- it's dangerous to -- to buy cars in a red lane. I would never do it. That's why you heard Him. I would never do it, period.

And if they wanted to maximize the profits on the sale of that car getting rid of it, they would have ran it through a green light and hid that, but they didn't. They ran it through a red light, and they got rid of that car the way they knew best. Did they miss the rules? They did. Four months earlier, they came up. But they did what they thought they were doing right to dispose of that car. But they never go in that lane and purchase those cars, ever. Ever. Never do that.

MR. WALKER: No further questions.

REDIRECT EXAMINATION

GREG NALEWAGA BY BY MR. MOSKOS:

Q. Now, Mr. Nalewaja, I think when I was asking you questions, you said you didn't know what was happening at Midlands Honda before 2013, when you got there. Wasn't that your testimony?

A. That is correct, yeah.

Q. Okay. So, you don't know if Midlands Honda had a copy of the rules in 2010, do you?

A. No. I'm just telling you what my opinion is of how the auctions work.

Q. I didn't ask for your opinion, sir. I'm asking if you know, in 2010, when this car was sold, if Midlands Honda had a copy of the rules?

A. Not to my knowledge.

Q. Do you know?

A. No.

Q. Thank you. Do you know if Mr. Ferrell ever read the rules? You don't have any personal knowledge if he sat down and read the rules?

A. No.

Q. When he went to the auction, he could get a copy of the rules, right?

A. Yes.

Q. And like he said yesterday, when he walked in the first time and registered, he got a copy of the rules, right?

A. That's what he said. I can't -- if that's what he said. I don't recall.

Q. Well, that's what happens, right? You register, and they say here are the rules.

A. Actually, that's not how it works.

Q. Okay. So, people just walk in, and they get to make up the rules?

A. No. You now -- and I don't know about 2010 ---

Q. Well, then, let's not talk about now cause now is irrelevant.

A. --- then I can't answer the question.
Q. Okay.
A. But I can tell you how it works now.
Q. We're worried about 2010. Okay? And at the time, in 2010, it was incumbent upon Mr. Ferrell to know what the auction rules were?
A. Correct.
Q. And when you got in there in 2013 to the dealership, and you learned that there wasn't a set of rules in the -- in the file, you didn't pick up the phone and call the auction, did you, and say, give me a copy of the rules?
A. When we learned that there was this writ, we immediately corrected our policy.
Q. That's not -- No, sir. I didn't ask if you corrected the policy. You said a little while ago you all never had a copy of the rules. When you got in there and you learned about this case, you didn't pick up the phone and call, did you, and say, hey, ADESA, give me copy of the rules?
A. Yeah. I mean, we got a copy of the rules. Once this went down, we were like, well, what are we doing wrong? We got the information immediately. And I think a lot of dealers, from this, got the information.
Q. You didn't have the rules until we swapped papers back and forth in this litigation. Isn't that the truth?
A. That is correct, yeah.

Q. Right. So, when you found out about this, you didn't pick up the phone and say, hey, guys at ADESA, I want to know what the rules are. You waited until we supplied 'em.

A. Actually, we -- we dug into it immediately too. We wanted to make sure we were in compliance, one hundred percent.

Q. Now, in 2010, you testified you weren't at the dealership. So, you don't know if Roger called or not, do you?

A. We don't have any record of Roger calling.

Q. You don't know if he called.

A. We don't -- I mean, no, I don't know personally, but we don't have any record of him calling at all.

Q. Well, you all don't keep records of everything that happens at the dealership, do you?

A. No, not everything.

Q. Now, when you go -- excuse me. Sometimes, when people go to auctions, the used car managers, and they get the run list, and they're looking at the cars, they'll be in the lane. And all of a sudden a car will come across that they hadn't seen before on the run list, right? And sometimes they'll be interested in bidding on that car. That happens.

A. I would highly advise not doing that without the inspection.

Q. I --

A. Nobody -- Nowadays, they can't risk doing that. They don't do that.

Q. Mr. Nalewaja, I didn't ask you what you would recommend. What I'm asking is, when you were at these auctions, and you know this to be the case, that cars -- that the used car manager would have a run list. He would pick whatever cars he thought were of importance. But occasionally, a car would come across the block that he hadn't considered, and he would want to bid on that car.

A. I can't speak for other people but if he's a good used car manager, he would never just buy something on the spot without checking it out thoroughly. Whether it's a green-light or a red-light, you check them out thoroughly. You need to know, even under a green light, what kind of condition that car is in, and how much you're going to have to spend to get that car up to par for the consumer and that's what they do.

Q. And occasionally, they will buy cars that they haven't looked at on the run list, right?

A. I can't speak for them, but a good used car manager would never do that.

Q. Okay. Now, this car really should have gone to a salvage auction, right?

A. I can't say that. I wasn't -- you know, I -- I can't say.

Q. Well, you're up here talking about how, you know, red-light. You talk about red-light sales and what kind of cars go through them. You've just seen all these pictures, and you don't know if this car should go through a salvage auction?

A. This car should be sold to a auction under a red light. It should be disclosed that it is a damaged car, which it wasn't, but it should have been. They didn't do it. But people use those cars on farms. They use them for hauling stuff in their lake homes, or whatever.

Q. So, you think it's okay ---

A. But that's how we ---

Q. --- to see them?

A. --- dispose of them. We would not --

Q. You think it's okay to sell -- you still think it's okay to sell cars in that kind of condition, in that market, where they could wind up with people driving it?

A. No. I don't determine --

Q. You just said it.

A. I don't determine who drives them. I don't determine who -- if they're going to take those cars and sell them. That's their right.

Q. You've given them -- -

A. We are disposing of the car --

Q. --- the opportunity, didn't you?

A. Let me finish talking, please. We dispose of the cars properly. Okay? That's the way we dispose of them. If they choose to sell a car from a red light that says, danger, danger, red light, not yellow, not green, danger, to a consumer, they should check that out. They should inspect that car. They know what they're buying in that lane.

Q. And Midlands Honda doesn't have any responsibility whatsoever to tell people what kind of cars they're buying?

A. We have the responsibility --

MR. WALKER: Object. Asked and answered, your Honor.

THE COURT: It has been??

BY MR. MOSKOS:

Q. And that's why it is so important, when you're standing there in that lane, to listen to the announcements coming from the auctioneer. That's super-important, isn't it?

A. If you're standing in a red lane? If you're standing in a red lane buying cars, and you haven't pre-inspected it, and you don't inspect it afterwards, and you don't arbitrate it, even when you have a chance to, on a red-lane car? I mean, just because the car's going through the red lanes doesn't mean it's a salvageable junkyard car. There's lots of people that use those on their farms, to haul wood, for different item -- for different things. I mean, it has value. But that's how you dispose of it, and you're telling them, I am releasing all liability, I'm selling it as-is. When you buy something as-is, you better beware, buyer beware. Be -- be careful.

Q. But that's not the kind of car you've got here. That's not the buyer beware-type situation is it? In this auction, that's not the case. The case is, the dealership selling the car has an obligation to announce the salvage -- damage disclosure and the unibody frame. That's the kind of auction we're talking about, right?

MR. WALKER: Asked, answered, and admitted.

MR. MOSKOS: Oh, okay. So, now, Midlands admits that. Very good.

Q. How about an announcement? We've got to go back to my original question. When a car comes across the lane, isn't it incumbent upon people to listen intently to the announcements, so that they know what they're buying?

A. The buyer should, yes.

Q. The buyer should. That's real important, isn't it? And you know you should be doing it, as a -- as a buyer, right?

A. Yes. The buyer should. They should look at the run list. They should see what's on it, everything.

Q. And you agree that the buyer listening to the

announcements intently has a right to rely on what the auctioneer is telling him, right?
A. Absolutely. Especially if they're in a red lane.
Q. And that is because the person talking to them is speaking for the dealership, and telling the auctioneer what to say at the auction, right? You know that to be the case.
A. They are not there repre -- repping the cars all of the time.
Q. I understand you're not there. But the person who stands instead of the dealership is the person from the auction, who has the power of attorney to represent the dealership. And they are -- they are supplying the information to the auctioneer on behalf of the dealer, right?
A. Yes.
Q. And that person who is providing the information for the dealership should have full knowledge of what is being sold, so that the announcement can be made to the bidders?
A. Yes. According to the rules.
Q. And in order to be fair to those people?
A. Yes, according to the rules.
Q. And do you think that the bidder should be allowed to rely on the damage -- the information on the Damage Disclosure Form?

MR. WALKER: Objection, your Honor. Calls for a legal conclusion.

MR. MOSKOS: I'm asking, if they look at it, can they believe what's on the -- on the Damage Disclosure Form.

THE COURT: You can ask it that way. That other way is legal.

MR. MOSKOS: Yes, sir.

Q. The damage disclosure form, when the consumer -- when the buyer obtains the Damage Disclosure Form, can he rely -- excuse me -- can he believe, is it okay for him to believe the information that's on there?

A. Yes. According to what it says, five years or older. Five years or newer.

Q. So, if it's older than five years ---

A. No, no.

Q. --- it's okay for a dealer to lie on the paperwork.

A. No.

Q. Right?

A. No. It's what the form says.

Q. No, sir. The form says more than that. Okay? If you were -- And let me put it in front of you. There's the Damage Disclosure Form in this case.

MR. WALKER: Your Honor, I'm going to object. Its not responsive. We didn't discuss the Disclosure Form at all on cross.

MR. MOSKOS: He's -- He's gone into the various representations and that kind of thing. I'm just trying to -- you know, what --

THE COURT: You took him there, he didn't. Right?

MR. WALKER: I didn't ask him --

MR. MOSKOS: I don't think so.

MR. WALKER: I didn't ask him anything about the Disclosure Statement at all, never mentioned it.

MR. MOSKOS: Well, is -- it's the representations that have to be made to the con -- to the buyers. He talked about that.

THE COURT: I mean is that -- that Disclosure Form, I mean, the jury's seen it. We've gone over it hundreds of times.

BY MR. MOSKOS:

Q. You talked about arbitration rights. Those are -- those can be pretty significant, right?

A. Yes, sir.

Q. You know, because you buy something that's been misrepresented, you can go back and get your money back, or try to, anyway, right?

A. Yes, sir.

Q. All right. So, if you're relying on the paperwork that you received, and you don't either have the car at this point, or you put it off because you were relying on the paperwork, any misrepresentation can cause you to lose those rights. Isn't that true?

A. If I am relying on paperwork when I bought a car at a red light, I wouldn't rely on paperwork, I would inspect the car.

Q. I understand that. My question, though, is, if you are relying on the paperwork, if you're believing that paperwork, and you know, life happens, other things are happening, if you believe that paperwork, and you don't do this inspection that you're talking about before the seven-day period, you're just out of luck, right?

A. Yes.

MR. MOSKOS: I have no further questions, your Honor.

THE COURT: Okay. You can step down.

(WITNESS LEAVES WITNESS STAND.)

THE COURT: Is there any reason we shouldn't go to lunch??

MR. MOSKOS: No, sir.

THE COURT: Okay, ladies and gentlemen, we're going to break for lunch. Quarter of two give you all enough time?

A JUROR: Quarter of two, sir?

THE COURT: Yeah. That's an hour and fifteen minutes.

When you come back in the jury room, I need you to do something for me. I need you to select a foreperson. I don't know any of you. You've been -- spent the last couple of days together. The foreperson has no greater vote than anyone else. They'll simply preside over the deliberations and sign the verdict form. When you get back after lunch, if you would sit down and decide who is going to be your foreperson I would appreciate it. I'll see you at quarter 'till two. Thank you.

(JURY EXITS COURTROOM ON LUNCH RECESS AT 12:26 PM.)

THE COURT: Okay. From a scheduling standpoint, how many more witnesses you think?

MR. MOSKOS: Just one. Mr. Whitley.

THE COURT: And then, we'll be in a position to argue and charge?

MR. MOSKOS: I don't know. I don't know what the charges look like. But I do have a -- I started looking at Mr. Walker's material last night. The problem I have is, I think he has real estate charges in there and contract claims that deal with real property. And I don't know if you used them, but I don't think they are appropriate.

THE COURT: Well, since I don't have -- since they're all North Carolina I need y'all to at least -- I've got his copy. I need you to give me at least -- I guess at this point, if you all will go over it and tell me what you agree on, and then what you don't agree on, I need to deal with in the end.

When I say that, we can do that after lunch. So, this one witness we've got left, if we come back at a quarter 'til two, when do you think we would stop? I mean, I assume you all are going to go to the jury. I normally don't give a case to the jury after four o'clock. But I understand we are on a time table this week. Usually, when I do give it to them after four we're here half the night and even cases that I thought they would be out five minutes. It's crazy. But I'm willing to stay if you all are or we can --

MR. MOSKOS: I'm at your pleasure, your Honor. I'm committed this week here.

THE COURT: How long do you -- do y'all normally think your closings --

MR. MOSKOS: I don't -- I, honestly, your Honor, I don't know. I mean, I understand the Court's position, you know, fifteen, twenty minutes --

THE COURT: Oh, no, you can take -- I've had many a lawyers that go two hours. I just think you, you know, it's a mistake. You go -- The rules say you can go two hours, and if you want to go two hours, you can go two hours. I just need to know, you know. And whatever works for you. I have, I guess there's a few lawyers ou there that can argue two hours and keep everybody's attention, but there's only a few. But that's your call.

MR. MOSKOS: I doubt it's me, your Honor.

THE COURT: But you, you know, you're successful at what you do and I'm just trying -- and it's -- if you normally take fifteen to twenty minutes, I understand that. If you normally take an hour or two, that's fine, too. I just need to try to time everything. I'm not pushing you. But the problem is once -- Normally, once we start the process of arguing and charging, most of 'em or a jury we can -- and if y'all agree, we can argue and charge them this late in the night and we could let 'em start deliberations in the morning but that's something that's normally y'all need to agree with.

MR. MOSKOS: Your Honor, I'd prefer for them to have the law and immediately start talking about it, because if they go home and start, one, I would hope they wouldn't go and research the law; but number two, I don't want them getting a mis-recollection overnight, and then it gets locked in, and nobody can change that person's opinion of what the law is, and creates problems.

THE COURT: Okay.

MR. MOSKOS: I'd rather do the charge in the morning. Well, I mean --

THE COURT: Well, I didn't know whether you wanted me to -- I mean, I don't have any problems with charging it in the morning. I was just trying to find out giving the case to the jury tonight, depends on how late. And if -- if we can get through by four or four fifteen, and you all want to take a chance, it suits me to give it to them tonight.

Now, if it's five or six before we can give it to them, then that's a different story. And I think we ought to at least we could save the charge 'til in the morning, and charge them the law and give it to them in the morning. And then, we've got -- I'm guessing we've still got situations, since it's bifurcated, we're going to have to go back, if, based on the verdict, whether we're going to be dealing with punitive damages or not.

MR. MOSKOS: Which reminds me, your Honor. The other -- Monday morning, I asked for the Court to require the defendant to produce 2015 -- excuse me -- 2014 and 2015 financial documents that have been previously produced. I haven't received them, but Mr. Reibold represented that they would be easy to get. I would just ask that the defendant have those ready, here.

THE COURT: Okay.

MR. MOSKOS: And if I -- I need a chance to look at them before we start.

THE COURT: Is that a problem?

MR. WALKER: No, sir. And again, I -- I've spoken with Mr. Nalewaja about it yesterday, and apparently it fell through the cracks there.

THE COURT: Okay.

MR. WALKER: So, we'll remind somebody to do it. And again, to remind the Court, I just don't know if the 2015 year-end, if there have been -- if the CPA's are finished screwing with it, but whatever is the most recent final I will get it for them.

THE COURT: Okay. And I guess we can -- while the jury's deliberating, we can deal with -- with punitive damages and what -- what the South Carolina law -- North Carolina law applies. You know, my law clerk's found a case that basically says that South Carolina law applies on punitive damages. It came out of the Court of Appeals in '97. That case was the rule and I guess that's the most recent case, unless you all know something different.

MR. MOSKOS: What's the case, your Honor?

THE COURT: *Lister*, L-i-s-t-e-r, *versus National Bank of Delaware.* It's a Court of Appeals case, November 17, 1997, 329 S.C. 133, 494 on S.E. 2d 449.

Now, we'll continue to research that, but that's the least -- if you all -- there was a similar situation in that they applied the law and the rule but what the Court of Appeals said, under traditional South Carolina choice of law principles keeping it in state, the -- The Court comes to the conclusion that the issue of punitive damages must be decided under South Carolina substantive law. So, at least that's what that case says. And I guess, as far as I know, at this point, that's what case I have to follow, unless you all can come up with something that changes that.

MR. MOSKOS: Well, as I stated in chambers the other day, your Honor, I believe that South Carolina law applies, so, I support that case and the Court of Appeals.

THE COURT: I'll -- I would assume since its North Carolina, it would apply, but the Court of Appeals decides differently. I don't always agree with them, but I have to follow them until the Supreme Court corrects it. Okay.

Anything else before we go to lunch?

MR. MOSKOS: No, sir.

MR. WALKER: No, sir.

MR. MOSKOS: Just -- I just want to make sure. One forty-five? Be back by one?

THE COURT: Wait a minute.

MR. MOSKOS: One forty-five is when we're going to start again?

THE COURT: Yeah. That's for an hour and fifteen minutes. And if you're a few minutes late, it won't be the end of the world.

MR. MOSKOS: Yes, sir.

THE COURT: I'll see you all.

MR. MOSKOS: Okay. Thank you.

MR. WALKER: And after we get our last witness, we'll take up the law?

THE COURT: Yeah, I got -- I mean, we may try to take a break. Yeah, we'll try to do that. And if you all can kind of get it together as much as you can. I hate for the jury just to be sitting back there for hours.

MR. WALKER: Well, that's why I figured we'd do the witness and then break.

THE COURT: Yeah. Okay.

THE COURT: That sounds good. Thank you.

MR. MOSKOS: Yes, sir. Thank you.

(COURT ON LUNCH RECESS AT 12:34 PM)

(COURT BACK IN SESSION AT 01:48 PM.)

THE COURT: Thank you. You may be seated.

MR. MOSKOS: Not sure where my client is, your Honor. Let me go check on him real quick.

THE COURT: Okay.

(PAUSE.)

THE COURT: All right. Are we ready for the jury?

MR. MOSKOS: Yes, sir.

THE COURT: Bring me a jury, please, ma'am.

MR. WALKER: Can we move that demonstrative exhibit when he starts to testify.

THE COURT: Don't swear him in until the jury gets in here.

MADAM CLERK: Right. Just wait. Okay?

MR. WALKER: Would you move that, please?

MR. MOSKOS: How am I gonna get to it?

MR. WALKER: Okay. That's fair.

(JURY RE-ENTERS COURTROOM AT 01:56 PM.)

THE BAILIFF: The jurors are seated, your Honor.

THE COURT: Were you all able to select a foreperson?

A JUROR: Yes, we did.

THE COURT: Okay. Who is that person? Okay. Thank you, ma'am.

All right, you may swear in your next witness.

MADAM CLERK: Put your left hand on the Bible and raise your right, please.

(WHEREUPON, ROGER WHITLEY, BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

MADAM CLERK: Thank you. What's your name please?

DIRECT EXAMINATION

ROGER WHITLEY BY MR. MOSKOS:

Q. What's your name?

A. Roger W. Whitley.

Q. Mr. Whitley, can you hear me?

A. I can.

Q. All right. Are you hard of hearing?

A. Some. I've had a virus, and I'm a little hard of hearing because of that, also. But I'll listen real good.

Q. All right. Well, if anybody in here starts speaking

and you can't hear them, would you please raise your hand, so that we can be sure that -- that you hear everything?
A. Thank you, sir.
Q. Okay. You'll put your hand up and let us know?
A. I will.
Q. All right. Am I talking loud enough now?
A. You are.
Q. All right, Roger. Tell us a little bit about yourself.
A. Well, I am seventy-six years old. I was born and raised in a small mill village in Albemarle, North Carolina. My father died when I was about sixteen. I went off to college when I was like, twenty years old. I was probably the first kid in my family to go to college. I graduated from Morris Hill College in about 1925, '26. I was married, have three children, three little girls, three fantastic little girls.
Q. How old are these little girls?
A. Well, one is fifty, one is forty-three, and the other one's about forty-one now, so.
Q. So, when you got out of college -- Well, were you working during college?
A. I worked at every little job I could find, but nothing -- no permanent employment, no.
Q. What was your first major job?

A. My first major job was the -- I was an officer at Greensboro Police Department.

Q. And what were you doing there?

A. What am I doing now?

Q. No, no. What were you doing at the Greensboro Police Department?

A. Okay. I was a patrolman with the Greensboro Police Department. I worked there about four years.

Q. All right. And did you stay with the police force?

A. No. I became a parole and probation officer in 1966. I moved to Shelby, North Carolina.

Q. All right. And what -- Did you retire from there?

A. No. In 1979, I went to Gaston College as the Director of Criminal Justice. I had the responsibility for planning, training, and supervising police officer recruits. I worked there until I was -- well, I spent twenty-seven years there, and I turned out twenty-three hundred police officers.

Q. All right. And what did you -- Well, why did -- excuse me -- why did you like working in the police force, criminal justice, that kind of thing?

A. Well, I started out at a car lot looking at cars and the next thing I know, I'm at a police department and I'm stuck at a lost vocation and I absolutely loved it.

Q. But you weren't arrested, were you? How did you wind up in the police station?

A. I was looking at a car at a -- at a car location, and I had no job. I was just looking at the car, and I saw the salesman coming, and he had on a coat and tie. And I says, I wish I hadn't stopped here. So, I -- I was going to try to get away from him, and as I did he called my name, and his name was Mr. D.C. Moore. He called to me, and he said wait a minute, wait a minute, let me sell you a car. And I said well, I am not able to buy a car, I have no job. He said, tell me about your life; have you ever been in any trouble, and I said no. No more than speeding tickets or something. So, he says, you get in the car and go with me, and he took me to personnel and training at the Greensboro Police Department, where he was a reserve officer himself. And three weeks later, I was a uniformed police officer, and that's where I've -- was -- that's where I was stuck ever since, you know.

Q. Did you enjoy it?

A. I --

Q. Did you enjoy that?

A. Absolutely love it. You love helping people, you love all the things about it.

Q. All right. So, when did you get into the car business?

A. Well, I guess my thoughts went back to that car, when

I was looking at it on the corner, and as Hugo came along there were a lot of cars that were damaged, bruised tops, bruised trunks and stuff like that, and I bought one or two of those cars. And as I came closer and closer to retirement, I thought more about having a dealer's license. And in --

Q. Were -- excuse me a second. Were you buying the -- the cars that were damaged for your own personal use, or to sell them?

A. Well, both. I -- my children, I bought them -- I bought them several really good cars that had damage to the top, damage to the trunk, damage to the hood.

Q. Where did you buy those?

A. I bought them at several I -- at a sale called IAA in Charlotte. ADESA -- Well, excuse me. ADESA didn't sell any of those cars, that I know of, but there were several salvage sales in Charlotte that did sell them.

Q. Okay. So, other than the cosmetic damage from tree limbs or whatever, was there ---

A. There were.

Q. --- were -- Were they mechanically fine?

A. Oh, yeah. Yeah. They were great cars.

Q. And were those similar to the cars that you might buy through a red-light sale?

MR. WALKER: Your Honor, I think it would be great if he would quit leading the witness, so, I object to the --

THE COURT: Let him testify.

MR. MOSKOS: Yes, sir.

Q. All right. So, when you -- when did you get your dealer's license?

A. I got my dealer's license right at -- right after Hugo, in about '91, somewhere in there.

Q. And when did you -- did you immediately open up a dealership?

A. We located a place that we could keep our cars, and I owned some property where I could set up -- set a small lot up. Yeah, and that was in probably 1994.

Q. Well, tell us what was going on with your business back then. Were you doing a large volume, or was it --

A. I've never really had a large -- a large volume of -- of cars. I really made a good living. I don't know how that sounds, but I really made a good living at the job I had. I enjoyed the cars. I bought cars for my friends. I bought cars for people at church.

Occasionally, there would be a young person come along, or a young woman, maybe with a child or something, that really was struggling with having an automobile and I worked really hard sometimes to -- to help those people get a car. And that's really what I was about. I really wasn't about making money so much as I was maybe helping people. And I really -- I made money, but that was not the object.

Q. And were you working at the school at the same time you were selling cars?

A. I was.

Q. All right. Now, do you have any body shop training?

A. No.

Q. All right. Let's talk about your car lot in 2010. At that time, you were a partner with Dan O'Shields?

A. That's correct.

Q. And who is he?

A. Dan is a guy who ran jewelry stores in Shelby. He lived a similar background from myself. We became very good friends. We partnered with what we were doing, and we had the same philosophy about how to handle the cars and what to do with them.

Q. How big is Shelby?

A. Twenty thousand. What we count is about a hundred thousand.

Q. Has it grown over the years?

A. It has grown in diameter some, yeah. And it is growing now, because Charlotte is pushing -- pushing that way.

Q. Now, tell us about the kind of cars that you sell. In 2010 -- Well, if you're talking about today, has your --

excuse me. Have you changed the way you sold cars, or the kinds of cars that you sold since 2010; or do you still sell them the same way?

A. We've done the same thing, basically over and over. We try to buy economical cars, and buy cars that would serve whomever guy that -- would serve them well. Yeah.

Q. Well, tell me about the makes and models that you try to buy.

A. Well, we try to buy Hondas. We try to buy Toyotas. We try to buy Nissans, and did buy a lot of those. We tried not to buy a total off-brand car. People tended to have more trouble with cars when you got out of the mainstream line. Small Fords, small Chevrolets like that.

Q. Now, let's talk about when you went to the ADESA Auto Auction, buying this ---

A. Okay.

Q. --- buying this Civic. Okay?

A. Uh-huh.

Q. Had you ever been to the auction before?

A. Many times.

Q. Describe your experience at the auction before this Honda.

A. Well, ADESA Auto Auction is a very large building, very large barn-type building, metal building. On one end, they have an area where they clean up cars. They've got eight or nine lanes, where the cars go into the building. There's a large parking lot where the cars are parked. Usually, they sell on Thursday. Sometimes, there will be up to two thousand cars in the parking lot. Maybe they would sell a thousand, twelve hundred, fourteen hundred cars. They -- they work those cars through different lanes, and the lanes would start at different times. You know, like there would be a lane starting at nine o'clock; there would be one starting at ten, one starting at ten thirty, one ten forty-five, and so on.

Q. Is there one lane that's designated for junk cars, one lane designated for great cars, and one lane designated for something else?

A. No, sir. No. You have a lane that deals with off-lease Hondas. You have a lane that deals with off-lease Toyotas. You have lanes that deal with other off-lease cars. Then, you have lanes that deal with trade-ins that are brought by dealers, you know. And then, you have what I call a pin hooker lane. That's the guy that goes out and buys the car, brushes the -- the -- the -- the running board out and then brings it back, runs it back through the sale, tries to make money off of it.

Q. What do you mean brushes it? What do you mean brushes it?

A. Well, they clean it out. They make it look as good as they can and bring it back through the sale, try to make money from it.

Q. Why don't you buy from a pin hooker?

A. I've always trusted the franchise dealers. I've always felt like they were honest in what they brought in. I've always trusted the off-lease dealers. I don't trust what I've see, the pin hooker dude, because they don't really care how well they -- how -- what -- they don't really care how good the car is they bring. They just bring it back and get their money out of it. They make it look the best they can make it, and they get the -- try to get their money back, try to make money on it.

Q. So, what -- When you go to the auction, what kind of cars are you trying to buy?

A. I look for small cars, Hondas, Toyotas. Of course, they're great. Small Chevrolets, small Fords. But the smaller car.

Q. All right. The cars that come through the auction, we've talked a lot about the lights, green light, red light. Do you -- do you ever buy cars under a green light?

A. Sure. Sure.

Q. Okay. How about under a red light?

A. Sure. I've bought many cars under the red light.

Q. All right. Tell us your experience with red-light cars.

A. Well, you've got to listen to what the auctioneer says, and when I've heard and understands -- understand what he's said, then I know whether I should deal with that car or not. And if he says it's got motor sludge, if he says it's got a knock in the motor, if he says it's got transmission problems, on and on and on with the negative problems, you know, I'll leave it alone. If he would say the car has frame damage, if he says it's got unibody damage, unibody is a light frame damage, that doesn't scare me as bad as it would if the car were advertised with frame damage, or, if it's advertised as salvage. You know, I don't need that kind of problem. I don't work for that kind of problem.

Q. In your experience at the auction, are all the cars that go through or are shown under a red light junk cars?

A. No. Absolutely not. That's poppycock. No. There are a lot of good cars that come out of there.

Q. And who do you sell these -- Have you ever purchased cars under a red-light sale?

A. I purchased a Kia, a 2000 Kia, under a red light about two months ago for a very minimum amount of money. Sold it the next week for one thousand dollars. The guy drove it to Jacksonville, Florida and back the next day. Said it was one of his better cars. It was a red-light car.

Q. Why was it going through the red light? I mean.

A. Had bad -- had a couple of bad tires, and something wrong with the brakes.

Q. Did you fix the brakes?

A. We did. We -- we -- we corrected the problems that were there, yeah.

Q. Has he come back and wanted his money back?

A. Absolutely not.

Q. And the other cars that you've purchased at the ADESA Auto Auction under a red light, have they had similar-type problems?

A. They might have had some problems, but we corrected them. I mean, you know when it comes through on a red light it's got -- there's an announcement about the car, and there probably is a problem with it. But that doesn't make it bad. It might have a bent fender, it might have a light -- the taillights out. But when we present it to a customer, it's a good car, and I've never had the first complaint about it.

Q. Now, prior to January 2010, was the auction making these kinds of announcements?

A. Would you say that again?

Q. Sure. There's been a big deal made about January 2010 and these rules coming in. And my question to you is, were -- was the auction doing the same -- performing the same way before the rule changes? Did they announce the same type things?

A. Well, there's always been the same kind of announcements. I remember going to the auction on one occasion, putting my access card in, and it rejected it. I went to the -- to the registration desk, and they gave me new paperwork, and then gave me an access to the auction. They gave me new paperwork to get in the auction, and the new rules.

Q. When was that?

A. That was after -- I ran a slack period there where I didn't buy a lot of cars and it was somewhere in 2005 or something like that. I really can't tell you the exact date, but I just remember the occasion.

Q. You had one of those cards that you had to put in a machine?

A. I have an access card, yes.

Q. And what do you do with that access card?

A. I put it in a machine, and it gives me a number, the time I came in, the -- everything about myself that they have, you know, on recording.

Q. And when the rules changed and the paperwork changed, your card wouldn't work?

A. The rule --

Q. Did your card work?

A. Yeah, it -- their card -- the card worked from then, on. Yeah.

Q. After you got a new paperwork?

A. Yeah. Yeah. But they held me up 'til they gave me new paperwork.

Q. Did that happen again in 2010, when they came out with these rules?

A. I don't recall it happening again, no. I've had -- I have had to pick up new rules occasionally.

Q. Why?

A. Well, sometimes you need to review them. You need to -- there might be a question in my mind about why something is one way or the other, and you go in and they get -- they have all kinds of copies of the rules.

Q. Are there any rules on the wall?

A. No. They have them where they can hand them to you. They might have them on the wall, but they also have them at the desk, at the registration desk. I'm well-known at the registration desk. I go there a lot, so.

Q. All right. So, let's talk about the day you went and bought this car. Okay? Do you remember going there that day?

A. Absolutely.

Q. What were you looking for when you went?

A. Well, I was looking for bargains. I was looking for good small cars. I had somebody who -- a specific little sixteen-year-old girl that was looking for a car to drive to school.

Q. All right. So, tell us about being at the auction.

A. Well, you're at the auction. There's a lot of noise. You've got -- if you've got six or seven lanes with the auctioneer talking, boy, it's like, you know, it's yack, yack, yack over here; and the same thing about seven or eight different places. And you've got to keep up and -- and watch the different cars as they come into the auction area, and they come in from outside.

If you see something that you really like or you want to ask about, you hustle over to that side to see what the car's all about, and see what kind of money, what kind of bid is being placed on it at that time.

Q. All right. And tell us about this 2003 Honda Civic.

A. Okay.

Q. Tell us what happened.

A. Well, I was in about the third lane over when the car came in the door and as it moved toward -- toward the auction -- toward the auctioneer, who is up on a platform, like -- like the judge's table here, and there's a lady standing beside of the auctioneer, who is deciding if the car is up -- if the price that comes up is good enough to sell it. He's usually relying on her to tell him whether or not he can sell the car.

The car came in and rolled up to the block, and I specifically listened for announcements, you know. I mean, it's -- it's -- it's a little gray car. Not real clean, but not -- it's just a modest car, you know. It comes up to a stop, and the bid -- there was a lot of noise all the way around -- the bid stopped at about forty-seven hundred dollars on the car.

Q. All right. Well, let me ask you this. Did you look at it? Did you go up to it?

A. I was looking at it all the time. I was very interested in it.

Q. Could you notice, or did you notice any damage to the car?

A. I noticed some little bitty scrapes, and I noticed there was a -- there was damage to the right-rear door. But you know, that wasn't anything that really scared me.

Q. Why not?

A. Well, I knew I could fix that. I knew that if I could buy this car cheap enough, I could put it back together. And I might not give somebody a cream puff car, which is the very best, but I could give them a good car for their money. They'd have something to drive to work or drive to school, or whatever. And I could sell it. I could make a little bit of money. The person buying it would have, maybe, a good car. That was my idea.

Q. Well, did you get down on the ground and look underneath it, and ---

A. Well, it was ---

Q. --- check it out?

A. --- it was wet that day, and there was -- sometimes, there will be a car that drips a little oil and stuff. And if you get down on the ground, you'll get run over. So, I tried to maintain, you know, I don't want anybody running over this big body.

Q. Okay. So, did the car sell on the block?

A. Yeah. It -- they didn't sell it, so they drove it straight out the lane and out to the left, which has to cross six or seven lanes and then it went outside. The car went outside.

Q. So, what did you do?

A. Well, it did a no-sale. There was a no-sale on the car. So, I walked into what they call the If desk, and I asked the lady there if the car actually sold, or what -- what was the situation, and she looked it up. I gave her the number off the windshield and she looked it up; came back and said the car didn't sell. Told me -- told me -- Well, I went in to talk to Elaine Hamilton about it, who had represented the car, standing up with the auctioneer. And she told me that --

MR. WALKER: Your Honor, I will object to hearsay testimony about what other people said.

THE COURT: Okay. I'll sustain.

MR. MOSKOS: Yes, sir.

Q. What do you say to Ms. Hamilton? What did you say to her?

A. Well, I just -- I asked about the car, and a phone call was made to Midland Honda. She -- I was then told that --

MR. WALKER: Your Honor, I -- again, I -- I'm not trying to be difficult. I wonder if there's another way we can get this addressed?

A. I received -- Is it okay?

Q. Well --

A. I received the information that they wanted seventy-two hundred dollars for the car.

Q. What did you think of that number? What did you think of that number?

A. Not very much. I started to walk away, and was informed that another call would be made, to see if that was the minimum price.

Q. Okay. Did you receive a minimum price?

A. Found out later I could buy it for fifty-two hundred dollars.

Q. How did you feel about that number?

A. Well, I had offered fifty, so.

Q. You talking five thousand dollars?
A. So, I --
Q. You said -- You said you offered fifty. I want to make sure it --
A. I offered -- yeah, I offered five thousand dollars.
Q. Okay.
A. So, I agreed to pay fifty-two hundred dollars for it.
Q. All right. So, what are you doing next?
A. I go out. The car is parked within a close proximity with a lot of other cars that are squeezed in. I get to the car, and I take it -- I look it over. I got in it, I drove it. The motor ran well. The transmission changed good. Although I knew it had some little glitches, I brought it back, and I agreed to the fifty-two hundred dollars, that I would take it.
Q. Did you consider that car a piece of junk at that time?
A. Absolutely not.
Q. And so, you paid the fifty-two hundred dollars right then?
A. I wrote a check.
Q. Take a look at that document on top.
What is that, Roger?
A. It's a check that I wrote to ADESA on 4-2-10.
Q. For how much?

A. Six thousand, nine hundred and sixty dollars.
Q. And is that for just the Honda?
A. No. That was for a Honda car, for a box trailer, and for a Ford Taurus.
Q. How did the Ford Taurus run?
MR. WALKER: Your Honor, I've allowed a lot of talk about other vehicles, but I would be grateful if we'd focus on this car, so, I object on relevance.
MR. MOSKOS: Okay. Well ---
THE COURT: I --
MR. MOSKOS: --- Mr. Walker has had his witnesses talk about how red-light cars were all junk, and I just want the jury to understand what red-light cars really are.
THE COURT: But you didn't ask him whether that Taurus was bought under the red light.
MR. MOSKOS: Very good. Yes, sir. Your, Honor, you're absolutely right.
Q. What -- Mr. Whitley, did you buy the Taurus at a red light?
A. I did.
Q. And how did it run after that?
A. Fine. It was able to perform in the way that I expected it to.
Q. Okay. Did you find any wreck damage in that car?
A. No.

MR. MOSKOS: Your Honor, I would move to introduce the check. It's Plaintiff's Exhibit Number?

MADAM COURT REPORTER: Ninety.

MR. MOSKOS: Ninety.

THE COURT: What say the Defense?

MR. WALKER: No objection.

THE COURT: Okay. Without objection.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER NINETY, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

MR. MOSKOS: Hand that to her.

A. Oh, I'm sorry.

MADAM COURT REPORTER: You want all three? I mean, you handed me -- just the check?

MR. MOSKOS: Just the check, yes, ma'am.

A. Thank you.

MADAM COURT REPORTER: There you go, sir.

A. Thank you, ma'am.

MADAM COURT REPORTER: You're welcome.

BY MR. MOSKOS:

Q. Now, Roger, I've handed you, or presented -- put in front of you Exhibit One, which is the Damage Disclosure sheet, and Exhibit Number Fifty-six, which is the buyer's receipt for when you bought that car.

Did you have to pay the auction any money?

A. Only the checks.

Q. No, sir. I didn't -- What I meant was, in addition to buying the car and paying Midlands ---

A. Oh.

Q. --- did you have to pay an auction fee?

A. Yes. There was a hundred and eighty-five dollar buyer fee.

Q. And you said the car was Fifty-two hundred dollars?

A. Fifty-two hundred dollars, yeah.

Q. Now, when did you get the receipt?

A. I got a receipt for the car at that time.

Q. When you paid for it?

A. I did.

Q. And what about the Damage Disclosure Sheet?

A. I got that at the same time, also.

Q. You got the Damage Disclosure Sheet when you got the -- the sales receipt?

A. Yeah.

Q. And did you look at both of them?

A. I did.

Q. And on the sales receipt, what does it show on the left-hand side of the page, as far as announcements?

A. On this -- the Sale Contract?

Q. Yes, sir.

A. Okay. On the left-hand side, it shows -- it shows the three cars, or the three vehicles.

Q. What does it say under announcements?

A. There's no announcement.

Q. And if you had gone to the dealer -- excuse me -- to the auction office and bought the car, and that sales receipt had indicated that there was frame damage, unibody damage, anything like that, what would you have done?

A. I would have taken it straight to arbitration. I would've never -- I never would have paid for the car. I wouldn't -- I would not -- if I had paid for the car, I would have asked my money back right there, until I got through arbitration.

Q. Did you believe that the sales contract accurately represented the car?

A. It always has before. I did, yeah.

Q. Now, take a look at Exhibit Number One, the Damage Disclosure Form.

A. Okay.

Q. Item number one says that the -- it says, has this vehicle been damaged by collision or other occurrence to the extent the damages exceed twenty-five percent of the value at the time of the collision or other occurrence. And it says, no. If it had said yes, what would you have done?

A. I would have retreated right back to the office where I got it. I would have gone right back and said, hey, this is not correct.

Q. And if they said, oh, yes, it is; we have information from the dealer, what would you have done?

A. If I still had my money, in which I probably didn't, but if I -- otherwise, I'd have gone straight to arbitration.

Q. And if -- Number five says has this vehicle been reconstructed. It has asterisks, and it says, any year, if that had been checked yes, instead of no, what would you have done?

A. I would've done the same thing. I would've gone right back and asked for my money back or gone to arbitration. I would never have moved the car.

Q. So, after you received the sales receipt and the Damage Disclosure Form, what did you do?

A. Well I was notified it was probably going to be twenty-one days before I would be able to get the title, so, I packed up, got ready to get my cars home.

Q. Twenty-one days to get the title? Were you okay with that?

A. Well, I had to live with it. I wanted the car.

Q. Had you had that happen before.

A. Most of the time I've been notified at the time -- at the time of the auction, and -- I mean, at the time of the sale, by the auctioneer.

Q. Did they mention that when this car came across the block?
A. Not that I recall.
Q. Was that enough for you to want to get out of the deal?
A. No.
Q. All right. So, did you take the car home that day, April the 2nd?
A. I would've, but the car wasn't available.
Q. What do you mean, it wasn't available?
A. Well, it had been put on a rollback, or some kind of transport, and brought back to Midlands Honda, as I found out about three hours after searching for it.
Q. Okay. And let me back up and cover one thing before we move on. Is there any area of the ADESA Auto Auction that has junk cars in it? Is there a particular location there?
A. There is a back-row situation where cars that have a variety of problems, and that's when you better beware. You go back there and you pick out what you want; when you buy it, it's yours. There's no arbitration. There's no -- no guesswork about it.
Q. And do you ever buy from that area of the auction?
A. I have.
Q. Were you interested in any of those cars at this

point?

A. Well, I was so busy trying to buy this car that I hadn't looked at the cars in the back row.

Q. All right. So, you left. Did you come back to the auction?

A. Well, I left, and I came back the next day to try to pick up the car. I brought something to transport it on, and still couldn't find it.

Q. All right. So, what did you do?

A. Well, I finally called Elaine Jarvis on Monday, and told her I couldn't find the car. And she then notified me that --

MR. WALKER: Your Honor, I'll -- Again, I'll object to hearsay statements.

BY MR. MOSKOS:

Q. Is it -- let me back up just a second. Is it Elaine Jarvis, or Hamilton?

A. Hamilton. I'm sorry. Yeah.

Q. And what did you learn from Ms. Hamilton?

A. That the car had been transported back to Columbia.

Q. And did it ever show up?

A. It showed up on Tuesday or Wednesday. I'm not sure which day it was.

Q. After -- after the auction?

A. Yeah. Yeah.

Q. So, the car shows up. Does it show up at your lot, or at the auction?

A. Say that again.

Q. Did the car actually come to your location, or was it just transported back to the --

A. It was transported back to ADESA.

Q. And then, you had to go get it?

A. I had to go get it.

Q. And what happened when you went and picked it up, if anything?

A. I picked it up. I took it to the shop. We looked the car over. The shop foreman drove it, just gave it a short looking over. The car looked okay. Knew that we couldn't work on it until we got the title or we might lose our money.

Q. What do you mean by that? Why would you lose your money?

A. Well, they notify you at the sale when the title's attached and the title's not there, don't -- don't do anything to the car until you get the title.

Q. Why?

A. Well, there might be some glitch where the title doesn't come in, and you might end up losing your money, because you might have to give the car back to them. The sale, in their mind, is not final until you get the title.

Q. Did the title ever show up?
A. Twenty-one days later.
Q. And after that, what did you do?
A. I proceeded to fix the car. I mean, it had a damaged door, and it had some other very small things. And we -- we had sold it to this young sixteen-year-old girl.
Q. Okay. Well, let's -- let's talk about the repairs first.
A. Okay. Well, we did the repairs. We did the repairs to the door.
Q. Well, let's take a look at this. You should have a --
MR. MOSKOS: Can I get this marked as Ninety-one, please?
(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER NINETY-ONE, REMARKED FOR IDENTIFICATION.)
BY MR. MOSKOS:
Q. Roger, take a look at what is marked as Ninety-one.
What is that?
A. It's a bill from Evans -- wait a minute. Yeah, from Evans Body Shop for Five hundred and fifty dollars for repair to the door.
Q. I'm sorry. Are you saying Yeltins?
A. Yeah. Billy Yeltin's body shop. I have a hard time reading his, his letterhead.
Q. Okay.

A. Yeltin's Body Shop for Five hundred and fifty dollars. That was for Three hundred and fifty dollars for labor, and Two hundred dollars for parts, was a total of Five hundred and fifty dollars.
Q. Did he paint the door, too, or was it a two-tone car?
A. The car was -- Well, which half of the car are you talking about?
Q. I'm -- No. I'm talking about when he put the door on it. Did he paint the door?
A. Painted the door white. The -- the front of the car was gray; the back of the car was white. We painted the whole thing. The whole thing was painted white.
Q. The door was painted white?
A. Yeah. We painted the door white.
Q. This -- this --
A. It -- The back door was white.
Q. Right. But the car was silver, right? The Honda?
A. Yeah. That's -- that is correct. The car was silver, but the back end of it was white. The front part of the car white -- was silver, and the back was white.
Q. Well, when you bought it at the auction, could you see two different colors of paint?
A. No, it was silver. It was silver.
Q. The whole car was silver?
A. It was.

Q. All right. What I'm asking you about now it, did Mr. Yeltin take a blue door and put it on a silver car?

MR. WALKER: Your Honor, I -- I'm gonna ---

A. They put a -- They put a white door.

MR. WALKER: --- object to leading.

THE COURT: Okay. Don't lead him.

MR. MOSKOS: Yes, sir.

Q. What did Mr. Yeltin do to the door?

A. He put a white door on the car.

Q. Was there any paint -- painting involved with the door?

A. Then, he painted it silver.

Q. And after he finished, what did you do?

A. We picked the car up, took it back to the shop.

Q. What did you do with it?

A. Well, we'd made an -- an agreement to sell it to this Ms. Gorman, and White and I turned the car over to the salesperson there.

MR. WALKER: No objection.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER NINETY-TWO, REMARKED FOR IDENTIFICATION.)

BY MR. MOSKOS:

Q. Now, Ninety-two is the Bill of Sale?

A. I did.

Q. Excuse me. Sorry about that. How much did you sell

the car for?
A. I sold it -- Actually Terry Evans sold it for Sixty-eight hundred dollars.
Q. Now, who is Terry Evans?
A. She works at the garage and she holds a dealer's license.
Q. And did she work solely for you?
A. No.
Q. Who did she work for?
A. For her husband, and for me, also.
Q. Who is her husband?
A. Randy Evans.
Q. And where does he work?
A. He owns Evans Garage.
Q. Where is that?
A. It's right in front of where our car business is.
Q. Is it y'all are next door?
A. Actually, we rent property from him.
Q. And occasionally, she'll sell a car for you?
A. Right. Uh-huh.
Q. And is she a salary employee?
A. No.
Q. When she sold this, did she receive any money, when she sold this car?
A. She received a Two hundred dollar commission.

Q. So, did you pass along any information to -- well, let me -- before we get into that, let me show you this document.

MR. WALKER: No objection.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER NINETY-THREE, PREMARKED FOR IDENTIFICATION.)

BY MR. MOSKOS:

Q. Let me show you Ninety-three. What is Ninety-three?

A. It is a -- it's a bill from Tim Mossberg Ten dollars and twenty-seven cents for a part.

Q. Did that go on the car?

A. It did.

Q. And what kind of part was it?

A. It's some kind of relay, or something of that type.

Q. How much was that?

A. Ten dollars and twenty-seven cents.

Q. Was that work done before you sold the car?

A. Yeah.

Q. Did you have any other costs in the car, other than the car, the auction fee, the door, Ms. Evans, and this relay? At that point?

A. I don't think so, no.

Q. So, you sold -- who -- you sold this to whom, this car to whom?

A. Sold -- who I sold it to?

Q. Yes, sir.
A. Okay. Terry Evans sold it to Ms. Gorman and her daughter, White.
Q. Did you communicate to Ms. Gorman and Ms. White you would do anything else about this car, or related to this car?
A. Through Terry I agreed to do the timing belt and water pump. Not pay for that material, but at least furnish the labor for it to be done.
Q. So, they pay for the part, and you would furnish the labor?
A. Right. As I recall, yeah.
Q. And when was that work supposed to be done?
A. At Evans Garage.
Q. No, when was that supposed to be done?
A. Well, as soon as possible. It was not a long time before they brought the car in to fix it.
Q. And what happened then?
A. They put it on the rack. I was at ADESA considering other cars when I got a call concerning the clip of the car.
Q. So, what are you thinking at that point?
A. It was a sick feeling. A very sick feeling.
Q. So, what did you do?
A. I told them to immediately call the folks that owned

the car. Tell them to bring it back, get their money back.
Q. No, who did you tell?
A. I told Terry. I told Terry.
Q. Terry Evans?
A. Evans, yeah.
Q. Okay. What did you tell her?
A. To call the Whites, and tell them to come and get -- to come bring the car, or come bring the title, and get their money back. Or we'd talk to them about getting another car.
Q. You had -- Did you have possession of the car at that point? Was --
A. We did.
Q. What did you do while you were at the auction?
A. I went to arbitration.
Q. And what happened?
A. We looked the car up on -- on their computer.
Q. Okay. And did you talk to the people there about the problem you were having with this car, that it was a clipped car?
A. I talked to Billy Jarvis, who was the arbitrator. Yeah.
Q. What did you tell him?
A. I told him the problem I had. That I had a car that had severe damage to it that I had just purchased.

Q. Did you tell him about the announcements, or going through the auction?

A. I questioned -- Yeah. I told him there were -- I told him there were no announcements with it.

Q. And as a result of talking to him, were you able to go through arbitration?

A. Well, he pulled the car up on the computer.

MR. WALKER: Your Honor, I'll object. That's going to be hearsay, what's going to be on the computer.

A. I was looking at it.

THE COURT: Well --

BY MR. MOSKOS:

Q. Were you able to go through arbitration?

A. No.

Q. Why not?

A. My time period had run out. There was a three-or four-day arbitration period, which, the car hadn't been there during that time, but I still -- that was the only time I had to arbitrate it was during that time. I mean, that was while I was --

Q. Well, after you found out that your arbitration time had run out, what did you do?

A. I went upstairs.

Q. Upstairs? Why did you go upstairs?

A. I went upstairs and spoke with Elaine Hamilton about

the car.
Q. What did you tell her?
A. Same thing I told the rest of 'em, the others; that I needed to have somebody contact me about the car.
Q. And did you know how to get in touch with the seller, Midlands Honda?
A. The only name I could get from them was Brent Ferrell. I was told that he was the manager.
Q. Okay. And did -- Were you given any -- any contact information?
A. I was.
Q. So, after you finished over at ADESA, what did you do?
A. About two days later I called Midland Honda.
Q. Why did you wait two days?
A. I mean, I -- I don't know. It might have been -- I don't know.
Q. Okay.
A. I mean, there was a lot of frustration during that time, but.
Q. So, what happened when you called Midlands Honda?
A. I asked if Billy Jarvis -- I mean if Brent Ferrell was the used car manager, and they said yes. I -- I asked if he were there and they put him on the phone.
Q. And then, what?
A. I asked him if he were Brent Ferrell, and he said yes.

Q. And then, what?

A. I gave him the serial number of the car, I told him I had a clipped car that I had purchased from them, and that I expected them to contact me and reimburse my money.

Q. How much were you looking for at that time?

A. Somewhere -- I didn't quote a price, but somewhere around eight thousand dollars, transport fees and all that.

Q. And what is Mr. Ferrell doing at that time?

A. He never contacted me. I never had any contact with him.

Q. Did you tell him which car you were calling about?

A. Yeah. Oh, yeah. I gave him the serial number, the VIN number and everything. He said it when he wrote it down. He took time to -- and he said, I'll -- I'll be in touch, I'll be in contact.

Q. Did you ever hear from him again?

A. No, sir.

Q. What did you do about Ms. Gorman?

A. We gave them their money back.

Q. Well, did you try to look for another car for her?

A. I did look for another car, and I found another car. It wasn't what they wanted. It was a bigger car, so we just gave them their money back.

Q. Did you give them any additional money?

A. Say that again?

Q. Did you give them any additional money?
A. I gave them ---
Q. Anything more than their check?
A. --- I gave them money for all their transfer fees, and every -- Everything that it had cost them to possess that car I gave them the money back to them.
Q. And how much additional money was that?
A. It was like, three hundred and forty-five dollars, or something like that.
They would have kept the car. I wouldn't let 'em.
Q. Now, when I add up the car, the auction fee, the door, the expense you had for Terry, and the relay, that gives me Six thousand, one hundred and forty-five dollars and twenty-seven cents. Does that sound about right?
A. That sounds about right.
Q. Roger, do me a favor. Take this calculator. You had a sale of Six thousand, eight hundred dollars. You had expenses of Six thousand, one hundred forty-five dollars and twenty-seven cents. What's the difference? Can you -- I'm sorry. I didn't do that right. Would you please subtract Six thousand, one hundred and forty-five dollars and twenty-seven cents from Six thousand, eight hundred dollars. I've got it backwards now.
A. I'm not doing too good with that.
Q. Try this. Six thousand, eight hundred. You got it?

A. Yeah.
Q. What is the number?
A. You do it.
Q. Okay. All right.
A. I wasn't looking at it.
Q. I was -- I'm sorry. I asked you -- I asked it all wrong. All right. Six thousand, eight hundred dollars minus --
A. When you're old, you got old eyes.
Q. Read that number on the calculator for me.
A. Okay.
Q. Can you read it?
A. Well, I got something here. Okay. Sixty-five, four seventy-three.
Q. Say that again?
A. Sixty-five, four seventy-three. Sixty-five.
Q. Six hundred and fifty-four dollars and seventy-three cents?
A. Yeah.
Q. Is that the profit that you made on that car?
A. Yeah. That's all we could have possibly made, yeah.
Q. All right. So, you gave Ms. Gorman back her money.
What did you do with the car?
A. The car's been from pillar to post. It's in -- it's in my back yard right now.

Q. Just sitting there?
A. It's -- it's been around different places. It's in my back yard right now.
Q. And did you -- did you ever go out and try and sell the car?
A. I went out and talked to friends I knew, trying to find out what they thought the car would be worth, should I get stuck with it to the point that I couldn't sell it, couldn't get rid of it. But I didn't try to sell it. I just wanted to know the value.
Q. And you have -- When did you learn that the car was unsafe?
A. Well, when we -- when we put the car up to put a timing belt and water pump on it, the guys looked at it. We looked at it, I looked at it. It was a chopped-up mess underneath.
Q. Okay. And based on your experience in the car business -- Well, could you have sold that car in that condition?
A. What?
Q. Could you have sold it?
A. Oh, absolutely not.
Q. Why not?
A. Well, even if I could have gotten somebody to buy it, I would not have been responsible for that car. I wouldn't

want the responsibility for it.

Q. And based on your experience in the car business, and your researching this issue, did come to a conclusion as to what the value of that vehicle could have been, or was, at that time?

A. Well, it wasn't worth anything to me. It would have been worth maybe three or four hundred dollars, retail. Somebody -- In fact, one dealer did say that he would give five hundred dollars for it.

MR. WALKER: I will object, your Honor. That's straight hearsay offered for the truth.

BY MR. MOSKOS:

Q. If you were -- if you were to have gotten rid of this, just to whoever you could find to buy it, what's the most you could have gotten for it?

A. Five hundred dollars.

Q. Now, when Mr. Walker took your deposition and asked you a whole bunch of questions, just like what we've been doing the last couple of days, you gave them a different number. Why did you give them a different number?

A. Well the car could be -- could have been worth two thousand dollars. But it wouldn't have been worth two thousand dollars to me, in that I don't have the tools or the skills to take it apart, take the motor out, take the transmission out, and take it off piece by piece, and then wait 'til four or five years so I could sell all the parts so it wouldn't.

Q. Do you own a junkyard or a salvage yard?

A. I absolutely don't, no.

Q. And so, the only way to get the two thousand dollars would be to part it out?

A. Or to try to get one of those guys to buy it.

Q. But those guys, the junkyard guys ---

A. The junkyard.

Q. --- they have to make a profit, too, right?

A. Absolutely.

Q. And -- Okay. Okay. So, are you going to -- are you demanding that Midlands take this vehicle back, or are you going to keep it?

A. I'm going to keep the car. I got that much money in it, and --

Q. What are you going to do with it?

A. I'll -- I'll chop it up, and see that it doesn't get back on the road. It'll be a salvage title.

Q. Are you going to sell it for five hundred bucks?

A. If I can get that much.

Q. All right. After you add up all your damages, all right?

A. Right.

Q. And keeping the car worth five hundred bucks, what's the total loss on this car?

A. The total loss is six -- six thousand -- I mean, six hundred -- Six thousand, six hundred and forty-five dollars.

MR. MOSKOS: No further questions, your Honor.

CROSS-EXAMINATION

ROGER WHITLEY BY MR. WALKER:

Q. Mr. Whitley, I -- I tend to not talk very loud, so, if you have trouble hearing, please let me know. Okay?

A. I tend not to hear very well, so I will.

Q. Okay. I'll -- When I change topics, I'll try to let you know, so we can follow each other. Okay?

First thing I want to talk about is when you bought the car. Okay?

A. Okay.

Q. As I understand it, you bought it off the block, and the car was out in the lot.

A. When I finalized the deal, yeah, the car was out in the lot.

Q. You had the opportunity to test-drive it?

A. I did.

Q. And since it's not on the block, you had all the time you wanted to walk around and look at it, right?

A. Well, if you do that, you get run over. But I had time I could walk around it a little bit.

Q. Did you have all the time you felt you needed to evaluate and examine the vehicle at the auction before you decided to buy it?
A. I had some time. I had some time. It wasn't super-adequate. It never is at the auction. It's all usually push-and-shove, but I had looked at the car, and I was -- I was satisfied I wanted to -- to pursue it further.
Q. Well, the car's parked in the lot, sitting there, isn't it?
A. Between about four or five other cars, yeah. You couldn't hardly get to it, but I.
Q. But you could get to it, and you could look at it, and take all the time you wanted, right?
A. I took an adequate amount of time.
Q. Now, I understand there was a dent in the rear-passenger door, right?
A. Say that again?
Q. Wasn't there a dent in the rear-passenger door of that car when you looked at it, at the auction?
A. That's right.
Q. So, you knew it had run into something.
A. I didn't run -- I don't know what had run into it. I didn't know whether a car had backed into it, or -- I don't know. I mean, I didn't know what caused the damage. I knew the damage was there.

Q. Well, and that's why I asked you --
A. But the door was closed, yeah.
Q. But that's why I asked a broad question. Either the car ran into something, or something ran into it and made a dent?
A. Uh-huh.
Q. Right?
A. I -- I -- yes. I ---
Q. And you talked --
A. --- I would assume that, yes.
Q. And you talked earlier about scrapes. There was some other damage on the body of the vehicle. Why?
A. I don't recall any. There might a been some cratches, but I don't recall any other damage on the vehicle.
Q. Well, you've -- you watched Mr. Ecklund's testimony on the video, right?
A. Uh-huh.
Q. And remember, he identified some photos ---
A. Uh-huh.
Q. --- of the vehicle. Right?
A. Uh-huh. Right.
Q. I'm going to show you Exhibit Twenty. And I'll tell you, he testified, this is a seam in the right-rear quarter panel.
A. Okay.

Q. Isn't it true that shows white paint and gray paint?

A. As far as I can see there, yeah.

Q. You heard Mr. Ecklund say that's how it looked when he left it.

A. I don't -- I don't recall him saying that. I'm not saying he didn't say it, but.

Q. When you looked at the car in the lot at the auction, when you had an adequate amount of time, did you even notice the white paint and the gray paint clearly visible?

A. No.

Q. When you looked at the car sitting in the lot, was it dirty?

A. It wasn't clean.

Q. It -- So, it hadn't been cleaned up, or spiffed to ---

A. Uh-huh.

Q. --- look better at the auction?

A. No.

Q. Now, this car came in under the red light, correct?

A. Like many cars do.

Q. I understand that. We've talked for days about ---

A. Uh-huh.

Q. --- announcements and all that. But you understand there's more risk to a red-light car than there a green-light car, right?

A. Far as I know, yes, sir.

Q. And subject to all these fifteen pages of rules, its an as-is sale.
A. Say that again?
Q. Subject to the fifteen pages of the auction rules, this is an as-is sale under a red light.
A. I guess. Yeah.
Q. That's correct, isn't it? When you looked at the car in the parking lot at the auction, did you use a paint meter to go around the car, and see if it had more body damage?
A. I don't operate with that kind of equipment. No.
Q. Well, a paint meter is something, I can stick it in my pocket.
A. I understand what it is. I -- No.
Q. Well, they -- they don't. Isn't that a device you can use to measure the thickness of the paint?
A. It's the life's blood of a lot of people who buy cars. It's not mine. I just don't use.
Q. But you can go around the car with a paint meter, measure the paint, and get some idea if it's got a lot of body work or a little body work, can't you?
A. I guess that could. It's like I said, I do not -- I don't rely on that kind of equipment, so.
Q. Didn't do it then, right? On this car?
A. No.

Q. Did you get a mirror to look underneath it, to see if it had damage to the undercarriage?
A. No. No. I relied on the auctioneer and what he had said.
Q. I understand that. Now, the place where you operate your car lot in 2010, do you essentially kind of share space with Evans' Garage?
A. I do, yeah.
Q. So, you've got access to the garage facilities right there, don't you?
A. Yeah. Yeah.
Q. Did you take this car in and put it on a lift, and take a look at it, to be sure if those announced conditions were accurate or not?
A. Well, we had looked at the car just as much as Midland Honda had when it -- before it sent it up there. We had looked at the car just as much as Midland Honda did. If they didn't see it, why would you say I should see it?
Q. So, you -- they gave it a visual inspection, and you gave it a visual inspection, right?
A. We gave it a visual. I felt like the car was safe, yeah.
Q. But you all both gave it a visual inspection, and missed the damage; is that right? You all both -- Midlands Honda and you gave the visual inspection at some point, but

didn't both of you miss the damage?
A. I didn't, no. Uh-huh.
Q. Okay. So, you didn't miss the damage?
A. I didn't find the damage. I didn't see the damage.
Q. I'm going to hand you Exhibit Fifty-two. These are rules. And this is where we looked at the chart earlier. Okay? And in the upper right-hand corner -- excuse me, the upper left-hand corner of Exhibit Fifty-two is the date January 2010, right?
A. Okay.
Q. I mean, it's -- that's what's on here, right?
A. Uh-huh.
Q. When you bought this car out on the lot at the auction, what was your responsibility to examine the vehicle? Under the rules.
A. I did everything I was supposed to, under the rules.
Q. Well, what's your responsibility? What do the rules say about what you're supposed to do? And if you don't know, that's okay.
A. Auction -- you want me to read it to you?
Q. Well, why don't we look at paragraph 2(d), as in -- excuse me 3(d), as in dog. It says buyers are cautioned to expect inspect lot-sale vehicles very carefully and verify announced conditions before purchasing. Did you very carefully inspect this vehicle and verify that what you

heard at the sale was accurate?
A. By the time I paid for the vehicle and got back outside, the car disappeared.
Q. Well, your check's dated April 2nd, and the auction was April 1st. So, didn't you have plenty of time to look at this car?
A. I looked -- I didn't see the car until the day of the auction.
Q. Right.
A. I saw the car the day of the auction. The car went outside, and I looked at the car there. But it was a cursory -- I just -- You know I drove it and then I had time to look at it a little bit and then I went back in and talked about it. Then, when I turned around to come back and get it, the car was gone. And it didn't come back until after the time frame -- until after my time for arbitration was over with. I didn't have a chance to -- I didn't have a chance to arbitrate it.
Q. Even after -- Well, when the car finally got to you from the auction, and you had it right there at your facility with Evans' Garage, what did you do to verify that the conditions announced were accurate, as you are required to do in the rules?
A. When I looked at the car and I saw that there were some problems, I went in and talked to Billy Jarvis, who is

in charge of the arbitration.
Q. I'm asking you what you did yourself to verify that the conditions were accurate, when you had access to Evans' Garage, and lifts, and everything. Isn't it true --
A. As far as I could see --
Q. Isn't it true you did nothing?
A. As far as I could see, and the way this car was presented to me, it was okay. It was okay to Midland Honda when they left with it, so it was -- I don't know how you could expect me to know any more about it than they did.
Q. So, you were -- you just stuck your head in the sand, and just did the visual inspection?
A. About like Midland did, I guess.
Q. That's what you did, right?
A. I -- Not necessarily. I'd put out some money that I didn't have to waste. And no, I wanted a good -- I wanted a good car. I didn't expect them to send junk up there.
Q. Well, we'll talk about the money. Sure. Okay?
A. Okay.
Q. Do you feel you very carefully inspected the car before you purchased it?
A. I inspected it the very best I could. Just like they inspected it the best they could when they sent it up there, supposedly. They've got better equipment to inspect it with than I have.

Q. Before you sold it, did you do anything to verify there wasn't any damage to the undercarriage ---
A. I ---
Q. --- where somebody run over a stump or whatever?
A. --- did not. That was a mistake that we made that we corrected it. As soon as we found out that we made a mistake, we gave the people their money back. That's better than I got from you folks.
Q. When you were standing in the lot at the auction, did you pull a Carfax on this vehicle?
A. Did I pull the car up?
Q. When you were looking at the car in the parking lot at the auction before you bought it, did you pull up a Carfax on a telephone or an Ipad?
A. There is no way that I have, or not many people have, of pulling a Carfax. Now if you'll look at the Carfax on it, you wouldn't want to see it, because the Carfax doesn't tell the truth about the car.
Q. Well, do you realize there's at least one Carfax in evidence in this case that talks about wreck damage?
A. There was one Carfax that showed one wreck. The car had been wrecked three times. Midland Honda apparently hadn't checked that.
Q. Well, you didn't check it, either, did you?
A. I absolutely did not.

Q. So, that's --
A. But I don't have the facilities that they have.
Q. So, that's something else you and Midlands Honda did in common?
A. But -- I don't know about in common, but.
Q. I want to shift gears from the purchase and talk about the rules. Okay? The auction rules. Are you with me?
A. I'm following you.
Q. Okay. I understand you started selling cars at about 1990 or 1991, right?
A. Somewhere along there.
Q. And somewhere along there, you went to ADESA and got signed up and got the rules.
A. Uh-huh.
Q. Right?
A. Right.
Q. And isn't it true that, since you're not sure if you ever looked at them again from that time until this segment in 2010?
A. After we had our little situation, I went and looked at them thoroughly.
Q. Isn't it true that from 1990 and 1991 until 2010, you never looked at -- you're not sure if you ever looked at the rules again?
A. That might have been true. 1991. But I've seen 'em

since.

Q. And you and I started this conversation about paragraph 3(d), as in dog, you didn't realize you had a duty to verify those conditions, did you?

A. I don't really know what's on that paper.

Q. Got it. And the upper right-hand corner -- excuse me, I keep calling it right -- the upper left-hand corner of these rules, first page, the date on there is January 2010, right?

A. I suppose it is.

Q. And this sale was April 1 of 2010. Right?

A. It was in 2010.

Q. So, from January 1 to April 1, that's three months of time, right?

A. Okay.

Q. And that's the period that these rules would have been in effect.

A. Say that again.

Q. That's the period of time these rules had been in effect before your purchase.

A. Okay.

Q. And when you bought the car on April the 1st of 2010, you didn't have a copy of these either, did you?

A. I didn't -- Nobody had a copy of those. They don't carry them around over there.

Q. Well, that's one more thing that you and Midlands Honda have in common, right?
A. But that's something you don't carry around at a sale.
Q. Both you and Midlands Honda, on April 1, 2010, did not have a copy of the rules that are Exhibit Fifty-two?
A. Probably had one at the office.
Q. You had a conversation with your lawyer, shifting gears a little bit, the bill of sale, the receipt you get from the auction, you're familiar with that piece of paper, right?
A. I'm familiar with the receipt that I got from the office -- off -- from the auction, yes.
Q. And on this Honda, from 2010, there's a box checked that says red light, as-is, correct?
A. I know what you're talking about, as far as red light. About half the cars I buy are on red-lights, and they're -- they're good automobiles. It has nothing to do with structure of the automobile. We were advised that when we had the session with the guy from ADESA.
Q. So, you had --
A. The damage to the automobile is completely separate.
Q. Well, I just want to be sure I'm clear. On the document itself that you get, the receipt, it simply has the words red light, as-is.
A. About everything I buy has got red light on it.

Q. And it says as-is, correct?
A. Well, it means I can't come back and ask for money back, but it -- in the rule book that we get from ADESA, it says the seller has to notify us if it has more than twenty-five points of damage; and you're supposed to announce it at the sale, which you did not do. It was not announced at the sale that it had damage. It showed clear title. No matter what the red-light sale says.
Q. The form you got said as-is, right? That's all I'm asking.
A. Well, it was as-is as far as the auction was concerned, but not as-is as far as Midlands Honda is concerned. They can't sell cars like that.
Q. Is there a reason you don't want to answer this question, Mr. Whitley? It's real simple.
A. But that's my thinking. That's the way I see it.
Q. And Mr. Whitley, I -- I'm not feeling well today. I'm a little slow, so I apologize if I kind of hold up here a little bit.
A. Well, I apologize to you, also. I don't mean to be disrespectful, but I want us to be honest about this thing, and -- and I haven't run into honesty from Midland Honda.
Q. Well, we're going to shift gears a little bit and talk about training. Okay? Your lawyers asked other folks a lot of questions about whether they are highly trained. Do

you consider yourself to be a highly-trained used car expert?
A. I've had a lot of experience. I'm not an expert at anything, but I've had a lot of experience.
Q. And by experience, we're talking about sort of on-the-job training, right?
A. Yeah. I've had a little on-the-job training.
Q. So, you've learned how to value cars by buying and selling cars?
A. I haven't crawled around on the ground to look at 'em, and I haven't seen anybody else doing that.
Q. And you haven't taken any classes or formal training in --
A. Absolutely not.
Q. What about Ms. Evans, your salesperson?
A. She'd probably come closer to having experience like that than I would. They have a list.
Q. But you don't know -- she hasn't been trained in what she's supposed to say and not to say to customers, has she?
A. I haven't -- Well, they had a good business, so she evidently has smarts enough to know what to say to customers and not.
Q. Shifting gears a little bit to the vehicle and what you did to it. Your company replaced the door, right?
A. We did.

Q. Had paint work done, right?
A. We painted it. We -- we painted the door.
Q. And that was to cover up the body damage from whatever had happened to the vehicle?
A. It had a bent door on a gray car. We put a white door on it and repainted it.
Q. Repainted the car white?
A. Repainted the -- the white door gray.
Q. Earlier, I thought I heard you say --
A. I might have made a mistake.
Q. I understand that.
A. The car -- the car was gray. It was chopped in half, and the back half of it is white. The front half has got eighty-four thousand miles on it. I couldn't tell you what the back half has, because I don't know where it came from or anything about it.
Q. After you had replaced the door and had the painting done, you couldn't really tell that the door had been dented. That -- that problem was solved, right?
A. It was a pretty good job of correcting it.
Q. Do you know if that damaged -- the replacement of the door and that paint work got disclosed to the people who bought the car from you?
A. Do I know if?
Q. When the car got sold to the young lady who was buying

it from you, Ms. Evans made that sale, right?
A. Right.
Q. And you don't know if she even told those people that you replaced the door, do you?
A. I don't know what she told them. I never saw the people, I never knew them. All I knew is that we were going to treat 'em fair.
Q. I want to shift gears and talk about the underside of the Honda. Okay?
A. Okay.
Q. You saw the underside of the Honda after Evans' Garage put it up on a lift, right?
A. It didn't take them but about three minutes to tell what was there.
Q. And when you walked up, it was real obvious, wasn't it?
A. I didn't even have to walk up and look at it. They called me and told me about it.
Q. So, if you'd made an effort to look under there before, you would have caught this long in the past?
A. Well, I'm a pretty good-sized fellow, and it would be hard for me to crawl around under the car. And besides, when I buy a car from a reputable dealer like Midland Honda, I don't expect to have to crawl around on the ground and look under it. I expect them -- They sold me the car

with no problems. I expected it to be that way. I didn't think I needed to crawl around on the ground, and find out what was under it.

Q. Even though the auction rules require you to verify what got announced?

A. All I know is, I've been buying car for twenty-five years, and I've never been asked to crawl under one like that.

Q. I want to talk to you about two documents: the Title to the Honda and the Disclosure Statement. Okay?

A. Okay.

Q. I understand it took twenty-one days for you to get the title, right?

A. At least.

Q. And it was delivered to you by the auction.

A. In the mail.

Q. Right?

A. Right.

Q. And the Disclosure Statement came with it, didn't it?

A. The Disclosure Statement I got at the time I bought the car.

Q. Well, you heard the auction guy testify earlier this week, right?

A. I don't really know what he said, but I'm just telling you, I got it at the time I paid for it. I wasn't going to

leave without some evidence that I'd paid for the car.
Q. So, this form isn't received until some point after the sale, when the title is transmitted?
A. I don't know what that paper says. I know what I walked off with.
Q. This is not a paper. This is Mr. Guyer.
A. I don't -- I don't mean any disrespect for Mr. Guyer, but I know what I walked off with.
Q. Is there --
A. I had -- I had a disclosure.
Q. Is there some reason why your deal about it handled differently from the thousands of others that get done every week?
A. I don't know -- I don't know my -- I don't even know how to answer that question.
Q. Well, let me ask it a different way.
A. Okay.
Q. Isn't it true you paid the money, when you didn't even have the Disclosure Statement, because it came with the Title?
A. He gave -- Well, they didn't have the title. The title was in -- was down here, you know, so.
Q. Isn't it true the Disclosure Statement came in the mail with the Title just --
A. Absolutely not. Absolutely not.

Q. So, your deal was handled differently between the thousands of others that the auction does?

A. I don't know what happens with thousands of other buyers. There are some, when they leave, they're happy; some are mad. I don't know.

Q. The people who bought the vehicle from you, you gave them a Disclosure Statement, right?

A. I did.

Q. And it also incorrectly said --

A. If it was incorrect because what I had gotten from you people was incorrect. That's what was incorrect.

Q. So, it got sold again with a disclosure that wasn't accurate?

A. I did according to the paperwork, the paper trail, I had to operate.

Q. One short topic. I understand you've been in law enforcement for much of your life, right?

A. I have.

Q. And when I was a long-ago young lawyer, I did a lot of criminal work. You've been in court a lot, haven't you?

A. In my older days, I've spent a lot of time in court.

Q. So, you're a lot more comfortable in the courtroom than a lot of other people, because you're used to being here?

A. Well, as time goes on, you might not be. But anyway.

Q. I understand that. We need to talk about the numbers. And, got my cheat sheet. I understand you had the car sold for Six eight hundred dollars?

A. Something thereabouts. Right at Sixty-eight hundred.

Q. And you paid, with the auction fee added, Five thousand, three hundred and eighty-five dollars for that, right?

A. Five thousand, three hundred and eight-five.

Q. So, that's your cost. And you're going to have a gross profit off of that, right?

A. Right.

Q. I got some bad math here. I apologize. I'm gonna have to do this in my head. Always dangerous.

A. If you get close to it it'll be good.

Q. I'll be close.

A. Okay.

Q. And I apologize, I looked at the wrong line and I messed up. Well, I did have the right number. And I'll move this so you can see it. I took your sales price, minus your cost, and you've got a gross profit of One thousand, four hundred and fifteen bucks. That sound about right?

A. I can't argue with it. I can't say it's right.

Q. Okay.

A. From this standpoint.

Q. Well, and --
A. Mr. Moskos had it right there, I think.
Q. Well, I under -- I understand that. But this is you and me talking now. Okay?
A. That's fine.
Q. And I understood you had some costs. You paid -- Profit.
You guys see this okay?
And you had some costs. You had Two hundred dollars commission, right?
A. I did.
Q. And you had these repairs. That invoice was Five hundred and fifty bucks; is that right?
A. Right. Apparently.
Q. And those were costs you incurred to make the sale, right? Is that correct?
A. That sounds good. Sounds good.
Q. So, you got Seven hundred and fifty bucks in costs, and I'm not worried about the ten-dollar switch.
A. Okay.
Q. So, it'll be close. Okay?
A. That's fine.
Q. So. I do that math. That leaves you with Six hundred and sixty-five dollars-worth of profit, right?
A. That's fine with me.

Q. Okay. Now, I understand you gave them Three hundred and forty-five dollars to undo the title stuff.
A. I gave their money back for the title.
Q. So, that was an extra cost?
A. Well, it was.
Q. Okay. So, if you take your profit, and then the money you had to add in, that's Eleven hundred bucks.
A. And I spent a hundred dollars to get it brought in on a rollback.
Q. I'm sorry?
A. If you want to split hairs, I spent One hundred dollars to get it home on the rollback, after I chased it about three or four days.
Q. Okay. Now. You paid Fifty-two hundred bucks for the car, right? Correct?
A. That, plus the buyer fee.
Q. Okay. Now, isn't it true that y'all previously told me this car was worth up to Two thousand dollars, salvage value?
A. Two thousand dollars if you got somebody to chop it up and get the motor and transmission out of it, yeah. But otherwise, about three or four hundred dollars. I don't have the skills to take that equipment out.
Q. Do you remember having to help answer some written questions that your lawyer gave me answers to?

A. Might have. I don't recall that particular piece of paper.
Q. I -- It's called Answers to Interrogatories. That's your lawyer's signature, right? And looking at answer number nine, doesn't it say that the value is up to Two thousand dollars?
A. It is, but I just -- I just explained that Two thousand dollars to you.
Q. Well, that explains that answer in writing from your lawyer --
A. Well --
Q. Hold on. Let me finish.
A. Okay.
Q. That written answer from your lawyer to me, in writing, it's not explained in there, is it?
A. Okay. But I just explained it to you.
Q. What's the date?
A. October 3, 2013.
Q. So, two and a half years later, you want to give me a different answer? Is that --
A. I'm just telling you the truth.
Q. Okay. Did you not tell me the truth right here, in writing?
A. Well, you know, there's always -- there's always a different thinking -- the way of thinking about it. The

car's worth Two thousand dollars, and you can have it for Two thousand dollars if you want to take it apart with a screwdriver and a wrench, and the parts. But I don't have the capacity to do that. I'm not -- I don't have the skills for it.

Q. Assuming the prior Two thousand dollar figure is accurate, that's Thirty-two hundred dollars difference in value at the time you bought it, assuming that Two thousand dollar igure you gave me in October is accurate. Right?

A. If you're asking me -- Are you asking me if the Two thousand dollars is what the car's worth?

Q. I'm asking you to assume that the Two thousand dollar figure on the paper is the value, and I'm just asking you if the math is accurate. Fifty-two hundred dollars minus Two thousand dollars is Thirty-two hundred bucks?

A. If somebody -- if -- You didn't ask me the question far enough. At Two thousand dollars, yeah, it's worth Two thousand.

Q. Right.

A. It's not worth Two thousand dollars to me to take it apart and try to sell it. It's just won't bring that much. The man that buys it from me and give Five hundred dollars for it, he could get Two thousand dollars for it, because he's got the skills to take it apart. I don't.

Q. Your net profit, plus what you had to pay these people to get back even with them, is Eleven hundred dollars, right?

A. Okay.

Q. So, if you add up your profit and what you had to pay to get square with those people and the difference in value of the car, ---

A. I don't --

Q. --- that's Four thousand, three hundred bucks.

A. I don't agree that the Two thousand dollars is the value of the car the way it sits.

Q. Then, why did you tell me in writing --

A. It was an error on my part. Or at least I didn't give you a full answer. But you know and I know that I don't have the skills and you don't have the skills to take it apart.

Q. We're almost done. I apologize -- We're almost finished. I apologize for taking so long.

A. That's fine. I enjoy talking to you.

Q. I understand that after the problem was discovered, you telephoned and spoke to Mr. Ferrell?

A. I did.

Q. And I understand that was the sole phone call, or letter or email, made to Midlands Honda about this.

A. That is absolutely correct. He -- I was absolutely clear to him what I had and what I needed to have done.

And I didn't feel like I needed to call him again.
Q. And this phone call was made sometime, what, September of 2010?
A. I can't give you the date. It was after I discovered all this junk I had in the yard.
Q. Sometime in 2010, right?
A. Yeah.
Q. And I understand you were upset. You've told us that, right?
A. I didn't say a whole lot to him. I just said he needed -- I've got the car, the serial number. I bought it from you at auction. Do you recall the car? Yes. I'm Brent Ferrell, yes. You need to come and pick it up, and bring my money back. And I didn't ask for anything beyond the Eight thousand dollars that was involved at that time.
Q. And as I understand it, when you --
A. I didn't even -- I didn't even ask for Eight thousand dollars.
Q. When you didn't get a call back, you never wrote him a letter, right?
A. I've been very clear about what I had and what he needed to do, and how he needed to take care of it. No, I didn't write him a letter.
Q. Isn't it true you never sent him an email?
A. Never sent him a mail.

Q. Isn't it true you never called him back?

A. Never intended to.

Q. And throughout the entire next year, 2011, you never made a phone call, wrote a letter, had a lawyer write a letter, any effort to resolve this with Midlands Honda?

A. By the same token, he didn't, either.

Q. Throughout 2012, despite all your upset, you didn't write, call, or reach out to Midlands Honda?

A. And all the responsibility he had, he didn't do it either.

Q. Isn't it true you were simply waiting on everybody's memory to fade, and people to leave these jobs before you brought this lawsuit?

A. Sir, I don't make my living doing this. I make my -- I make my way by treating people well, and getting good products for them, and trying to help the ladies that don't have a car, who have children. The ladies that have children that need a car to go to school, that's -- that's where I get my pleasure from. It's not the money I put in my pocket. These people knew what they needed to do, and they didn't do it.

Q. And you didn't do anything about it for two and a half years?

A. Absolutely not.

Q. So, you were waiting for these employees to leave us, and people forget everything?

A. I didn't care what they did. If they had a good job, they were going to stay there. I wasn't worried about them leaving.

Q. I understand that both you and Midlands Honda inspected this vehicle and missed the damage, right?

A. Say that again?

Q. You inspected the vehicle at the auction and didn't see the damage. At one point, Midlands Honda obviously inspected it, they missed the damage.

A. I don't inspect -- expect any more than you would, sir.

Q. In April of 2010, Midlands Honda didn't have the new arbitration rules -- auction rules, and you didn't have the new auction rules.

A. I had them -- I had what I picked up the last time I visited -- visited the office.

Q. That wasn't the applicable 2010 rules, was it?

A. You know, for me to sit here and tell you I remember the exact date, you know I can't.

Q. And when you sold the car, and when Midlands sold the car, that Disclosure Statement was filled out incorrectly?

A. I don't really understand what you mean. The Disclosure Statement was sent to me when I got the title.

MR. WALKER: Your Honor, if I can just check in with my client very briefly.

(PAUSE AT 03:44 PM.)

Q. Did you get -- did you get the Disclosure Statement when you got the car??

A. Did I get the Disclosure Statement? Am I supposed to have it here?

Q. No, sir. When you -- when the title came in the mail, did the Disclosure Statement --

A. The Disclosure Statement was given to me at the time I bought the car.

MR. WALKER: Your Honor, I don't have any more questions.

THE COURT: Okay.

REDIRECT EXAMINATION

ROGER WHITELEY BY MR. MOSKOS:

Q. Mr. Whitley, Roger.

A. Yes, sir.

Q. If you're out looking at cars, is the auction still going on?

A. It is.

Q. And if you're outside looking at cars, can you buy cars at the same time?

A. If you're out looking at 'em you'd have a hard time buying, yeah.

Q. And you might miss out on what you're trying to buy?

A. Unless I have somebody with me, yeah.

Q. If the proper announcements had been made by the auction, would you have needed a paint meter?

A. Would you say that again?

Q. Sure. If -- if the auction had -- if Midlands Honda had told the auction that this was a clipped car, and that had been announced, would you have needed a paint meter?

A. No. No. I don't need a paint meter, anyway.

Q. And when you bought other cars, did you get the damage disclosure statements at the same time? As the receipt?

A. As I recall, I did. I did most of the time, yes. That's one of the most important pieces of paper I can get is the Damage Disclosure.

Q. Did you, at any time, do a 159-point inspection comparable to a Honda certified pre-owned inspection?

A. I didn't, but I understand Midland Honda did.

MR. MOSKOS: No further questions, your Honor.

THE COURT: Okay. You can step down.

(WITNESS LEAVES WITNESS STAND.)

THE COURT: All right. Ladies and gentlemen, we're going to take a break. I remind you, don't discuss the case yet.

(JURY EXITS COURTROOM AT 03:47 PM.)

THE COURT: Okay. You got any more witnesses?

MR. MOSKOS: No, sir.

THE COURT: What do y'all --

MR. MOSKOS: My suggestion, your Honor, is, my expectation is Mr. Walker has some motions, I have some motions, and that will probably take a fair amount of time. And I don't see how we're going to be able to even start closing without being here 'til, you know, eight or nine, a lot, and I know nobody wants to do that.

THE COURT: All right. What's your position?

MR. WALKER: Well, I suspect by the time we finish our chat here, it's going to be -- and we haven't even dealt with jury charges. I think starting tonight would be difficult.

THE COURT: Okay. So, this means we plan on arguing and charging in the morning?

MR. MOSKOS: Yes, sir.

THE COURT: You want me to send the jury home?

MR. MOSKOS: Yes, sir.

THE COURT: Today? And have them come back at nine thirty? Is that -- Okay. All right. Any objection to the bailiff telling them about it, or you want me to get them back in here?

MR. WALKER: No, sir.

MR. MOSKOS: No objection, your Honor.

THE COURT: Okay. If you would just let them know to be back at nine thirty in the morning, that I've got some legal matters, and instead of keeping them back there.

THE BAILIFF: Yes, sir.

(JURY DISMISSED ON EVENING RECESS AT 03:49 PM.)

THE COURT: Before we get into all the legal matters, we'll take a break.

MR. REIBOLD: Yes, sir.

(COURT IN RECESS AT 03:49 PM.)

(COURT BACK IN SESSION AT 03:58 PM.)

THE COURT: Okay, I'll be glad to hear from you.

MR. MOSKOS: Yes, sir. At this time the Plaintiff moves for a directed verdict and we're making other motions. The first is a motion to strike the defendant's -- defense's, affirmative defenses, as they failed to comply with Rule 8. There's a case *RoTate Services Inc. versus Encompass Services*, 359 S.C. 467, 597 S.E. 2d, 881, a 2004 appellate case, that basically says when you put defenses into your pleadings you have to include facts to back them up.

The defendant as you can tell by the complaint has simply made generalized statements without providing any sort of factual basis for the defenses. And I don't know how your Honor wants to handle these. You want me just keep going or do you want to rule on 'em one at a time or?

THE COURT: Well, depends on how many there are. Let's keep going I guess.

MR. MOSKOS: Yes, sir.

MR. REIBOLD: Your Honor, just briefly if I could. Which affirmative defenses, because not all of them I think would fall into that category.

MR. MOSKOS: Well then I'll go through them.

THE COURT: Okay.

MR. MOSKOS: The third defense, and this is in relation to the amended answer to Plaintiff's second amended complaint and I received that today, your Honor, from Mr. Walker.

THE COURT: Okay.

MR. MOSKOS: The mitigation of damages, they have not alleged in any way how my client has failed to mitigate his damages. I mean was he supposed to go out and buy another car, repair the car? We don't know what the basis for that is.

Number - The third defense. Excuse me, the fourth defense a Notice of Application of Foreign Law. They haven't identified where that comes from or why there's even - I guess I need to ask if that's still some sort of defense.

MR. REIBOLD: Your Rule 44.1 requires that you notify the other party in the pleadings if you contend the law is applicable. We complied with that rule by notifying you in the pleadings.

MR. MOSKOS: Well you got the or the laws of Indiana. So I don't - Nobody's discussed Indiana until right now and I don't understand why that's of any importance.

MR. REIBOLD: Rule 44.1 requires that we notify you in the pleadings if we're gonna assert foreign law.

MR. MOSKOS: Okay. What Indiana -

MR. REIBOLD: You're only to specify -

MR. MOSKOS: What Indiana law are we talking about?

MR. REIBOLD: We don't contend any - At this point we don't contend of being out of our control speaking - We give up North Carolina from the moment we met in his chambers on Monday morning through now.

MR. MOSKOS: Then I would ask that that be stricken from the pleadings. If they're not going to rely on Indiana law it shouldn't be there.

MR. REIBOLD: I don't care.

THE COURT: Okay.

MR. REIBOLD: We're not going to rely on Indiana law.

THE COURT: Okay.

MR. REIBOLD: That North Carolina law -

THE COURT: The understanding is that I was told from the get go that this is North Carolina law.

MR. MOSKOS: I understand but before -

THE COURT: Do y'all disagree with that?

MR. MOSKOS: No, sir. And that's what's - I don't understand. It says Defendant hereby gives notice that some or all of Plaintiff's claims are governed by the laws of North Carolina law or the laws of Indiana. That's their defense.

THE COURT: Well we'll strike Indiana. I didn't hear any testimony about Indiana.

MR. MOSKOS: Okay. Absolutely. Defense defense. Economic loss rule. They have - They made a motion early on Judge Gee denied that. The economic loss rule deals with contract law and performance of contracts and that kind of thing. Well, but we have been dealing with the fraud claims; the unfair trade practices; that's all pre-contractual stuff. That's all before the sale. That's what got us into the contract, the lies and the misrepresentations that caused my client's damages. So the economic loss rule doesn't apply to this case and we'd ask that it be stricken.

THE COURT: Okay. You all want to address that?

MR. REIBOLD: Yeah. In fact you're gonna hear why the Economic Loss Rule does apply to this case in our directed verdict motion. I can cut to it right now if you want to but its certainly a live issue denied on Summary Judgment by Judge Gee; has no effect on this proceeding. It's a non-event that's established law irrelevant when Judge Gee did it. And it was a summary judgment not binding.

THE COURT: Okay.

MR. REIBOLD: The economic loss Rule in North Carolina is stricter than what we have here.

MR. MOSKOS: Your Honor, I ask - Are you gonna hear this motion for the Economic Loss Rule now?

THE COURT: You want it stricken I thought he was in respond.

MR. MOSKOS: My apologies, your Honor.

THE COURT: I mean I know you - Instead of - It seem to me to be clearer instead of him going back and deal with 'em one at a time so I was just hearing him in response to you wanting it to be stricken.

Go ahead, Mr. Reibold.

MR. REIBOLD: The economic there are a claim for negligence which is a failure to disclose claim. There's a negligent misrepresentation claim; there's a failure to disclose claim. And in North Carolina they've - in some of the cases they even apply it in loss to UTPA and fraud. I'll tell you why that this does apply. Part of the disclosures that they complained about in this case are the things that are contained in those arbitration rules.

This car was sold off a lot. The only reason those arbitration rules apply is because the parties' contract says we're gonna incorporate by reference the terms and conditions of the auction and the auction incorporate by reference the arbitration rules. So the obligation to disclose anything on that appendix is a term of their contract. Otherwise those rules wouldn't apply in this case. And the violation of those rules to the extent they're claiming these technically caused damage is a breach of contract in this case.

That is the exact same remedy they're seeking in the negligence claim; that exact same measure of damage they're seeking in the negligent misrepresentation and measure of damages they're seeing in the UTPA claim and the exact same measure of damages they're seeking in the fraud claim with respect to that portion or that alleged non-disclosure. Those are contract remedies; it's a term of the contract between the parties. Their seeking the same measure of damages that's a contract remedy.

Economic loss rule would bar any recovery for a claim related to the condition of a product itself and that's all this is. So I think the Economic Loss Rule would apply in this case to the extent they're claiming a non-disclosure pursuant to the Arbitration Rules which were incorporated by reference into the parties contract.

MR. MOSKOS: And that's simply not the case here. The problem that they have is that the fraudulent representations that are made before the sale, those are, they have affirmative duties not to misrepresent -

represent their cars. That's independent of any contractual rights that arise after the contract is consummated. You've got the damage disclosure Form which is a North Carolina statute. The duty to set forth that it's a reconstructed vehicle; that's outside of any sort of arbitration rules. That's outside of the terms and conditions of the auction rules. At the end of the day North Carolina Common Law says that if you conceal a material aspect of a transaction from the other person who doesn't know you're guilty of fraud just as if you misrepresented and, you know, verbally said this car's never been wrecked because in essence that's what they were doing. They had a duty to disclose because they knew the truth. They did it. They hoped they could get a guy to buy it and he wouldn't pick up on it and that's exactly what happened. Roger didn't pick up on it. They got him. It's a gotcha moment.

Now, so you've got three different types of duties they have out there. One is the duty under the terms and conditions. The second is under the North Carolina Statutory Law; the third is North Carolina Common Law. All of those duties arise before you enter into a contract. Keep in mind the terms and conditions are not contracts between the buyer and the seller. The terms and conditions and all the rules are between the auction and the buyer and the auction and the seller. Okay. When you go there you agree to abide by these rules. And the seller had an obligation to set forth this information.

As you can see on the exhibit one of the first things it talks about is the ethical - trying to uphold the ethical dealings. And you know at the end of the day the economic loss rule it's a very inventive thing by defense lawyers. They have taken the products liability law that deals with a situation where somebody buys a car from, you know, it winds up like a warranty and the car doesn't perform correctly and instead of going after the warranty rights they go and super fraud. You've lied to me about the Volkswagen getting fifty miles to the gallon when it only gets twelve, I'm gonna sue for fraud.

That's when the Economic Loss Rule comes in. All right. It's - If you have contractual remedies available to you then you can't sue - and I may not be saying this right - it's coming out of the product's liability side. And defense lawyers are now trying to use it to apply to all contracts. And in essence what they're asking you to do is to say that fraud no longer exist. Because if you think about it if - Fraud comes about because of misrepresentations that cause people to enter into contracts. And if you say, hey, all of those fraudulent statements that were made before are now wiped out the cause of action of fraud is gone, there is no fraud in South Carolina any more. And that just encourages - encourages lying, cheating and stealing. The exact thing that should be forbidden. And, you know, the policy of both states says that unfair and deceptive acts and practices is unlawful. That's all there is to it.

And so, you know, to - It makes absolutely no sense to reduce - Well, at the end of the day you've got - there are so many parts of this that are wrong. I'm having a hard time articulating. First, it doesn't apply because the duties arise outside of the contract. So, that doesn't - that doesn't even apply, the Economic Loss Rule in this situation.

If you take Mr. Rodger's position that the contract claim is everything in this case then all of a sudden you have no fraud, you can't sue for negligent misrepresentation, you can't sue for negligence and if he has his way he can't sue for unfair and deceptive acts and practices so the public policy consideration then becomes how do you - How do you keep people from cheating in contracts when all they have to do is give back the money?

If I was a criminal and I got caught and I came before you, Judge, and I said here let me just give him back his money let me go, you'd look over those glasses pretty hard when you'd say no, I don't think so, son, you're gonna go to jail. And - You know that's what they're asking for. They've been asking for a pass since this case began.

MR. REIBOLD: Our motion is not very close to what he's described. It's a much narrower motion. I am not standing before you saying the Economic Loss Rule bars a claim based upon North Carolina's Damage Disclosure Statute. I'm saying the economic loss rule bars a claim based upon the auction rules. Those are totally separate. If you were to grant my motion you would not be dismissing any claim in its entirety. You would only be dismissing that portion of the claim which is based upon the Auction Rules. This is the Sale Contract of both parties.

THE COURT: I've never seen that.

MR. REIBOLD: And it says that the vehicle is sold subject to the auction terms and conditions. The disclosure requirements in the auction rules are incorporated into records by reference into this contract to sale between the parties. That portion, the duty to disclose under that Arbitration Matrix that's been displayed in this case, is a contract. So what we're saying is that the Plaintiff can't stand before the jury and say they committed negligence, they committed negligent misrepresentation, unfair trade practices, or fraud based upon that Matrix.

If they want to argue, hey, the damages disclosure statute says they had a duty, that's fine. But the arbitration rules part is from a contract and it should not survive. That's our motion on the economic loss.

MR. MOSKOS: And just so we're clear, your Honor, I apologize for continuing this, but the contract, the terms and conditions, are ADESA's. That's a contract that they have with individual dealers. It's not like my client went to Midland's Honda and said, hey, let's use these terms and conditions to buy and sell cars. The terms and conditions are those imposed through contract between ADESA and the individual dealers. It's not a contract between the parties. The sales receipt shows - shows the binding contract once the title key part, once the title is delivered and that in this case of course occurred twenty-one days later, so the deal wasn't even consummated at that point.

MR. REIBOLD: That's not correct. This sales contract it list Midland's Honda as a seller and it list the buyer as O&W Cars, that's the plaintiff. It has Roger Whitley's signature on this document; it's a form provided by ADESA but it's a contract between the buyer and the seller of the vehicle.

THE COURT: Okay. What Exhibit is that cause I've never seen that contract.

MR. REIBOLD: It's the same one that says red light as is.

MR. MOSKOS: I think its Fifty-six or Fifty-two.

THE COURT: Okay.

MADAM COURT REPORTER: You talking about the one with the B and S in the corner?

MR. MOSKOS: Yes, ma'am.

MADAM COURT REPORTER: That is Fifty-six and Fifty-five. S is Fifty-five and B is Fifty-six.

MR. WALKER: Do you want me to hand it up, Judge?

THE COURT: Yes.

(EXHIBITS FIFTY-FIVE AND FIFTY-SIX RECEIVED UP BY THE COURT.)

THE COURT: Thank you.

MR. WALKER: You're welcome.

THE COURT: It appears from the face of it it's a contract between Midland's Honda and O&W Cars.

MR. MOSKOS: Right. So the duty to disclose comes before that based on the contract at the time between the buyer and - or excuse me, the seller and ADESA. That's a totally - He's trying to get you to say that there can't be any - It's very creative. You can't - You can use the damage disclosure form, you can do - use North Carolina law but you can't use the Matrix that governs everybody's or supposed to govern about everybody's behavior because it's a separate contract that ultimately gets incorporated into a sale later on after the representations have already been made. They are jumping through a ton of boots and, you know, that dog does not hunt, Judge.

MR. REIBOLD: The evidence is crystal clear it was not sold during the auction. It was sold off the auction which is why this contract is necessary and why the duty to disclosure arises from a contract.

MR. MOSKOS: Well --

MR. REIBOLD: We're not saying they abuse it. In fact it would be a breach of contract and they have a remedy for that disclosure. They just can't pile on everything else when it's a contract term.

MR. MOSKOS: But the economic loss rule doesn't apply to these kinds of cases. That's the whole point. It doesn't apply to these cases as - -

THE COURT: It says they do in North Carolina.

MR. MOSKOS: Well, I disagree, your Honor. If you look at the cases they deal with - a lot of them deal with products liability cases which this is not a products liability case. And the other is where people have failed to perform. They had a contract, the honor contract, they failed to perform and the other person in the contract sued for negligence or misrepresentation.

But the fact that they didn't perform not - Well, the duties, they sued on the duties arising out of the contract. That's not necessarily what we're dealing with here. We're dealing with the representations that were made beforehand. And the defendant knew that it had duties, responsibilities to announce certain things. Those were independent duties based on it's contract with ADESA; not it's contract with Mr. Whitley. And they're trying to boot strap in a defense that doesn't exist.

I really wish I was more articulate on the law, Judge. But it's a --

THE COURT: Me too.

MR. MOSKOS: I apologize.

THE COURT: No. It would be easy ---

MR. REIBOLD: Your Honor, I'll be happy to provide you with cases.

THE COURT: --- you know it would be easy dealing with South Carolina law and I'd have a lot better handle on this. And I'm trying to determine the South Carolina law. I'll be glad to look.

MR. REIBOLD: Well I don't --

THE COURT: I mean I'll probably have to read this over night while you on this issue.

MR. MOSKOS: Yes, sir.

MR. REIBOLD: I - By tomorrow morning or I can email it to your office. There are cases which apply this in North Carolina outside of liability context and happy to give them to you.

THE COURT: Okay.

MR. REIBOLD: If you'd like me email them to you.

THE COURT: That would be great.

MR. REIBOLD: Okay.

THE COURT: Okay. I'll take that issue under advisement. What else?

MR. MOSKOS: The sixth dealing with arbitration. The arbitration rule --

MR. REIBOLD: We've agreed that one would go.

THE COURT: Okay. That's gone.

MR. MOSKOS: Seven, same thing.

MR. REIBOLD: Seven is related to the sixth. That can go.

THE COURT: Okay.

MR. MOSKOS: Eight, form selection.

MR. REIBOLD: This issue --

MR. MOSKOS: I mean that's Indiana. Again, we haven't discussed anything about Indiana. They never made a motion to move to Indiana.

MR. REIBOLD: This is in the contract but we haven't argued it. That's fine.

THE COURT: Okay. Eight goes? Okay.

MR. MOSKOS: I believe Number Nine should be out. Mr. Whitley has testified that he did make a demand for his money back and obviously never got it back so we would ask that it be stricken.

MR. REIBOLD: Number nine is the North Carolina UCC.

It's very comparable to the South Carolina counter part. Loss clearly that they accepted the vehicle as they paid for it and they took it home and they did an act that is incongruent with out ownership. They sold it. So the question is did they properly revoke their acceptance. With South Carolina it has to be in writing. That didn't take place here. North Carolina I couldn't find a case one way or the other on that. But it also has to be done within a reasonable time. And we would argue that you cannot - If you've already sold the property it's too late to revoke your acceptance period because at that point in time you don't have control of the vehicle. It's up to the owner in due course to do with whatever they want with the vehicle. You can't fix the problem between the original parties. If you wait until after you sell the car you've notified somebody too late. At a minimum there's a jury question on whether it was timely given those facts.

MR. MOSKOS: Well it's not like he sold it and didn't get it back. He sold it got the car back and he had it in his possession and he said give me my money back. No. You know when I - no response.

MR. REIBOLD: He wrote that in this case but that act it might not.

MR. MOSKOS: That's what we're dealing with is this occasion.

MR. REIBOLD: We believe that if you - He had it on the lot for days, he admits he didn't look, never looked under it before he sold it. It was at least three months before there was a notification. This duration goes to defense.

THE COURT: You know it seems to me it's a jury issue as well. I mean I think - The jury paid a lot of attention to that - and I think that is a jury issue. And whether he - I mean you know, he demanded his money back, he made one phone call and never followed through. But I think that's a question of fact.

MR. MOSKOS: Yes, sir.

THE COURT: I'm gonna let that go to the jury.

MR. MOSKOS: Number ten. Well obviously that's a little premature cause we still - because we have a bifurcated case, but it says that this particular section bars an award of punitive damages in this case and that's not the case.

THE COURT: What particular section is that?

MR. MOSKOS: Well this - They're talking about this 1D-15 and I don't have it handy.

THE COURT: Where is 1D?

MR. REIBOLD: You know I don't have it in hand either. If you can defer that one I will look at it cause it might not be applicable.

THE COURT: Okay.

MR. REIBOLD: I just can't say right now cause I don't have it.

THE COURT: Well, you know the cases we have saying that the South Carolina law is gonna apply on punitive damages and not North Carolina. I mean do y'all have a case that's contrary?

MR. MOSKOS: Sure.

THE COURT: Do you think North Carolina law --

MR. REIBOLD: I do think North Carolina punitive damage is the law that applies under lexi loci delicti. If I say that right, I'm never sure if I - without saying that one correctly.

THE COURT: But what about this South Carolina Court of Appeals case?

MR. REIBOLD: Which one is it?

THE COURT: The Lister case.

MR. REIBOLD: The Lister case I think actually supports my proposition because the reason they apply South Carolina punitive damages in Lister versus Nations Bank is because the wrong occurred in South Carolina in that case. The harm was suffered in South Carolina in that case. And that's exactly how the rule works. We have - I've got three other cases here. Now granted Lister is as close as you get to South Carolina. And it does squarely address it. But if you look at what happened, they did apply South Carolina punitive damages but they applied that law because that's where the harm was suffered. That's exactly what lexi loci delicti says with respect to substance of law.

And they cases we're handing up now they're from other jurisdictions but they also cite - restate the principles. For example they're pretty clear that punitive damages is a substantive versus procedural issue and the substantive laws is what the gets the court lexi loci delicti and there's two cases specifically in there - -

THE COURT: Lister says - I thought Lister said just the opposite. You know procedurally it should not substantive. I'm sorry, I was wrong.

MR. REIBOLD So I think it's pretty clear that North Carolina law on punitive damages is gonna control in this case.

THE COURT: Okay.

MR. REIBOLD: But with respect to this particular defense if you'll just give us a little bit of time I can check on that one and verify that for you.

MR. MOSKOS: I think the next one is in the event that - this is eleven and obviously we haven't gotten to that phase yet.

THE COURT: Okay.

MR. MOSKOS: Number twelve is about caps on punitive damages. And that obviously is going to depend on which way the court goes.

THE COURT: Okay.

MR. MOSKOS: Comparative negligence. And this is -

THE COURT: Let me ask - Let me back up just a minute.

On the punitive damages issue, and obviously we're not there yet, but, so if we apply North Carolina punitive damages do - we don't apply the gamble deaths in South Carolina?

MR. REIBOLD: That would be my - my guess would - -

THE COURT: Does North Carolina have gamble type standards that we do?

MR. REIBOLD: That is something I attach myself in finding out today.

MR. MOSKOS: Yes, sir, they do. There is another statutory provision in that area that list out the factors.

THE COURT: Okay.

MR. MOSKOS: I can't quote the citation.

THE COURT: I need - Okay, we need those if y'all, you know.

MR. MOSKOS: Yes, sir.

MR. REIBOLD: That's no problem.

MR. MOSKOS: Yes, sir.

THE COURT: Okay. I'm sorry, I cut you off. Go ahead.

MR. MOSKOS: No, sir, that's fine.

THE COURT: No, tell me about number eleven now.

MR. MOSKOS: Well eleven and twelve deal with the punitive damages issues.

MR. REIBOLD: Under North Carolina law.

THE COURT: Okay.

MR. MOSKOS: And I'm assuming we're not quite there yet so comparative negligence and contributory negligence.

First of all they haven't made any allegations of fact to support those provisions. Second, every witness who got up from the defendant starting with the gentleman Mr. Farrell, Mr. Threatt, Mr. Nalewaja, I apologize I can't get that, they all said Roger did nothing wrong. They've all admitted there was no - nothing he did - he didn't do anything wrong in handling this matter.

I ask Mr. Farrell that twice at the beginning and the end. I ask Mr. Threatt that and I ask Mr. Nalewaja today and everyone one of 'em said, nope, Roger didn't do anything wrong. So if the defendant can't produce any evidence that he did anything wrong, those defenses need to go away.

MR. REIBOLD: All right, your Honor, with respect to comparative negligence, we'd plead under the alternative but I think we all agreed that North Carolina law applies which would mean comparative negligence would be out. Contributory is what we're dealing with because that's what North Carolina has.

THE COURT: Okay.

MR. REIBOLD: And the evidence in this case does support the question of contributory negligence in several respects. Many of the witnesses' testified that he should have inspected the car immediately. There is a question of whether he did a sufficient inspection of the car. The rules that were put into evidence tell him that for an off the block sale he should inspect the car very carefully and verify all the auction announcements.

The word I heard him use about his inspection was cursory from his own mouth. That's not very carefully. That would support a finding of contributory negligence. Additionally under North Carolina law every motor vehicle dealer who's gonna sell a car to a consumer has a duty to inspect it for safety before they put on the block and sell it - before they put it on the lot and sell it.

It's very clear that no inspection for these alleged safety issues was done. They did put it on a block, he did not discover the damage that he says would have been readily apparent to anybody once the car was lifted and he sold it to somebody else. To the extent he's claiming damages based on that sale or anything that happened to him after that sale he's contributorially negligent.

MR. MOSKOS: The issue is did he do anything during the sale of this car there was a problem. Not what happened afterwards, not what happened after he got the car. Not what happened when he sold it to somebody else. The question is did he do something to contribute to his harm at the time of dealing with the defendant at the auction.

Everybody said no. Simple.

MR. REIBOLD: It's not quite that clear.

THE COURT: I know but he - You're looking at damages to things that he did after the sale, I., e., that he sold the car and lost that profit. Were if not we'd be dealing with just the amount of money that he paid for it. Right? I mean part of the damages in part of the testimony is he had sold the car without inspecting it, put it in the stream of commerce, then it came back so - you know - he had the car fixed where he could sell it. He had the door fixed, you know, so he - You're putting in damages of all these things that he did after the sale.

MR. MOSKOS: Yes, sir. But first of all I would take exception to the fact that you're saying he didn't inspect it. He did inspect it. He went around it, he checked it.

THE COURT: He did the exact same thing you're suing the Plaintiff's for.

MR. MOSKOS: Well that's not true. That's not true. They have done a one hundred and fifty-nine point inspection on this car when they bought it from Ms. Watkins and not only that the man who bought it comes back with it and says you sold me a clipped car. They had it in their possession for four days. You know they looked at it and then they turn around and sell it to Roger in North Carolina.

THE COURT: I understand that and that's why we're here but that goes to damages and so at that point if that's all that was done with it and you are suing for the amount of money he's out and we'd be there. But the fact that he turned around and sold it again, you're trying to get that different money aren't you so doesn't that contributory negligence apply to that money?

MR. MOSKOS: No, sir. The contributory negligence is dealing with the wrongful act. That is the - one, failure to disclose through the announcements. The second is the affirmative misrepresentations on the disclosure sheet and on the receipt that shows no announcements. That's what's going on. That's where they have to share some sort of contributory negligence. Relying on them I mean is not a basis - relying on the false representations by Midland's

Honda is not a contributory negligence defense. All the other stuff those are damages that arose because they weren't truthful.

MR. REIBOLD: Your Honor, --

MR. MOSKOS: If anybody can tell me what he did wrong at the time of the sale -

THE COURT: He didn't - I mean of course the rules say that he has to inspect the vehicle. And they're just saying that his contributorially negligent that he didn't inspect the vehicle before he bought it or at the time he bought it. Isn't that what the rules say?

MR. WALKER: There's a difference between a cursory inspection and a very careful inspection to verify conditions.

THE COURT: Right. But now the rules said - -

MR. REIBOLD: That's a fact question.

MR. WALKER: And that statements based on what came out of his mouth on the stand.

MR. MOSKOS: Do I get to argue against two lawyers, Judge?

THE COURT: Sure.

MR. MOSKOS: I would ask only one. I been beat up enough by one I don't need two.

THE COURT: I understand. We'll keep one going.

MR. MOSKOS: Thank you, sir.

MR. REIBOLD: On contributory - I keep wanting to say comparative cause I'm so used to them - on contributory negligence it's not what contributed to the wrongful act. It's was did the plaintiff breach a legal duty that was a proximate cause of the harm plaintiff seeks? That's the question. This fact issue about whether he inspected the car sufficiently when he bought it had he done he, had he discovered this never would have happened, clearly if we're right about the insufficiency of the inspection it contributed to his damage. There is a question about whether he inspected the car for safety before he sold it and in fact he admits he did it and that he's also seeking damages which resulted from the sale. So on both levels we've got jury issues on this question.

THE COURT: Okay. If y'all get me a copy of North Carolina Contributory Negligence law I'll think about it and -- the next -- All right. Now what about back up to number three? Were you through with all the --

MR. MOSKOS: Well fifteen. Well as I understand it comparative negligence is out so that's not an issue.

Fifteen and Sixteen still deal with punitive damages. After we spoke in chambers last night Mr. Walker added the substantive and procedural due process arguments to his - to his answer. I should have kept my mouth shut but anyway it is what it is.

THE COURT: Okay.

MR. MOSKOS: So as far as the pleading - pleadings go yes, sir, I am finished with that.

THE COURT Okay.

MR. MOSKOS: The next issue --

THE COURT: Before --

MR. MOSKOS: Yes, sir.

THE COURT: Just to - You said the third defense and mitigating damages. I didn't get any other response from that I know of so that's not an issue any more? Really the economic law --

MR. REIBOLD: You're right we did. Before I started to address it he had moved past it so I think it would be fair to go back and talk about it.

THE COURT: Okay.

MR. REIBOLD: I think there is evidence that he failed to mitigate his damages and it goes back to what we were just talking about. Had he done a safety inspection which is required by law, he would not have sold the car. He would not have incurred a portion of his damages. I think that supports the mitigation argument as well.

MR. MOSKOS: That's not mitigation in North Carolina, your Honor. That is making sure that - the example that I read is that if - Let's just - Mitigation of damages in North Carolina works like this. If you have - If you enter into a contract to sell a hundred bushels of apples for ten dollars to an apple company and months go by your apples come in and you go over there and you say, hey, I got my hundred bushels and they say, well, you know everybody had a whole bunch of apples this year so we don't need yours we're not gonna pay a hundred dollars.

The law in North Carolina is you have to go out and try and sell those apples. You can't just simply let them rot and then sue for a thousand dollars. You might have been able to get two hundred and fifty or seven hundred and fifty and then you sue for the difference. The mitigation that he's talking about is more of a contributory negligence or a comparative negligence type thing. He should have done something else to protect himself and I don't think mitigation of damages works in this case.

THE COURT: Okay. You want to respond to that?

MR. REIBOLD: I don't think it's quite - I mean certainly the example he gave is an example of mitigation of damages no doubt about that.

THE COURT: All right.

MR. REIBOLD: I don't think its as narrow as he portrays.

THE COURT: If y'all got a copy of North Carolina law then I'll be glad to --

MR. REIBOLD: Okay. I'll be doing some research tonight sounds like.

THE COURT: All right. Now tell me are there any others defenses that we hadn't addressed? I don't know what the third defense is that you brought up. What is the third defense?

MR. MOSKOS: The third defense is mitigation of damages.

THE COURT: Oh, okay. I'm sorry. Okay. So everything's covered?

MR. MOSKOS: As far as that goes.

THE COURT: All right.

MR. MOSKOS: Now, your Honor, Mr. - I am in awe and amazement at Mr. Walker and his legal acumen and what he has done in this case. It's amazing. Very clever and I've experienced something in this trial that I have never experienced before. A defendant admitting that it made false representations; that it made mistakes. To that end I think I'm entitled to a directed verdict on all causes of action because the defendant has admitted that there were rules, they made a mistake, and at this point the only issue frankly are the damages.

So, if you want me to go through each one I can go through each one of the causes of action but I think at this point Mr. Walker is judicially estopped when he stood up in open court in front of the jury and said, you know, we admit that we didn't do the disclosure, we admit that we made a mistake, we admit that we - Well I think he said broke the contract but we're in violation of the contract. So that's an admission that false representations of important fact were made to my client and they had a duty to disclose the truth they breached that duty and now all we're dealing with is damages.

And it's an unfair trade practice misrepresenting the facts of this car. Excuse me.

THE COURT: Do you want to respond to that?

MR. REIBOLD: I sure do. Something like that I think needs a response. We would agree initially that directed verdict is appropriate in respect to liability on the breach of contract claim. The arbitration rules were incorporated in the contract. It was a disclosure not made as required by the arbitration matrix. That's a breach of contract. So as to liability on that claim we would concede directed verdict is appropriate. We do not believe damages are undisputed at this point and I think Mr. Moskos agrees with that.

With respect to the remaining claims however there are a variety of other elements that are still very much an issue. For example, fraud requires contempt. There was - The evidence is we did not intend to do this; this was a mistake and we didn't understand the rules or North

Carolina law whatever it may be. Intent is an issue. A directed verdict on fraud is inappropriate. Negligent misrepresentation, first of all I think that's subject to the economic loss rule and you'll see what one of our affirmative defenses is strictly legal in nature affects both the negligence claim and the negligent misrepresentation claim which would make it inappropriate to grant this motion. I can do this now or I can do that when I do my presentation in full, however you would like it.

THE COURT: Okay.

MR. REIBOLD: But negligent misrepresentation also requires justifiable reliance. We think there's a question about whether reliance is justified between car dealers given the option rules which require a very careful inspection and verification of all announced conditions. Was it reasonable for her to do that rather than do his own inspection? I think that's a jury question. In fact in every case I've ever tried if I've ever tried to argue that reasonable was not a jury question I lost. I lost that argument. I think justifiable reliance are gonna result in negligent misrepresentation we have to go forward. The UTPA claim in North Carolina has a reliance to Article II, both actual and justifiable, and I think that would prevent directed verdict on that claim.

Negligence: The negligence claim and the negligent misrepresentation claim are essentially synonymous at this point so I think the same grounds would apply. And so the only directed verdict that's appropriate based on that admission is gonna be the breach of contract claim with respect to liability.

I'll also tell you that in my presentation in chief North Carolina law does not recognize a claim for a negligent omission of fact. If you tell something affirmatively and it's wrong you can sue under North Carolina law negligence. If you fail to disclose something negligently in North Carolina you cannot sue. That cause of action is not recognized. That's the affirmative part. I'm just gonna go ahead and tell you its part of our motion for a directed verdict. We'll be moving for directed verdict on negligence and negligent misrepresentation on those grounds as well. But I think all of that include his motions.

THE COURT: Okay. On that negligence --

MR. REIBOLD: And he has cases on that.

THE COURT: But on the negligence omission issue and that was one of the things that was brought up during the trial is a form wasn't omitted; it was checked no. I mean if it had been a situation that they didn't put anything on the form; that they omitted to check those blocks, then you would be right. But at least to what I saw it was an affirmative because they checked no, no, no, no versus just left it blank. Did that not change it?

MR. REIBOLD: There's - The dispute about whether that disclosure form was presented directly at the time he bought it or certainly weeks later.

THE COURT: Right. That is a dispute and the jury's got to make that determination so it's not - -

MR. REIBOLD: But if it was a day later then it cannot have been material. He cannot have relied upon it because he paid the money and took the car before he got the disclosure. So the disclosure form and all that's on - claims on it would be out if the jury concludes that the form came at least after he paid for and received at the beginning.

THE COURT: Okay.

MR. REIBOLD: So I don't think you can go to directed verdict on that record. I think that's literally a investigative determination that will have to be made before your argument would apply.

MR. MOSKOS: I'm sorry. Did you say - I'm sorry, what did you just say? I didn't understand.

MR. REIBOLD: I said the jury has to decide whether the disclosure form was made at the time of the sale or weeks later. If it was in fact made weeks later then there can't be a claim at all based on the disclosure form. And arguing that disclosure under misrepresentation disclosure form justifies - directed verdict just doesn't work because the jury has to decide that preliminary fact.

THE COURT: Right.

MR. MOSKOS: And I would just -

THE COURT: How are we gonna - How is the jury gonna decide that fact?

MR. REIBOLD: They have to decide who to believe.

THE COURT: I understand that. How am I gonna tell them that? I understand because of the testimony how are we ever gonna know whether the jury decided that the disclosure form was done at the time he wrote the check or whether the disclosure form came at the time the title came? How are we gonna know whether the jury falls on that?

MR. REIBOLD: Well if it - A special interrogatory?

MR. MOSKOS: Well then you're gonna have to get into a whole bunch of other stuff, your Honor, because my - My argument is, you know, the defendant had a duty to make certain representations based on the Matrix and based on the law and it didn't do that. The fact that the auctioneer gets up there and is silent on the issue is a representation that those items do not exist. That's a representation because - because there's no duty to represent things like mechanical problems with the car.

There is a duty to say hey, this has unibody damage subject to the disclosure laws and all that. Now, that is the representation when he doesn't say its been wrecked. That's a representation that its not there.

THE COURT: When he - In the testimony he didn't know that and it wasn't a conscious misrepresentation. He thought that's what a red light sell was that the car had issues with he and he didn't know the new rules and therefore he didn't do anything. Didn't make no representation, thought the red light was - So isn't that a question of fact the jury's got to decide?

MR. MOSKOS: Who are we talking about? Who made those - Who are you saying made those --

THE COURT: Mr. Ferrell.

MR. MOSKOS: Mr. Ferrell. Yeah, that's what his representations were that he didn't know.

THE COURT: And he didn't know but he was supposed to. He assumed and went under a red light and everybody knew there was problems with the car and buyer as is and buy 'em anyway and he had no requirement to make any representation so he didn't make any. I don't know if he was there. No representation was made at the time of the sale. He went and sold it at the time of the auction. It was sold later and at least it appears my recollection of his testimony he didn't check any of those blocks. The girls or somebody in the office must have checked them when they sent the title in.

MR. MOSKOS: Under the power of attorney.

THE COURT: Right.

MR. MOSKOS: Okay. I mean that agency relationship is obviously very crucial. I mean if you had somebody who just - you know another dealer checking it off well we didn't know that dealer did it, you know, then they had some sort of a defense. But they are telling they have given the power of attorney to the auction to make representations. They made the representation that there wasn't any damage to the vehicle.

THE COURT: But they didn't - But isn't it a question of fact as to when? They didn't make any representations to the auction company. It's a question of fact as to whether the representation was made at the time of the sale. At least there's testimony that there was no representation made 'till twenty-one days later when the title came. There was no representation made at the time of the sale. And that the form was only checked on the one when he got the title. Now your client testified that he got it. He testified that he got it at the time he wrote the check. And then at one time he said no, I got it when I got the title. He said in the middle of his testimony cause I caught that and two of the jurors caught it and they started laughing. I paid close attention. Now he might have got confused.

MR. MOSKOS: I listened to Mr. Walker ask him about five times the same question and I missed it. I didn't hear it.

THE COURT: Well he said at one time he thought got it.

MR. REIBOLD: I did.

THE COURT: But sad he said that. It's a question of fact is when the misrepresentations were made. I mean if they were made - If they were made at the time he wrote the check is one issue. If they were made at the time he got the title is that not an issue?

MR. MOSKOS: I agree yes, sir.

THE COURT: Okay.

MR. REIBOLD: And we'll take up later this issue of whether an omission can be the same thing as misrepresentation. I don't think it can under North Carolina law but we'll deal with that ---

THE COURT: Okay.

MR. REIBOLD: --- a little bit later.

THE COURT: All right, any others? So they've admitted liability on the contract. And I think he's right on fraud and the other issues unless you can tell me - I mean there are other elements.

MR. MOSKOS: Oh, you're talking about going forward to the jury?

THE COURT: Yes.

MR. MOSKOS: Oh, okay, jury issues.

THE COURT: I mean these are jury issues that he agrees you're entitled to a directed verdict on the contract issue and they admit liability under the contract. But fraud and negligent misrepresentation they don't.

MR. MOSKOS: So, what are we gonna do with the breach of contract claim? Just leave it out? Cause damages are the same all across the board.

THE COURT: I'm not. What are y'all gonna do with it?

MR. WALKER: They've got to determine damages.

MR. MOSKOS: Well yes but --

MR. WALKER: They're literally saying two different numbers.

MR. MOSKOS: Well right, but my point is you got damages across the board that are gonna be the same. If there are damages under the fraud claim then there are damages -- the same damages are under the breach of contract claim and there's no reason to waste the ink in putting together jury instructions. I know Ryan's gonna be disappointed but, you know, there should be -- we should be able to stipulate that, you know, whatever the damages are they go into the breach of contract claim.

THE COURT: Can y'all agree to that?

MR. REIBOLD: I'm not sure I understood that last part.

THE COURT: I mean ---

MR. REIBOLD: I thought I heard - --

THE COURT: --- you said the damages are Six Thousand, Four Hundred and Forty-five Dollars. Right?

MR. MOSKOS: I --

THE COURT: So if the jury comes back - If you win and they come back with Six Thousand, Four Hundred and Forty-five Dollars. Right? They don't know anything else.

MR. MOSKOS: Well wait a minute. How are you going to present it to them? I don't understand what you're asking me.

THE COURT: I'm not -- I can let them decide but you in your opening statement you said your damages were - whatever they are - Six Thousand, six forty-five.

MR. MOSKOS: Yes, sir.

THE COURT: And we run some other numbers and he may - he was trying to show the numbers but the bottom line is that's where the damages are versus mi - I guess you could say minus Two Thousand Dollars cause he's still got a Two Thousand Dollar car or Five Hundred Dollars. So the damages could either be Six - I wrote it down - Six whatever your numbers are or his numbers.

MR. MOSKOS: Yes, sir.

THE COURT: Okay.

MR. MOSKOS: I'm not sure I understand. Are you saying that they still need to make a decision on the contract claim?

THE COURT: No. The liability is admitted. They just got to make sure there's no damages. Right?

MR. MOSKOS: Right.

MR. WALKER: Right.

MR. MOSKOS: Right. Right.

THE COURT: Yeah.

MR. MOSKOS: So that would go to the jury. Just the issue of damages to the jury.

THE COURT: Right.

MR. MOSKOS: Oh, okay. All right. Well however you want to do that. I was trying to make it easier on people.

THE COURT: It suites me too. I mean this is a Magistrate Court case you understand. The jurisdiction's under the Six Thousand Dollars.

MR. MOSKOS: Until you get to the punitive damage phase.

THE COURT: Okay. I understand.

MR. REIBOLD: Your Honor, before we had a couple of things in our motion we haven't gotten to.

THE COURT: I'm sorry, I didn't mean to cut you off.

MR. REIBOLD: I didn't know if you were stretching or if you were fixing to --

THE COURT: I was stretching but I wasn't going anywhere.

MR. WALKER: You want to switch seats so you can see?

MR. REIBOLD: I'm fine.

THE COURT: Okay.

MR. REIBOLD: Unless you have a problem.

THE COURT: No, no, Not at all.

MR. WALKER: I just realized you all --

MR. MOSKOS: No. I want to make a - I want to be specific on the UTPA claim. The UTPA claim requires an unfair deceptive act or practice or an unfair method of competition in or effecting commerce which approximately cause actual injuries to the plaintiff or to his business and I think at this point it is clear that failing to follow those rules, failing to follow the North Carolina law is unfair and deceptive. I have handed up to the court the case of *Huff versus Autos Limited*. Have I given you that with my jury instruction?

THE COURT: Yes. I got it right here.

MR. MOSKOS: And I believe that that case clearly shows that its unfair to misrepresent cars in North Carolina. Its obviously effecting commerce. I ask Mr.

Farrell if this was a commercial transaction and he said yes. Obviously it's an opportunity to continue to do business or there's lots of businesses just - an independent private sale. And it has approximately caused actual injury to the plaintiff or his business which obviously is the damages part and there's an issue there. So we're asking for at least a directed verdict on liability under the UTPA claim.

MR. REIBOLD: Your Honor, he has correctly identified some of the elements of a North Carolina UTPA claim. But in the case law we've given you on North Carolina UTPA even the pattern jury instructions put out by North Carolina itself says actual reliance and justifiable reliance are also elements of a UTPA claim. And we have - I have cases behind it which have the same - have the same or exact same proposition. Those elements are in dispute.

THE COURT: Okay.

MR. MOSKOS: I have two more.

THE COURT: I need to read those cases before I give you an answer.

MR. REIBOLD: Yes, sir.

THE COURT: Okay.

MR. MOSKOS: So you're taking the UTPA argument under advisement?

THE COURT: Right. Because you - you gave me the Huff case. He claims that based on the charge that he gave me that it requires actual reliance and justifiable reliance are also elements. And I don't know the factual basis because of whether they're actual or justifiable reliance.

MR. REIBOLD: I don't think that came up, your Honor.

THE COURT: Okay. Do you have any cases? You just got --

MR. REIBOLD: I do believe I have cases. I haven't had time to flip through them but - -

THE COURT: Okay. Go ahead. I'm sorry.

MR. REIBOLD: I have read cases. They exist and you'll have them.

THE COURT: Okay.

MR. REIBOLD: We talked about the claims for negligent omission and I'm gonna give you that case law. But I would point out the very fact that North Carolina law does not recognize a claim for negligent omission it's evidence they don't treat a failure to disclose the same way they treat an affirmative misrepresentation. Certainly both can be support for fraud. You conceal something you can be liable for fraud. Affirmative lying you can be liable for fraud but they're not equivalent under North Carolina law. I think that's important and all that on the negligence and and negligent misrepresentation claims to the extent they're alleging a failure to disclose and they are to some extent.

THE COURT: Right. Do the documents that have been introduced into evidence they got check marks that no versus they were left blank would be an omission the problem with what's actually been introduced whoever — checked no, no, no, no, you know, and there might not have been anything if they had done that right.

MR. REIBOLD: I also would talk about damages and I think I have to mention because of some of the arguments that were just made the issue of agency. Agency is not plead in the complaint. We were not alleged to have been liable for an improper conduct by the auction agent who committed the sole act of negligence. I mean based on our attorney admission agency but that's not a theory that's plead in the complaint. There has been no testimony about what the auction person knew or did. There has to be underlying liability on the part of the auction to make a principle liable. Agency just doesn't fit on these facts.

MR. MOSKOS: There's power of attorney admitted into evidence without objection giving the auction the authority to make representations on behalf of the dealership. It's not a simple fact of oh, we hired this guy to go out and do something and he screwed up. This is a fiduciary responsibility. Now if they think that the auction has some liability, I mean the auction clearly disclaims any liability in the terms and conditions because they say, you know, we're just repeating - we're parroting what you tell us so you make sure all of your disclosures and announcements are correct. You know it's just like Midland's Honda is standing right there.

THE COURT: I understand that. My understanding from the testimony though there was no testimony that the auctioneer said anything about the car other than it was a red light. He didn't make any disclosures one way or the other. He didn't go through that sheet and say there's been no - he made no disclosure. At least that's what I - and I may be wrong about that - so no disclosures were made when it was sold. It was just sold under a red light. And Mr. Farrell didn't make any because he didn't think he had to. It was sold under a red light. Only that sheet came out right at sometime either when the check was written or when the title was given. And whoever checked those - the things on that sheet, now, and the girl at the auction company checked those. She did not have the authority to check those because --

MR. MOSKOS: Oh, absolutely.

THE COURT: No, no.

MR. MOSKOS: That's what Mr. Guyer testified to. He testified that they would - that they complete those documents when the - when the dealer doesn't - isn't present. They had the authority under the --

THE COURT: Do you mean to tell me they can bind the deal when she just arbitrarily checks no and nobody tells her to check it off?

MR. MOSKOS: It's not that she arbitrarily - Well the simply answer is yes. If she just went willy nilly yes then maybe Midlands might have something or a dealer might have a claim against the auction for some negligent hiring or something of that nature. But in this case what we have is the power of attorney in the record; there are multiple documents from ADESA saying that the auction is acting in the stead of the dealer when the dealer's not there. The auction has the authority to complete the paperwork based on the information given by the dealer. In this case Mr. Farrell got on the front of them and - whether he didn't say anything or he affirmatively said no there are not announcements is irrelevant. At the bottom - you know, at the end of the day the auction checked off the information based on what was given to them by Midland's Honda under the authority of the terms and conditions.

THE COURT: I know. But I heard no testimony about that. I mean cause that's - If Midland Honda tells the auctioneer no, no, no, no, no, she checks the block that's true. But if she - they don't tell her anything cause he's telling me under North Carolina law negligence - omission is not there. If they don't tell 'em anything and she does that on her own without any representation from Midlands that's - they've just omitted telling. Right? So how could she bind them?

MR. MOSKOS: Because there is a valid power of attorney that allows the auction to complete the paperwork on behalf of the seller.

THE COURT: So, but, but how does she know whether the car had been wrecked without anything and she just arbitrarily checks no.

MR. MOSKOS: But she doesn't arbitrarily check no. What happens is you've got the telephone call and this is what Mr. Guyer testified to - not this specific one but generally what happens is the guy calls up and says I'm sending cars - I'm not gonna be at the auction - I'm sending cars and I've got three green lights and two reds. The reds have an engine problem or has been wrecked. You know this is the announcement. Or they don't say anything because there's no requirement under the law that says there's a mechanical issue. Excuse me, there's no requirement under the auction rules such as a mechanical issue to disclose it so they don't have to make an announcement. And the ladies take down the information; they put it into the computer. When the car sells the damage disclosure form is completed based on the information from the dealership. The sales receipt is completed based on the information from the dealership. And you know the lights are checked the announcements if any are put onto the paperwork and the paperwork is given to the buyer.

THE COURT: Okay.

MR. MOSKOS: That - That's in the record.

MR. REIBOLD: Your Honor, with respect as I now understand it is his theory is that Midland's is responsibile for the actions of it's agent appointed through the power of attorney. That's not in the complaint but I think that's probably appropriately raised. I'll withdraw our motion on a directed verdict on that ground.

THE COURT: All right.

MR. REIBOLD: The last thing I would have then is a little bit on damages.

THE COURT: Okay.

MR. REIBOLD: What you have in this case I think has really been an attempt to double dip.

THE COURT: I'm sorry.

MR. REIBOLD: A little bit of an attempt to double dip.

THE COURT: Okay.

MR. REIBOLD: One of the items they're claiming is loss profit. But they're also claiming expenses that would go into your lost profit calculation. You don't get - You can't do that twice. You've got the five hundred and fifty dollars to repair the car door; you've got the two hundred dollars of fees paid to the purchaser - I'm sorry, two hundred dollars in - Yeah, commission to salesman. And you have three hundred and fifty dollars to the customer. Those are already a part of the lost profit calculation. The way - if you're paid lost profits you take what you whatever minus your cost off your lost profit figure. You don't get to go back and add in your cost again. I mean that's a double recovery.

MR. MOSKOS: But we didn't do that. We didn't do that. The way the - The way we calculated it on the record you had the car at Fifty-two Hundred, the auction fee and the door, the commission fee, the relay; all right. And so you - we added all that information up which wound up being Six Thousand, One Hundred and Forty-five Dollars and Twenty-seven Cents. From Sixty Eight Hundred it leaves us a profit and - then we had the transfer fee of Three Hundred and Forty-five Dollars. That was outside of the Sixty-eight Hundred Dollars. That was an addition to the Sixty-eight Hundred Dollars. That brings you up to Seven Thousand, One Hundred and Forty-five Dollars. He says he can get Five Hundred Dollars for it; that piece of junk, and that leaves him Six Thousand, Six Hundred and Forty-five Dollars.

THE COURT: And so they're claiming to get Two Thousand Dollars for the car so under their theory - I mean if you ultimately made that you can get Six Thousand, Six Hundred and Forty-five Dollars for it?

MR. MOSKOS: Well, yes, sir, but my understanding of what Mr. Reibold ---

THE COURT: Fifteen Hundred.

MR. MOSKOS: --- argument is he's claiming that we ask for Sixty-eight Hundred Dollars took out Fifty-two and then we added - We took the Fifty - Sixty-eight Hundred Dollars and added in the door and the commission and all that.

MR. REIBOLD: The confusion is out of the - in the earlier disclosure. This was a different figure and I wasn't here when he drew the chart.

THE COURT: Okay.

MR. REIBOLD: I think we all right.

THE COURT: And I did it another way. The whole process I just added it all up and took the expenses out and I came up to the exact same Sixty-six, Forty-five.

MR. REIBOLD: I apologize for the confusion. I think we're right now.

THE COURT: Any difference the Five Hundred versus the Two Thousand. That car is worth Two Thousand or whether the car is worth Five Hundred ultimately the jury can make that call.

MR. MOSKOS: Yes, sir.

THE COURT: Okay.

MR. REIBOLD: I think that's it.

THE COURT: All right.

MR. REIBOLD: If that wasn't enough for you.

THE COURT: It's going to be an interesting evening. All right, as fast as you can get me that information.

MR. REIBOLD: Just email it to you? What's the address?

THE COURT: rcauthranj all the judges got it. Rcauthranj@sccourts.org. And my law clerk is the same thing it's just lc versus j.

MR. REIBOLD: That much I remember. I clerked for Judge Kinard when I was right out of law school. I love that job because everyone takes your phone calls.

MR. MOSKOS: I'm sorry, Judge, can you tell what exactly your looking for cause I know we been bouncing around.

THE COURT: Y'all just was to send me North Carolina law. The problem is you're asking me to try it with North Carolina law. I know absolutely nothing other than as I said earlier what I heard on the news lately . . . but other than that I don't know any North Carolina law.

MR. WALKER: And, your Honor, I think either late

Monday or early yesterday we had handed up proposed charges and the notebook. The notebook's got the law on the back of the charges.

THE COURT: What about those charges? Have you had a chance to look at the charges?

MR. MOSKOS: I really have not, your Honor. I started looking at them last night and what I noticed is that their from 2003. I don't know that they are up to date. And when I was looking at some of them it looked like they were real property law cases and obviously we're not dealing with real property.

THE COURT: They were talking about titles, but I think they were talking about titles of the car not property. You know I need y'all to let me know to give me something to charge. I mean this is a situation any more you all gonna be doing closing arguments and I got to put a charge together.

MR. MOSKOS: Yes, sir. I mean here's - I'm looking under Tab 2 of Defendant's Jury Notebook and the title is Contract Issue, Issue of Common Law Remedy. Direct Damages Buyer's Measure of Recovery for a Seller's Breach of Contract to Convey Real Property. That sounds like a piece of land so I don't know that that -

THE COURT: Yeah. That pretty well is.

MR. MOSKOS: So I have to go back.

THE COURT: All right. If you'll kind of go through them and see what we can glean from both sides to get me something.

MR. MOSKOS: Will do, Judge. Thank you.

(COURT IN EVENING RECESS AT 05:15 PM.)

(COURT BACK IN SESSION THURSDAY, APRIL 21, 20156 AT 09:38 AM.)

MR. MOSKOS: I have some additional charges and the cases that deal with North Carolina law that I think are hopefully dispositive of a couple of the issues that we have.

THE COURT: Okay.

MR. MOSKOS: And one of the cases that I had was a *Hardy versus Toler case*. I thought I had three copies so I've given you one and Mr. Reibold one and I can't put my hand on the third one so if I misstate something I apologize.

THE COURT: Okay. I have two copies here.

MR. MOSKOS: Oh, there you go. I thought I had it.

THE COURT: The *Hardy* case you're talking about?

MR. MOSKOS: Yes, sir. I just want to make sure I've - I don't think I highlighted one but I just wanted - there we go.

THE COURT: And basically what does it say?

MR. MOSKOS: This is one of the first cases dealing with the - with automobile fraud in North Carolina and the Unfair Trade Practices Act. This goes back to 1975 and basically there hasn't been any over ruling of the courts to be able to use the UTPA, North Carolina UTPA, based on an economic loss defense. That has carried through to 2006. I believe you have - I put in front of you Club Car versus Dow Chemical and that judge went through - He apparently did a --

THE COURT: I just read that case.

MR. MOSKOS: Yes, sir.

THE COURT: And he went through the factors and it basically from reading that the economic loss rule knocks out negligence but everything else stands at least from what I can tell. Do you disagree with that?

MR. REIBOLD: Well, your Honor, I don't think there's any doubt that the negligence and negligent misrepresentation claims will be knocked out by that - by that doctrine. Certainly there are times in North Carolina where UTPA and fraud can be - can be barred by that doctrine but this one I'll tell you frankly this is as close to say for sure.

THE COURT: Right.

MR. MOSKOS: Well, your Honor, like I said I disagree. There are independent duties, and this is really key in the analysis of the economic loss rule, there are other duties outside of the contract which is simply that document, the sales document, that --

THE COURT: What - Now that you brought that up, why is there Fifty-five and Fifty-six, why are there two different contracts with different - -

MR. MOSKOS: Because if you take a look at the top corner of the left - right hand corner, one says S and one says B. One is seller and one is buyer. They both got the same thing.

THE COURT: No they don't. The numbers are different. That's what - the numbers --

MR. MOSKOS: Oh, the numbers are different because they have fees that are attached to it from the auction. The sales price should still be the same.

THE COURT: Okay.

MR. MOSKOS: Is that right? I'm not looking at it.

THE COURT: Yeah. Okay. But they're not signed by the seller at all. I mean I assume y'all claims they're valid contracts. Right? Nobody raised that.

MR. WALKER: Oh, we took the money.

MR. REIBOLD: Yeah.

MR. WALKER: So that it's performance.

THE COURT: Okay. All right.

MR. MOSKOS: They took money however if they haven't entered that particular document then the terms and conditions don't apply. See, what Mr. Reibold's argument is by entering into that document, signing that document, the terms and conditions the rules, okay, and you got to start back. There's a contract with the - between the dealer, between Midland's Honda and ADESA and a separate contract between Mr. Whitley and the auction. Based on that they're supposed to follow certain rules and in those rules are the Matrix. And they are definitely afraid of that Matrix so what they're trying to do is to exclude it under this economic loss rule argument.

THE COURT: Well I think the economic - I mean --

MR. MOSKOS: Well but here's the issue. Their position is that document incorporates the terms and conditions from these rules. Well, if they haven't signed it then, you know, we don't - maybe there is an issue about whether or not there's - whether that term cause that term was never discussed and that term may not be available to them. And if that's the case then the Matrix definitely comes in because there's an independent duty arising outside of the contract for them to disclose. I don't think it comes in - I don't think the economic loss rule applies anyway but that's the way I understand Mr. Reibold's argument.

THE COURT: And if the economic loss rule does apply at least from my looking at the cases and understanding, you know, this is North Carolina cases that I'm having to scramble trying to figure. But at least from the North Carolina cases that I've looked at the economic loss rule bar recovery from negligence. But it doesn't necessarily seem to go to fraud or negligent misrepresentation; it just cuts the negligence out. Which I'm not really sure it's a big issue in this anyway.

MR. REIBOLD: Let me address that ---

THE COURT: Okay.

MR. REIBOLD: --- and his comments to it. First of all they signed the contract. Even if we didn't they're bound by the terms. It's a contract claim.

The second is well our argument deals with the Arbitration Matrix and that's the part we're addressing this argument to. We're not saying there can't be a claim based on some other duty. But we don't think they should be able to get up and argue and say to the jury that the Matrix is the basis of any tort - of the negligence tort claims. So we're not trying to have our cake and eat it too. We're not trying to bar the whole thing when there isn't an independent basis. We're just trying to get rid of the one that has a contractual basis.

MR. MOSKOS: And they are trying to have their cake and eat it too. They're saying - They're falling on their sword and they're saying oh, we admit it we made a mistake so now we don't want any of this - any of the documentation to come in or be argued to the jury because it's already been admitted. So I don't know ---

MR. REIBOLD: We got it later.

MR. MOSKOS: --- and it was entered without objection so I don't know how --

THE COURT: If its in evidence you can argue it to the jury. I mean that's the rules unless I --

MR. REIBOLD: Well it's in evidence related to the contract claim.

THE COURT: Right.

MR. REIBOLD: And we've admitted breach of contract but it does not provide a basis for the - And I can see you're already read the UTPA fraud I think. I think that's the argument but that's --

THE COURT: Well it appears to be from what I read that that's a question for the jury.

MR. REIBOLD: But the negligent misrepresentation that's a negligence based claim. I think this does cover negligence misrepresentation. And in these cases - I mean I provided cases to you that did.

THE COURT: And - Okay. And maybe it - and based on our research, you know, negligence was barred. Now I didn't get that from negligence misrepresentation and maybe I missed it. You know if you can show me certain and in what case you sent but it says that.

MR. REIBOLD: I'll have to check my emails.

MR. MOSKOS: Yeah, I did my best last night, Judge.

THE COURT: I know.

MR. MOSKOS: I got plenty of cases from Mr. Reibold.

(PAUSE.)

THE COURT: In the Wilson case is one.

MR. REIBOLD: I think there was more than one but that's certainly one of them.

THE COURT: And in that particular case it appears that they are tied to negligence. And then they discuss negligent misrepresentation and fraud but they didn't apply that. They never say it whether it applies to those at least from my interpretation of that case. They don't give us any direction whether it applies to negligent misrepresentation. Negligent misrepresentation or fraud but they definitely said it applies to negligence so that's why I was bringing out the Supreme Court in North Carolina.

MR. REIBOLD: Is that the only one I sent that covered that cause it seems to be clear to me.

MR. MOSKOS: I'm sorry, your Honor. I have never been good with names of cases. Can you give me an idea? Is that a construction case or is that - Cause I read a couple of those like a software program case. One was a construction case and --

THE COURT: We can go back to the back. Yeah, the new home manufacturer --

MR. MOSKOS: Right. And that's where you've got arms length transaction. These folks are sitting down and they're negotiating contracts and remedies and all of that. We don't have that in this case. What you have is I'm selling you this car as is subject to as Mr. Walker said yesterday subject to the terms and conditions. As long as those terms and conditions are applied and are accurate then, you know, as long as I can rely on those representations which Mr. Whitley did then I'll buy the car. He buys the car all of a sudden those terms and conditions - the representations are found out to be false and - I mean it's a classic case of fraud and negligent misrepresentation and negligence cause they have a duty to disclose it.

They also have the common law duty. We really haven't talked about that too much but there's a common law duty that where a transferor has superior knowledge about an item and knows about problems in that item; in this case Midland's knew about the clipped car. They have an affirmative duty under the common law to disclose this information prior to - prior to selling the item. As a result that's a duty outside of - that's a duty outside of the contract.

MR. REIBOLD: Yeah, but he can argue that. But first of all I think the statement about the duty is incomplete. The cases provided in the jury charges from Tennessee the North Carolina did to my understanding is that if a seller transfers a car or other product to the buyer and has superior knowledge and the - it's something that the buyer cannot be discover in the exercise of their own diligence then there's a duty. But that's neither here nor there. The real question is and what our position is he can't tell the jury that we were negligent either in a representation or other conduct based upon something that's covered in the contract claim. He can say there is a common law duty. He can say the damages disclosure statute. All we're saying is the arbitration Matrix can't be a basis for negligence. We're not trying to chop out the whole claim and that's what he's - that's what he's trying to tell you.

MR. MOSKOS: I just - I don't - Like I - I keep saying - I keep repeating myself, Judge. It is what it is.

THE COURT: Well at least and there is some question and I'm not really sure ---

MR. MOSKOS: And of course the --

THE COURT: --- but I don't know if that makes a difference in your whole scheme of things. The answers doesn't necessarily get you there anyway on - Negligence doesn't accomplish anything to you. I mean they've admitted liability the damages are whatever the jury gives 'em. Negligence doesn't get you anywhere. It doesn't get you into punitive damages. It doesn't get you there. My reading of the statute just simple negligence doesn't get you to punitive damages.

MR. MOSKOS: Well this is - And this was something else that - Oh, I think I sent it to you last night about the gross negligence.

THE COURT: Yeah, but - and gross negligence doesn't get you there based on the statute in North Carolina.

MR. MOSKOS: Are you talking about the punitive damages statute?

THE COURT: Yes, sir. If your gross negligence is not enough.

MR. MOSKOS: Give me one second, your Honor.

THE COURT: You sent me that last night. And it says --

MR. REIBOLD: And, your Honor, just so you know the LRP case that we sent you last night does bar the negligent misrepresentation claim.

THE COURT: Okay. Now let me look at that case.

MR. MOSKOS: Well, we have - I'll wait. Well, under the punitive damages statute I assume you're talking about (1)(D)(15). Willful wanton conduct ---

THE COURT: Right.

MR. MOSKOS: --- is what we're talking about and that gets me there.

THE COURT: Willful wanton goes to negligence doesn't it? But the statute says that doesn't it?

MR. MOSKOS: I apologize, your Honor, I did not get an opportunity to look up exactly how North Caroline defines willful and wanton conduct.

THE COURT: Okay. It's - Yeah, willful - But it takes willful and wanton conduct. Willful and wanton conduct means the conscious and intentional disregard and an indifference to the rights and safeties of others which the defendant knows or should know is reasonably likely to result in injury damage or arm. Willful or wanton conduct means more than gross negligence.

So the way you get it there is either fraud, malice, or willful and wanton conduct. And malice, we don't have malice in this case cause malice means a personal ill will toward the claimant that aggravated or decided the defendant to perform the act or undertaking that a conduct resulted in harm to the plaintiff.

They didn't even know each other.

MR. MOSKOS: I understand malice doesn't apply yes, sir.

THE COURT: Okay. That case you sent me on negligent misrepresentation had been --

MR. REIBOLD: Okay. That's fair.

THE COURT: So let's go - Let's talk about the charges real quick. Since - Do I need to charge breach of contract and that we've admitted that? Do I need to go through all the elements of a breach of contract in that situation or not?

MR. REIBOLD: Our proposed charges go straight to damages on the contract. We don't have the preliminary stuff.

THE COURT: I don't have it. Because the one you sent me goes with damages to breach of contract, general, direct damages breach of contract; intentional damages and breach of contract and damages so which one's?

You got this cover sheet you sent me?

MR. REIBOLD: Yeah. That's the index. And the charge number one just says here's all the types of damages you can get on breach of contract and the next three explain what each of those categories are.

MR. MOSKOS: Excuse me, your Honor, I apologize. Obviously while Mr. Walker and I have been in here Mr. Reibold has been back in his office working on all this stuff. I've gotten two or three sets of jury instructions and I'm trying to make sure, I haven't been able to go over everything just because of lack of time. I just want to make sure which one we're dealing with. The notebook or -

MR. REIBOLD: The notebook is just the cases.

THE COURT: The notebook is just the cases. This sheet he sent me is what we're dealing with.

MR. MOSKOS: All right.

THE COURT: So, --

MR. REIBOLD: While we're waiting there is a peculiarity about how North Carolina handles their UTPA claims that would affect the jury charges. The question of whether or not certain conduct would violate the statute meaning is it unfair and deceptive, is it oppressive, immoral, does it have the capacity to deceive, that's a question for you. And so the way they do that if you look at our proposed jury charge, and it came straight from the pattern jury charge in North Carolina, what they do is he tells you this is what we think violates the act. You say yes or no. If you say yes then we put that conduct in the jury charge and the jury decides whether that conduct happened. That appears to be the way North Carolina does it because it's clear that the question of whether there's a violation of the statute is only for the judge in North Carolina.

MR. MOSKOS: And where is that?

THE COURT: And that's - And we've got that and I saw that and it's - that is so strange to me because it seems like I'm commenting on the facts but that's what - and it appears to me he's right. That's what they do in North Carolina.

MR. MOSKOS: What - What I'm trying to figure out is what's the authority? Is that a case or is that a statute? I just want to look at it.

THE COURT: It's the pattern instructions that y'all gave me that said that's what they do in North Carolina.

MR. REIBOLD: And there's a case that we've cited and should be in that binder as well.

THE COURT: Right. It's instruction 813.21.

Look under 19 in your binder.

MR. REIBOLD: Yeah, and I've cited a case under there. It's odd.

THE COURT: I know.

MR. REIBOLD: That's the way that they seem to do it.

THE COURT: I wish I had a told the jury to come back at ten thirty. I hate to send them back out.

MR. MOSKOS: I agree with your Honor that to me the judge is commenting on the law or making factual determinations but that's what it says. If you will give me one moment.

THE COURT: Okay.

MR. REIBOLD: And that affects some of the preliminary jury charges that we would ordinarily have here with UTPA obviously you wouldn't have in North Carolina. I'm not trying - I just knew that was gonna come up. I wanted to makes sure we were --

THE COURT: When I was looking at these charges I was gonna ask y'all about that because that is totally different from what we do.

(PAUSE AT 10:05 AM.)

THE COURT: As far as negligence is concerned on the chart if the economic law of that case applies and the economic loss rule applies to negligence cause of action but does that also can apply to contributory negligence?

MR. REIBOLD: Well, --

MR. MOSKOS: It would have to I think.

MR. REIBOLD: If negligent - If we can't be negligent for that particular conduct then we can't have a contributory negligence defense for that particular conduct. He is however as he said many times this morning premising certain other allegations against us for which I think contributory negligence would still apply.

THE COURT: Now but in the instructions the - one of the things I'm telling the jury per my instructions is if you do not find the defendant negligent you can't find the plaintiff negligent.

MR. REIBOLD: Contributory negligence still applies to negligent misrepresentation. That's still a negligence based claim to which a defense of contributory negligence can apply.

MR. MOSKOS: I don't think so. Those are - They have different elements.

MR. REIBOLD: It's negligence. That's what it says in --

MR. MOSKOS: Still that is different elements.

THE COURT: Let me see.

MR. REIBOLD: Now I don't know that I have briefed that particular point but.

THE COURT: All right. Let me see.

(PAUSE.)

THE COURT: All right, are you ready to go through these charges?

MR. MOSKOS: Well I was working on the Unfair Trade Practice issue that we had talked about and I think I have the items.

THE COURT: Okay.

MR. MOSKOS: Now, we really haven't said today what exactly we're doing so I am assuming - Well, are we just dealing with the jury charges at this stage? Have we finished the directed verdict motion?

THE COURT: I thought we had.

MR. MOSKOS: Okay, so all we're doing now is the jury charges?

MR. REIBOLD: Have you ruled on the negligence?

THE COURT: And I think based on the information I have the negligence is off the table so I've granted their motion for negligence.

MR. REIBOLD: And if we get to punitive damages there will be a few other things but that's the separate phase?

THE COURT: Right.

MR. REIBOLD: Okay.

THE COURT: Okay. And I understand we can deal with the punitive damages later so.

MR. MOSKOS: All right. So on the Unfair Trade Practice part where you have to decide I'm assuming that this is in the form of a or would carry the same standard as a motion and that these need to be viewed in the light most favorable to the plaintiff. And in that case we would start with that the defendant failed to inspect the car prior to offering it for sale in North Carolina to the term of the extent of the damage.

You want me to just read 'em off or do you want me to wait? I can copy this and give it to you. Well I can't copy it.

THE COURT: Okay.

MR. MOSKOS: The defendant failed to disclose on the MVR-181 Mandatory North Carolina Damage Disclosure Form. The reconstructed - that it was a reconstructed vehicle.

THE COURT: Okay.

MR. MOSKOS: It affirmatively represented on the same form - the Damage Disclosure Statement - that the vehicle had not been damaged more than twenty-five percent of it's value.

THE COURT: Okay.

MR. MOSKOS: It failed to disclose the frame/unibody damage as required under the Auction Matrix.

THE COURT: Okay.

MR. MOSKOS: Also under -- They also failed - or it also failed to disclose the reconstructed nature of the car as required under the Auction Matrix.

It failed to follow the State mandated disclosure laws as required by the Matrix.

It failed to disclose the damage based on the North Carolina Common Law which requires a seller to disclose conditions in an item that would be material to a purchaser but unnoticeable. I believe that's it.

THE COURT: Okay.

MR. REIBOLD: Some of those I think are fine. I have a few issues with a couple of em.

THE COURT: Okay.

MR. MOSKOS: The very first one is failure to inspect.

That's conduct that occurred here in South Carolina. I don't think North Carolina can - North Carolina law can punish somebody for - it's actually territorial effect of that UTPA stature. I don't think that comes into play in North Carolina.

The second one talked about disclosure of all the Non-Disclosure Form and those are fine but the one caveat. We haven't decided and we won't until the jury rules or gives us a verdict whether that damage disclosure statement was given at the time of the sale or sometimes subsequently. And I just don't want the instruction you give to suggest to them that it was given at any particular point in time.

THE COURT: Okay, so how - So how do you propose that I do that?

MR. REIBOLD: If you conclude that the damage disclosure statement was given at the time of the transaction then. I'm not - Work with me. This is coming up right now I haven't had time to draft --

THE COURT: Well I understand that and this trying to word this it is - it so much runs against the grain of what I've always done in South Carolina and not comment on the facts to the jury because I am telling them certain things and they will take that as fact which makes it -- I don't know how North Carolina does this - in trying to make it as mutual as possible when they don't think I'm doing that.

MR. WALKER: Well you can just tell 'em that.

THE COURT: I guess I'm gonna have to.

MR. REIBOLD: And that covers the second and third.

The fourth talks about the Auction Matrix. That's an issue in the case.

THE COURT: So that second and third?

MR. REIBOLD: That's the one where he talks about the damages disclosure statute. We have the same - or the form, I'm sorry. We have the same concern on three as we did on two.

The fourth is the Arbitration Matrix. The fifth is the Arbitration Matrix. And so is the sixth. Those are issues in the case. You can proffer that. No problems there. North Carolina Common Law: I'm a little leery of that simply because if we're gonna talk about the Common Law I want to make sure that first of all, your Honor, you probably already been given a charge on that Common Law duty. And I don't want to misstate that. I don't think what we've heard from him is the complete law.

THE COURT: But I don't have a charge on the Common Law duty right now.

MR. REIBOLD: Okay.

THE COURT: I mean it's not in the packet is it?

MR. REIBOLD: We didn't give you one. And if there isn't one then that needs to come out in UTPA.

MR. MOSKOS: Well, your Honor, in my pretrial brief --

MR. REIBOLD: Your Honor, we don't disagree that there is a common law duty. We don't think it's quite as one sided as he's portrayed. But there certainly is a duty to disclose in certain situations.

MR. MOSKOS: Your Honor, I quoted in my pretrial brief, and I'd ask the Court to charge - Its on Page 12 - I start talking about fraud - fraud and I list out the elements. And then the next sentence is North Carolina has long recognized that where a material defect is known to the seller and he knows that the buyer is unaware of the defect and that it is not discoverable in the exercise of the buyer's diligent intention or observation the seller has a duty to disclose the existence of the defect to the buyer.

MR. REIBOLD: I think that's correct.

THE COURT: You say that's - you think that's correct?

MR. REIBOLD: I think that's a correct statement of North Carolina law.

THE COURT: Okay. Okay.

MR. MOSKOS: Your Honor, I would also ask that you charge the next sentence. Yeah. It says in such cases - and you don't have to do the Latin but - in such cases a failure to disclose the truth is as much fraud as affirmative false representation. That's the law in North Carolina and I would ask that that be charged also.

MR. REIBOLD: I have one hesitation on that. I certainly agree that fraudulent concealment can support fraud liability in the same way as affirmative representation. That's not in dispute. What I am afraid of is that Mr. Moskos will argue there was - it was an omission; this is somehow affirmative action because North Carolina says they're equivalents and that's - if you trace those cases back that's not what it says. It says they're equal in what it means to get to liability but it doesn't say that a negligent or fraudulent omission is the same thing as an affirmative statement. And as long as we have that understood I don't have no problem with that charge.

Do you understand the difference?

THE COURT: Yeah, but I'm trying to figure out how I'm gonna put in there where the jury will. What do you think I need - need to say to the jury that makes it fair? I mean I understand this is his brief and this is his interpretation of this case.

MR. MOSKOS: That should be the citation - I cited - that comes out of the case. It's probably a direct quote.

THE COURT: Okay.

MR. REIBOLD: I'm not so much concerned about the language of that statute as I am on an argument that takes it someplace where I know it shouldn't go.

THE COURT: I don't know how to deal with that other than he makes an argument and you can object.

MR. REIBOLD: How about this then? Failure to disclose the truth can support a fraud claim in the same manner as an affirmative misrepresentation.

THE COURT: Do you agree with that?

MR. MOSKOS: I'm sorry, say it again. A failure to disclose the truth is?

MR. REIBOLD: Can support a fraud claim in the same manner as affirmative representation.

MR. MOSKOS: My dilemma, your Honor, is I haven't traced the cases back so I don't know what the - what that's based on. I understand the argument I just don't know --

MR. REIBOLD: I only have one copy of each but --

THE COURT: As much as they --

MR. REIBOLD: *Rowan* cites *Griffin*. *Griffin* traces back to *Seztler* and *Seztler* basically here they're talking about equivalent means of liability and not equivalency in representations.

THE COURT: Well, what you're saying a failure to disclose the truth can support a fraud claim as much as an affirmative misrepresentation.

MR. REIBOLD: I think that's a better way to say that.

THE COURT: Okay. I'll try to put all of that together. So, any other issues with --

MR. REIBOLD: That's it on the suggested

specifications of UTPA liability.

THE COURT: Okay. Now as far as the charges are concerned that I was given by the defendant do you have any issues with any of these before - not --

MR. MOSKOS: To be honest with you, your Honor, I haven't even had an opportunity to look at it. I mean last night I got like five - well six, seven, eight cases they were twenty pages each and trying to figure them out and do the other research that you had requested --

THE COURT: I understand. We all had a tough night.

MR. WALKER: Your Honor, we gave them out Tuesday morning I think.

THE COURT: I know.

MR. MOSKOS: Well I been in a little tied up in this courtroom, your Honor. I haven't had another lawyer helping me out.

THE COURT: And I understand. And it's been difficult because I hadn't had any prior notice that I'm dealing with North Carolina law that I am totally unfamiliar with ---

MR. REIBOLD: This got dumped in your lap.

THE COURT: --- and trying to get up to speed. It would have been nice - I will file these if you want - at the end of closing arguments and both sides will take a brief recess and try to review them a little bit again and then before I charge the jury. I've had them sitting back there an hour.

MR. REIBOLD: I'm prepared to address his charges but we can wait until --

THE COURT: Okay. I mean what - what are y'all gonna tell me? You want to get started with closing arguments and then recess?

MR. MOSKOS: I would need about ten minutes because I have something I've got to do in my closing argument and getting it together I was rushing to get over here and had all kinds of --

THE COURT: All right. Well let's stop this right now and give you ten minutes. Like I said I got a jury locked up back there means I got to let them go for a while. We'll stop and do closing and then we'll take a break and try to wrap up. All right, we'll be back in ten minutes.

(COURT IN RECESS AT 10:26 AM.)

(COURT BACK IN SESSION AT 10:42 AM.)

THE COURT: Okay. Thank you, you can be seated. Did I give you the verdict form?

MR. WALKER: He did.

MR. REIBOLD: And this on a whole we don't have a problem with it. We do think given some of the discussions that we've been having that there are two potential special questions we need to have asked.

THE COURT: Okay.

MR. REIBOLD: And one deals with when was the disclosure form provided. And then the other's going to be on the fraud claim. Is the basis for the fraud claim the - is the basis the non-disclosure form? Those are the two issues that we're gonna need a specific information on.

MR. MOSKOS: I'm sorry, what was the second part?

MR. REIBOLD: On the fraud claim is the basis of their fraud claim on the disclosure form.

MR. MOSKOS: Why is that?

MR. REIBOLD: Well that becomes important because if we're going to be held liable for the under agency principle for the auctions checking those boxes on that disclosure form North Carolina law does not permit punitive damages based on vicarious liability. So we need to know that to know whether there is an additional step to the trial in the event there is fraud verdict.

MR. MOSKOS: Well, I think I know what he's talking about. There is a section in the punitive damages statute that - but it also says that - let's see.

MR. REIBOLD: We sent that to you last night.

MR. MOSKOS: Right. It says punitive - after the sentence he's talking about it says punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or, if in the case of a corporation the officers, directors or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages. Mr. Farrell, the used car manager; Mr. Threatt the General Manager; Mr. Threatt's signature is on the power of attorney; these gentlemen condoned what - you know whatever the jury finds they participated in it and they condoned the activity. Now, it's for the jury to decide what that - if there is a violation of the law. But as far as that issue goes it's a non-issue because they know.

MR. REIBOLD: There's no events they even knew of the disclosure form was made or that they give her any instructions at all about how to fill that form out, or, that she even provided one. They didn't condone or ratify any vehicle. There is no knowledge.

THE COURT: All right.

MR. REIBOLD: And if he - We went through this yesterday. I understood his claim to be a agency claim. That was what we argued about.

MR. MOSKOS: Well, I want them to understand that the auction had the authority. They did have the authority because they had power of attorney. And in Mr. Guyer's deposition he testified - and this is on page 13, line 18 through 22 - I ask him, "Mr. Guyer, take a look at Exhibit Forty-five and would you please tell us what that is please?" "This is the power of attorney form that a dealer would fill out in order to do business with ADESA Charlotte." Later I ask him on page 45, line 12 through 16, "And why did Ms. Haney sign this? What authority did Ms. - did she have to sign it?" "We would have had power of attorney from the seller to affix their signature to transfer title."

They had the authority to sign any document necessary to transfer title to this car and that's what she did based on the announcements given.

THE COURT: I understand that but the issue is not the transfer of title; it's who checked the box isn't it? I mean they had the authority to transfer title and --

MR. MOSKOS: Your Honor, excuse me, I apologize. If Mr. Ferrell went to a lowly clerk that had just been hired and said hey, fill this form out and here's what's wrong with it. Nothing. She checks it off. That - Mr. Reibold would say the dealership can't be held liable for the false disclosures because somebody else checked it off. Here the auction and its all through the documentation the power of attorney. In fact the power of attorney gives them more - they're a fiduciary. They're standing in the stead of Midlands. It's greater than an agency relationship. They had a power of attorney; they could do anything regarding that car that Midland's did and they did that based on the representations. You know they don't just make this stuff up. They do it based on the representations from the dealer otherwise as Mr. Guyer said the other day it doesn't get sold. If he didn't give any announcements; if he didn't tell us about the car we don't sell it; we don't have the authority to sell it.

THE COURT: Okay. Well --

MR. REIBOLD: Well we never had any direct contact with them. The entire claim is premised on what some people at the auction did. He said they could do it because they are our agent. If that's the primitive liability there is no punitive damages in North Carolina and that's why we think we need special interrogatories.

MR. MOSKOS: That - I'm sorry.

MR. REIBOLD: And you can address -- I mean if he disputes the issue we can address that later but --

THE COURT: I guess what we need to do is while we're doing closing argument print out the verdict form that you think should be there and then we'll argue with that after closing arguments, you know, before I charge.

MR. REIBOLD: Okay.

THE COURT: Cause the verdict form that I have is the one you sent us.

MR. REIBOLD: Yeah.

THE COURT: The sheet y'all give me this, that first paragraph we took that out.

MR. REIBOLD: It's pretty simple.

THE COURT: Send us another one and we'll look at it and we'll argue about it.

MR. MOSKOS: The only other thing I can think of in the jury charge is maybe a special interrogatory as to whether there was willful or wanton conduct because of the punitive damage statute.

MR. REIBOLD: I thought that we had already decided we don't have - Well, I'm sorry.

THE COURT: That's what we charge. Isn't that the charge where we give it to them on punitive damages? We're not giving them punitive damages now so at the time if we get to punitive damages in the second phase of the trial then I will charge them on all that then. Right? I mean that's when I'll charge them on the elements of punitive damages and willful and wanton and all that.

MR. MOSKOS: Yes, sir.

MR. REIBOLD: I think so.

THE COURT: They wouldn't have made that finding now.

MR. MOSKOS: That's fine.

MR. REIBOLD: Yes, sir.

THE COURT: They'll make that finding then.

MR. MOSKOS: Yes, sir.

THE COURT: Okay. If you'll just email me that.

MR. REIBOLD: Yes, sir.

THE COURT: That verdict form and then we'll take it up. And having the jury answer that question doesn't necessarily legally tie your hands. We can argue what --

MR. MOSKOS: That's fine, your Honor.

THE COURT: What it means.

MR. REIBOLD: Now I have yours down. Is it lc right after your first name?

THE COURT: Yeah. It's rcauthanlc instead of J. J is Judge and lc is law clerk and sc is secondary to that.

Okay. Are we ready for the jury?

MR. WALKER: Your Honor, if you can simply let me use my computer,

MR. REIBOLD: Let me set me up.

THE COURT: Okay. So are we ready for the jury now, gentlemen?

MR. MOSKOS: Yes, sir.

THE COURT: Okay. Get me a jury please.

(JURY REENTERS COURTROOM AT 10:52 AM.)

THE COURT: Thank you. Ladies and gentlemen, I'm sorry. In hindsight I should have told you to come in an hour later. We had some complicated legal issues in this case cause of a lot of the legal issues in this case deal with North Carolina law. We're in a South Carolina court and I'm a South Carolina judge so we had to deal with certain issues outside of your presence.

Now I ask you to pay close attention to the attorneys. They're going to give you their closing arguments and I will charge you on the law that applies and you will have this case to decide.

MR. MOSKOS: Thank you, your Honor.

(CLOSING ARGUMENT BY MR. MOSKOS AS TO ACTUAL DAMAGES:

MR. MOSKOS: Good morning, ladies and gentlemen. As I said at the beginning of this case prior to 1987 North Carolina had a serious problem with people being misled and cheated. They found that members of the public were being misled into believing that cars were not damaged by collision, fire, flood, accident; or other cause, or that the vehicle had not been altered and rebuilt or modified and was causing harm to the people in North Carolina. That's back in '87 so you know it had been going on even before this. So North Carolina - North Carolina - The North Carolina legislature passed a law; passed several laws to deal with this issue.

Now, we're going to be talking about those or I guess I'm going to be talking about those shortly. But what I want you to understand is that there are a couple of things we're asking you to do. We want you to take a look at Midland's Honda and we want you to understand that Midland's Honda has at least two duties and responsibilities in this case. It has a duty to inspect the car; inspect the car. They have to do that obviously for self-preservation. You want to make sure you're buying a good car but the more important thing, the reason we're here today, is that they have to protect the public. In South Carolina and in North Carolina there are laws that say you can't put dangerous cars on the road. You know, at silly as that is it's just - It's silly because we have to have it on them, folks. We should have to have them on, folks. It should be common sense. A lot of this stuff - and I'm going to ask you to remember Mr. Walker's words in his opening statement. Use your common sense. If we have a situation - Excuse me, I'm getting track. Car dealer's have a duty to inspect to protect the public. They also have a duty to disclose these damages when they find them in a car.

The North Carolina Supreme Court has ruled numerous times that the seller who has information about an item that is not easily discoverable by the buyer has a responsibility to disclose. Why do those cases come out like termite cases where a person sells a house and buys it with termites in it. The same issue is here. If the dealership knows that a car's been wrecked they have to disclose it. It's not if you want to, it's a requirement.

And a seller's duty to disclose information concerning a condition arises because they have a superior position to the buyer. Okay. They have information that the buyer does not. Disclosure - And then we have the Golden Rule. Okay. Do unto others as you would have them do unto you. So the disclosure laws are there for legal and moral uses. Dealerships need to take responsibility for their actions.

Now we brought this law suit for several reasons. One: Midland's misrepresented the car at the auction by not disclosing that it had been clipped. By not announcing damage it was telling everybody there, hey, this car is not damaged. Remember the Matrix. It says you got to disclose. They didn't do it that means it wasn't damaged.

The second is they violated the North Carolina statute dealing with disclosure, the damage disclosure form that you've seen so much of. And they wouldn't give Roger his money back.

Now as - as I thought about y'all the other - well last night, it kind of occurred to me y'all are sitting here sort of in a vacuum, you all get told where to go and what to do and nobody really explained a whole lot to you. And you may be sitting there knowing why are we dealing with North Carolina law; why is this case even here? Why am I being bothered with this? The reason is very simple. The law as it has developed says that you have to sue a defendant where the defendant resides.

The law also says that if the event happened in another location, another jurisdiction, in this case North Carolina, you'd have to use North Carolina law to decide the case. So that's why we're dealing with the issues that we're dealing with today.

Now, verdict. It means to speak the truth and that's what you get to do. You get to listen to the facts and then say what the truth is. Y'all have two jobs when y'all go back into the jury deliberation room. One of your jobs is to answer the questions that the Court is going to I've you. It's called a verdict form. The second is you have a duty to discuss the facts in this case. There's a lot of information, okay. Take a look at it discuss it. If you have a different opinion don't be afraid to express it. That's why we have twelve people we want the difference - the different perspectives.

Now, let me give you a couple of things to think about and talk about while you're back there. You've heard the defendant say well Mr. Ecklund never had a problem with his car. It was - And I'm sure Mr. Walker's gonna say it because he's been saying it since the beginning - it's a fantastic car, a wonderful car. Well if somebody brings that up remind them that the issue is not the drive ability of the car. It's the sellability of the car. It drives well, the engine runs, the transmission runs; it's a good marketable car. Right? Until you find out that it's been clipped. The fact that it's a fantastic car or a running car, a good running car, it is a way to sell it and convince other people to buy it before they can find out the truth.

Now, you heard the other day the defendant admitted that they had failed to disclose the damage and that was a mistake. Mr. Walker got up and said it in open court. Finally we heard the truth. But if someone brings that up implying that this was all an accident, a mistake, remind them that there was a one hundred and fifty-nine point inspection when this car initially came into the dealership. And not just any walk around type thing like Mr. Farrell says he does. This was done by a certified mechanic performing a Honda certified pre-owned inspection with a check list that has disappeared. They knew what they had. This was not an accident. We're not asking you - just to be clear - we're not asking you to find damages on behalf of Mr. Ecklund. What we're asking you to do is to take into consideration the way the dealership continues to deal with people. That is the way they dealt with Mr. Ecklund. They knew the problem and they didn't disclose it.

You've heard the defendant say that it sold the car the way it always does. You just take it out and sell it as an as is junk car that's what they say. And they didn't owe a duty to Mr. Whitley. All of them said it. Mr. Farrell who's got his own lot now with Mr. Threatt and Mr. Nalewaja. If anybody brings that up remind them that they do have duties. In fact they have three duties. One is what we call the common law. That's what comes after court's hear cases and they make decisions. They say this is what the public policy should be and the public policy in North Carolina as it is in South Carolina is that if you know something that is important, as I said before, if you know something that's important to a transaction you have an obligation to tell the other person. You can't hide that information. You can't conceal that information.

The second thing is the damage disclosure form. North Carolina requires that the damage be disclosed. Reconstructed damage has to be disclosed. Now I'm sure Mr. Walker will talk about the first four items and that we didn't have any obligation to tell them about the twenty-five percent or under the twenty-five percent rule. But you know, when you make that statement you may not have a duty to tell somebody about something but once you do, it's got to be the truth especially in this type of transaction.

And the third is the Auction Matrix. Now that obviously completely contradicts Mr. Farrell's statement that he had no duty to disclose. It's right there on the document all he had to do was tell somebody.

Now, Mr. Walker will probably get up and he will say well, we sold this car as is and everybody knows as is is as is and you don't have any rights to come back. Well that's not quite true. That's half the way right. It's subject to the terms and conditions of the auction. The dealership entered into an agreement with the auction to abide by the rules. It's signed a power of attorney allowing the auction to be there for it and do the things that Mr. Farrell would have done had he been there. In fact in this transaction the auction was Midland's Honda. That's what Midland's Honda agreed to in order to sell at the auction. And in doing so they agreed to abide by the terms and conditions. And I know it was laboriously the other day to listen to Mr. Guyer go through it but once you did you started to hear the responsibilities of the seller.

So while the car was sold as is, there are rules that go with it, there are conditions. It's not just simply you bought it you're stuck with it. Now they're gonna say Roger should have checked it out. Remind them that Roger listened at the auction. He was standing there at the block, he could see what was going on, he could hear them talking about the car. He was listening intently for an announcement and none came because Mr. Farrell hide the information. He then went outside and checked it out. He looked at it and guess what? If you see a little dent on the side of the car well that may be why it's going through the red light. Maybe the dealership - and he knew this was a franchise dealership. A franchise dealership may not want to have to put that kind of money into this car and do all that work so they're getting rid of it. Not a surprise. The fact that it had a dent that took his attention away from what was underneath and then - And I ask Mr. Farrell, I was sure the defendant was going to say oh, Mr. Whitley should have crawled underneath and looked at this car. And I made sure to ask Mr. Farrell when - if the car's going across the block would you get under it? No, get run over. So he went out and so the car came off the block Roger went outside and looked at it it checked out. It was a good car as far as he was concerned. He drove it everything was fine. So he did an adequate inspection for the time he had because remember, after he bought the car it disappeared, went back to Columbia. And by the time he got it it was several days later.

And then he's been told before don't work on a car until you get the title which didn't come for twenty-one days because if you fix that car and we have to take it back cause you can't the title issues worked out, you just gonna have to - you volunteered to make repairs to that car. You're stuck with it. So he's not - he didn't want to loose money so he let it sit until he got the title.

Mr. Walker may say or Midland's may say that they do - they do the right things, the right thing by their customers. Mr. Ecklund came back and he complained and we fixed, you know, we fixed the problem. No problem there.

If somebody brings that up remind them that they simply got caught that time. There was no way around it. They were in trouble and they bought their way out of it. Okay. Not only did they buy their way out of it, they sold the man another car. They didn't give him his money back. They traded him out; they forced him to buy another car.

They may say that it's common knowledge in the car business that cars are sold as - at a red light sale typically have the problem mechanical or otherwise. And that's fine. But remind them that the mechanical problems - that the mechanical problems don't necessarily have to be disclosed. But the wreck damage does. Roger was okay with the mechanical problems. He knew if he bought something that had a mechanical problem he was stuck with it. He was fine with it; he wasn't fine with a clipped car.

Now, the defendant may get up and say the defendant - Excuse me, the defendant may get up and say Roger had his own duties. He needed to inspect that car thoroughly and verify everything. Okay. Well that's not the way the auction works and Mr. Walker knows it. As all the men said that testified about the auction they drafted the rule real fast up there. There were people running around cars are coming through every thirty seconds to a couple of minutes, you got to watch out what's going on. There's not a whole lot of time to be sitting around and inspecting. You don't get to do a hundred and fifty point - fifty-nine point inspection while the car's sitting there. And if you're outside looking at the car how can you be buying a car? The auctions not waiting on you so you got to buy the car run it out and buy the next one, buy the next one, buy the next one.

And then they don't let you bring a lift in. I mean there's no way to lift it up and you can't get under it. And that's where the issue could be seen. Roger did what he could do to find - to check this car out. But remember and talk about the fact that Midland's had the superior position; they had the duty, they knew what was going on. They had the duty to put that out there and tell Roger. And had they done that we wouldn't be here.

One of the things they may talk about is that the new rules just came into effect four months before this sale. What they're saying to you is give us a pass but we didn't know what the rules were. Does that sound right? You don't know what the rules are so you get a pass? Well, the testimony is that the Matrix, and this is from Mr. Guyer, is the Matrix was in effect before January of 2010. The rules are all over the auction; all you got to do is pick 'em up. And as we all know ignorance of the law is no excuse. You don't get to say oops.

And then there's Mr. Farrell's testimony. He says I go to the auction every week, may skip one week or so, but he goes up there every week. He knows what the rules are. One thing Midland's may talk about is that this was just simply a mistake and could have been squared away had Roger gone to arbitration. Remind the other jurors that had they disclosed this information one, we wouldn't be here cause Roger wouldn't have purchased the car. Number two: The car had disappeared; he wasn't able to inspect it and he lost several days before the car even showed up at his place. And then three, he had - he didn't have a title. He was gonna wait until the title came in to be able to do the work that he felt was necessary, the minor work that he felt was necessary.

I don't know that Midland's may get up here and say oh, this is a one time thing no big deal, it was a mistake. Remember what Mr. Nalewaja testified to that this is how you get rid of a problem car. Its not like they had a rouge employee Mr. Threatt and was just throwing cars out there or Mr. Farrell. This the way they do business. This is they way they do business. They take these red - these cars that they don't want to sell and take 'em up to the auction and sell them. And if they're the red light kind of cars that they think they are they don't tell anybody about problems.

Well how many cars come through that place that get set up there? You know Mr. Farrell testified that back then they were doing two thousand - over two thousand cars a year, selling two thousand cars a year. Well people usually trade in their cars so - maybe not everybody - but you got a lot of people doing that. A thousand cars maybe. They got a lot of cars running up there. And you know that this is not the only car that's been in an accident.

And one thing you will not hear is that this is a good car. Okay. Everybody knows it's a bad car, it's a dangerous car, and it's an unsafe car, and as a result has no value.

Now, anyway, let me talk a little bit about some of the legal stuff which y'all get to be subjected to. The first thing is the burden of proof. Burden of proof. A lot of people hear criminal cases in the movies and beyond a reasonable doubt. That's not your burden of proof here. Or actually Mr. Whitley's burden of proof because he is the plaintiff. The court is gonna tell you that he has the burden of proof and what we call the preponderance of the evidence or the greater weight of the evidence. When I was in law school I didn't have any clue what that meant. And what that simply means is if you put all the information in a set of scales and it tips on one side ever so slightly, that is the person who succeeds.

I like this way better. Is it more likely than not that Roger is telling the truth? If it is more likely than not that he is telling the truth, then he has met his burden of proof and you must find in his favor. We're not asking for sympathy. We don't want you to feel sorry for him or anything like that.

The next thing is - this is not a context for y'all to see who can remember what the judge tells y'all. If you don't remember what the rules are that he is gonna tell you, the jury instructions, knock on the door, say we don't remember or we got a difference of opinion we want to hear the jury instructions again. The judge will bring you back out and y'all get to hear whatever you want to hear.

Now there are two parts to a case. One is liability the other is damages. Liability simply means who's at fault. And damages, how bad did somebody get hurt. Okay. There are two types of evidence. There's direct evidence and then there's circumstantial evidence. Direct evidence is pretty clear. That's somebody coming in and testifying, a piece of paper that shows whatever it shows. That's direct testimony. Circumstantial evidence is what you can infer from what you have heard or seen.

And a perfect example is if you got ship wrecked on a deserted island and you walked around the island everyday couldn't find a sole. Then one day you're walking and you see a footprint in the sand and you know it's not yours. There's somebody else on the island. You know that; you can figure it out. That's circumstantial evidence. That's just as good as direct evidence.

Now, his Honor is gonna give you a number of what we call causes of action. He's gonna talk to you about causes of action and those are the legal claims that we're making. The law requires a person bringing any claim to bring every possible claim that he or she has otherwise it's wiped out. The court is trying to make sure we don't get clogged up with, you know, with five different suits for the same problem. You know you go to court and you loose on one and you bring the next one. We don't want that. You bring it all or you loose it.

Now, the claims that are being made are like a recipe. And we'll talk about those in just a minute. There are certain items in there, ingredients, and the court is going to tell you what those ingredients are. And you go down the list, did you find this, did you find that. And if the answer is yes, yes, yes, then you wind up having to determine the damages.

Now, one thing that I want y'all to remember is that when you deal with the jury verdict form it will look something like this. Not exactly but something like this. And it may say on this particular count do you find for the plaintiff or the defendant and if so how much for the plaintiff. If you decide that - Let's assume for a second that you decide Mr. Whitley is entitled to money and you decide that the defendant has breached or violated all of these causes of action you then determine damages. If you determine the damages it goes in - the amount of the damages goes in each section. In other words you don't take it and divide it into five or four however many there are. You find out what the actual damages are for each section and you put it in there. One of the reasons is there may be what we call an election of remedies issues for later on. In other words Roger doesn't get - if you put in I think the damages will go over the amount sixty-six forty-five. In the first cause of action sixty-six forty-five; in the second cause of action, third, fourth, et cetera, Roger doesn't get Thirty Thousand, Forty Thousand dollars. He gets Six Thousand Six Hundred and Forty-five. He may have to pay; whichever one he wants, but he doesn't get it five times. Okay.

If you go - well, let's divide Sixty-six by five and he gets Eleven Hundred Dollars or Fourteen Hundred Dollars.

That's not what you intended because that's about all that he'll get. When you go through these please be sure to think about whether your decision is inconsistent. Okay. Does this can conflict with that cause of action and if you find this and you're in favor of Roger on this particular cause of action do we not find for him -- I'm sorry, let me go back. Let me talk about the causes of action. Let's just go straight to that.

There is a breach of contract claim. Defendant says we breached the contract so now you're just gonna deal with damages. That's it for the breach of contract claim. All right. They've admitted that. To me what they're doing is they're saying - they're falling on their sword because that's the easiest thing to do in this case. You've got a breach of contract. Why would they do that? Well, they finally got caught now they have to fess up. And if you think about it there - if you met a person and they said, hey, I got sued for breach of contract, had a dispute. You don't think much of it. But if they said I got sued for fraud you may question them a little bit. They want you simply to find a breach of contract so that they can go around and in essence again mislead people as to what they do in how they conduct their business. It's very simple to say a breach of contract no big deal. But to turn around and say hey, we got caught selling wrecked cars, clipped cars, that could wind up on the street that's a different thing and they don't want that.

So when they get up and they talk about oh, just find for the breach of contract, find the damages, determine that and finish, that's what they're trying to do. And they're asking you to aid them in that effort.

Now one thing that - one claim that you are going to deal with is called negligent misrepresentation. Negligent misrepresentation and that means a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care. Remember we got three duties of care. North Carolina law, the Common law, Statutory law, and the auction rules. Roger went up there listened inspected the car and relied on what they told him. He's not hurt. He's now got this car. It's a big bucket of rust right now. He has nothing. He can't do anything with it except sell it for scrape. And it was on information prepared without reasonable care.

So let's talk about that for just a second. What do we have? Mr. Farrell: Nobody wants to remember what happened back there back then and that's real interesting because one of two things happened. Either this kind of stuff happens all the time and it just kind of blends in with all the other times that they had complaints and sold wrecked cars and that's why they don't remember. Or, they're making that up. Because if you think about it if you sold - if you were at this dealership - and I tried to walk them through it - if you were at that dealership and somebody came in and said, hey, you sold me a clipped car, a wrecked car that's dangerous wouldn't that kind of stick out if you were that reputable? You would want to go find out what he's talking about. You would have it inspected. You would make note.

Now Mr. Farrell he says, I - I never inspected it. I didn't check it out, no need to. I was told by the manager, the general manager, get rid of it. And that's what he did. Now he knew it was wrecked. He said he knew it was wrecked; that the customer was bringing it back in because it was wrecked. At that point, ladies and gentlemen, there was a duty on the part of Midland's to inspect that car. Now these gentlemen are no independent. They are part of a corporation. The corporation is just a piece of paper. It only operates by it's people. And what one person knows the other knows. The corporation knows.

Mr. Threatt knew it was wrecked. We've got his note that shows that he knew it was a clipped car. Mr. Farrell knew it was wrecked and he turned around and told the auction nothing. Just sell it under a red light sell. So either they did inspect it and they knew how bad it was and they didn't disclose it, or, they knew it was wrecked and they didn't bother to find out how bad it is. And I believe Judge Cothran's going to instruct you on what is called willful blindness. You know if I don't look over there I don't know. I see something that might be a problem with it; as long as I stick my head in the sand like an ostrich I don't have to worry about knowing.

Plausible liability. That's not lawful in this country. You have a duty to inspect and know what you're selling especially with a car that's driving on the road and can become a dangerous instrumentality very quickly especially if it falls apart as somebody is driving down the road. That would be horrific to see or experience.

The next cause of action is a fraud cause of action. Fraud. This is a North Carolina fraud. In North Carolina defines fraud as a false representation, or, a concealment of a material fact reasonably calculated to deceive, made with the intent to deceive, which does in fact deceive resulting in damage to the injured party. So, a false representation or concealment of a material fact. I've talked about that. You got the Damage Disclosure Form. That is an affirmative misrepresentation. You've got no announcements at the auction. To me that's an affirmative representation that the wreck does not exist.

On the other hand you may say well that's just a concealment, but it's the same thing as far as North

Carolina goes. And as I said Mr. Farrell chose not to inspect it when he came in. And Mr. Threatt was amazing. He says you don't spend money for an inspection when you're going to sell it at a red light sale. You don't do your duty because it's gonna cost a couple of bucks.

Reasonably calculated to deceive. Now, you're selling a car at the red light sale and people know the rules you got to disclose. If you don't disclose it maybe they will buy it, miss their arbitration period and then they're stuck with it. You get the money and they're stuck with the problem. You get to pass it on. Was it reasonably calculated to deceive? Yeah. He said it up there, Mr. Farrell of Midland's, without disclosing it. They know North Carolina law requires disclosures. They know that people are relying on what they say.

Was it made with the intent to deceive, the fact that he didn't tell, or the announcements were false? Yeah. They knew it was a clipped car and they chose not to look further and find out about a safety issue. They knew it would sell and they could recoup their money. That was their motivation. And you could hear Mr. Threatt the other day, money was a big deal; it is a big deal to him. That's where the supply of cars is. You know you don't - it's not like car dealer's have other options. That's where the supply of used cars are. You want a car that's where you're going and that's . . .

Let's talk about the fact of which does in fact deceive. Roger said he was misled. Roger said, look, I wouldn't have - If they had told me the truth I wouldn't have bought this car, I would have walked away from it. Had I seen on the damage disclosure form in the auction receipt I would have just walked away. I would have gone to arbitration got my money back; I would not have dealt with this car resulting in damage to him.

And let me go through those real quick. My expectation is Mr. Walker and Midland's Honda are gonna agree with most of this obviously. And you'll see in the paperwork there's the car, there's a fee on the sale contract, the door receipt he had to pay, you know he paid Terry a commission for selling the car and there's the switch. No big deal. And then the profit. He paid them Three Hundred - them being the people who bought the car - Three Hundred and Forty-five Dollars to buy it back. Pretty simple.

Here's where Mr. Walker is gonna discuss the problem. All right. Now, think about this. Why do you buy a car? You buy a car to go from point A to point B. That's the way most of us buy a car or a reason we buy a car. When you're back there say, has anybody gone to a regular car dealer paid full price so that they could have a vehicle that they could sell for parts cause that's what he's arguing. The question you all have to determine is, what was the worth of that vehicle on the day that Roger bought it? On the day he bought it what was it worth?

Now, at that time Roger says it was worth Five Hundred Dollars. What he wound up with was worth Five Hundred Dollars because to get to Two Thousand you had to take that thing apart. A junk yard might buy it if they had taken it to a salvage auction or something. A junk-yard guy may have bought it and put it in his lot and he may have been able to sell it over a couple of years and make Two Thousand Dollars. Okay. But that's not what Roger was buying. He didn't buy a salvaged car to part out. He bought a retail piece that he could fix and put on the lot. And what he wound up with was about Five Hundred - Five Hundred Dollars worth of scape metal. That's what he wound up with.

Now, the next thing that the judge is gonna talk to you about is what we call the Unfair Trade Practices Act. That's a North Carolina statute. We have one here but it's a little bit different. The North Carolina statute says for - you can be liable under the Unfair Trade Practices statute. Here are the ingredients. An unfair deceptive act or practice or an unfair method of competition in or effecting commerce which approximately caused the actual injury to the plaintiff or to his business. All right. And unfair or deceptive act and practice. Not telling about the prior wreck damage affirmatively misrepresenting the wreck damage. That's unfair, that's deceptive.

In or effecting commerce. Mr. Farrell said this is a commercial transaction. Everybody's up there at the auction. Its commerce. And number three, which approximately causes actual injury to Roger.

Now, the other day I talked to Mr. Farrell and I ask him a lot of questions and frankly he was a lot more forthcoming than I expected, and he said, and I ask him, I said, do you know that you have superior knowledge about the cars that you're selling to your customers? He goes, yeah. Now, keep in mind he's got two types of customers. Midland's has two type of customers. Excuse me. One is you and I the average person who is gonna buy his car. They also have customers up at the auction. They are the bidders. Those guys are buying cars from 'em. And so these guys have superior knowledge. They know where their cars are coming from; they've had an opportunity to inspect them. They know who sold the car to the dealership; they have a lot more information. They have the titles, they know about the odometer and they know whether it's a salvaged vehicle based on the titles ran. A lot of information.

And I said, you know, you have to be fair to your customers. Yeah. And you have to be honest and you have to explain things thoroughly to those customers? And he said yeah. And you heard him on the stand. I ask him if he was in a superior position to Roger. And he said yeah. And I ask him if he intended for his customers to rely on representations that he was making. Yeah, surely do. And you expect your customers to believe you? Yeah. And rely on the statements that you make about the cars? Yeah.

One of the things that I want to stop here and talk about cause I know it's gonna come up is when Mr. Walker talks about Roger's duties to verify the accuracy of the announcements and things like that. I'm sure he'll read the provision to you, the buyer's duties. The auction is obviously trying to protect itself to some degree. But think about it. Do we go around - if somebody tells us something do we say, wait a minute, I'm gonna automatically not believe you. You told me I could buy this can of beans for a dollar. I want to see the general - I want to see the manager of the store so that I can make sure that this is actually - Do we do that? That doesn't make any sense. You know when we go in and buy clothes do we say wait a minute. You know this says it was made in Taiwan. I want to make sure somebody gets somebody on the phone so that I can make sure that it wasn't make in China or something like that, or South Korea, cause I don't like those people. We don't do that. That's ridiculous.

What they're asking you to imagine is that Roger didn't pick up the phone after every sale and call the prior owner and say wait a minute before I buy this car I need to know this information. That's not the way it works. There is no way that it works that way. Roger, I like him a lot, but he is not a technology guy. And he doesn't have that kind of money. He's not like one of these franchise guys, he's not gonna sit up there and invest tons of money in laptops and all of that equipment in a program where you got to pay to get car fax's and that kind of stuff. And you know what? He shouldn't have to. He shouldn't have to because there are representations in place, there are requirements, there are rules in place so that he doesn't have to do all that.

I ask Mr. Farrell if it was reasonable for his customers to believe him and he said yes. Now I ask him if he understood that failing to tell the customer about an important aspect of the transaction. He was like lying about it, I don't know, I'm not really sure.

Ladies and gentlemen, this is out of pocket money. That's what we're talking about. There's nothing on here - I know sometimes people hear about pain and suffering or emotional distress. There's none of that here. This is just straight cash out of pocket. All right. And at the end of the day when we finish Roger has a piece of metal worth about Five Hundred bucks that needs to be shredded and that's exactly what's gonna happen. His total damages are Six Thousand, Six Hundred and Forty-five Dollars.

Now one of the things that y'all get to do is y'all get to be the judge of the facts. That means y'all get to judge people. That's tough. That can be very difficult. But you get to look at credibility. Whose believable? When they talked were they looking at you, were they moving around in their seat a whole lot, or were they defensive a whole lot? Those kinds of things. And what we heard from the stand is that these guys at Midland misled Mr. Ecklund. They didn't tell him about the prior wreck damage. They misled Roger; they didn't tell him about the prior wreck damage. And now they're in here trying to mislead you into helping them continue their activity. As I said, if you find in their favor only under the breach of contract claim, they get to walk out of here and say, oh, it's just a matter of dispute no big deal. That's what they want. But you also send a message to them it's okay, it's okay to do this to send cars to North Carolina and lie about it.

Now they had been sending them to South Carolina that doesn't have a disclosure law so they were doing that here in our state. But we're not asking you to punish them for that; we're not asking you to make them pay anything for that. We just want you to understand when you're evaluating credibility, what you heard and what it actually means, and you be the judge of the testimony.

Now, very quickly. Midland's Honda knew it had to disclose. It knew the duty, you know, these are licensed dealers. They know what the laws are; they know what their responsibilities are. They didn't tell because they wouldn't have been able to recoup their money. Okay. They needed to get their money back out of this car. They didn't want to just take it to a salvage yard because they would get Five Hundred Dollars for it. They wanted initially Seventy-two Hundred Dollars for this car but agreed to take Fifty-two.

They put - They want you to put the burden - the burden on the business, on the people who know the least about the car when the burden is actually theirs. And it's sort of a game of gotcha for these guys. If they can get it through the auction and you buy it and you go on and you don't catch it for a few days it's your problem not mine.

If they do catch it and you take it back and give them back their money wait a couple of weeks and run it through again, see if you can do it, see if you can get it through. And one thing that was really telling was how different these guys are to their actions. Totally indifferent.

This is the way we do it. I don't know what happens to those cars and I don't care. They all know this is where people get their supply of cars. They all know that. But we don't care, we don't know, no big deal..

So, ladies and gentlemen, what you have before you is a choice. The choice is yours. You can find in favor of Midland's Honda and say it's business as usual, roll the dice take your chance, don't disclose, and your conduct will be rewarded because you will get away with it. On the other hand you can find for Roger for Six Thousand, Six Hundred and Forty-five Dollars and send the message to the dealership, hey, you need to change your practices. This isn't right. We don't appreciate it and we're not gonna tolerate it. Follow the rules be fair, be aware that your actions have consequences and look out for the people that you're dealing with.

Ladies and gentlemen, there are a ton of documents and the burden is on us to prove our case. That's why we have a whole bunch of documents and they didn't put in any. We have to prove to you that Roger was hurt and they misrepresented this car. You have tons of photographs take a look, you'll see. You heard Mr. Allen talk about how bad this really was. Take a look at the Matrix. It deals with as is cars. A failure to talk about these they took away Roger's right to walk away. And they took away his arbitration rights because he wasn't aware of what was going on. But here's the list, it's very clear.

Then you have this. If they had just simply had it filled out properly we wouldn't be here. Roger wouldn't have bought the car and we would be done. And don't forget this Matrix too. The seat cover was cut. Both of 'em were cut. That had to be disclosed anyway. At the end of the day, ladies and gentlemen, Roger's lost Six Thousand, Six Hundred and Forty-five Dollars. When you go back and you work on this verdict form you will need to go through each one separately and you will need to get to - I'm just trying to pick one - find for the plaintiff cause that's - that's who Roger is in this matter the plaintiff, you check next to his box or on his line and then you write the number Six Thousand, Six Hundred and Forty-five Dollars. Very straight forward, very simple. And you do that for each claim individually. Thank you.

MR. WALKER: May I?

THE COURT: Sure.

<u>CLOSING ARGUMENT BY MR. WALKER AS TO ACTUAL DAMAGES:</u>

MR. WALKER: I'm glad to be at this stage. I been sick all week and if I have been a little slow please do not hold it against my client. We're here because of two things. One is this Disclosure Statement which he never saw until twenty-one days after he bought this car, and we'll talk about that. But if he didn't have it when he bought the car there is no way he relied on it, and we'll talk about it. He said on the witness stand he admitted that. He told you different stories and we'll talk about that later. That's the first thing we hear about.

The other reason my people are here is three months after the auction rules changed they just didn't know it. And we'll talk about it in detail but you've heard we didn't have them and they didn't have them. Neither one of these people really knew all about the rules when this sale happened. Those are the two big things we're gonna talk about.

The first thing I want to touch on is just who sneaked in to deceive. And you've heard a lot of implication that we're just bad people. And there are two things that make it real clear - one's specific to this sale and one's specific to the claim - we're not. I told you in the beginning one thing I didn't want you to forget when this car went to the sale we didn't bang out the door that Mr. Ecklund said had bad damage on it. There's that - We got this damage on the back of the car. There are really a few things y'all got to look at to figure out what's going on here.

And this is this fender. This is the wheel well on the passenger side of the car at the back. And there is the grey paint and there's a white strip. I mean it's clear as a bell something's going on with this car. All you got to do is look at it. We didn't fix it. The car wasn't even clean. It hadn't even been washed. We didn't nothing to hide the condition of the car. There's no piece of evidence in this case makes it real clear we're not sneaky and it's - This phone note. This is the note that Randy Threatt got from Mr. Ecklund saying this car is a bad car, it's been cut in half. This, you know, this is not pretty. It was in the file. The reason they got it Midland's Honda they didn't take this bad note and throw it in the trash; they kept it. And then when this law suit came up they kept it. If we were deceitful ---

(ATTORNEY WALKER WADDED PAPER.)

MR. WALKER: --- be gone. You'd never know about it and that they wouldn't get it. So my client's are not deceitful people. We don't hide evidence. We don't misplace things on purpose. That simple.

Now, when this case started I told you it was really important to look for things that you don't get; you don't see. And you got ninety something exhibits, okay. Where's the phone record proving that these people in Shelby, North Carolina ever called me? Ever. You know they ask Mr. Farrell where's the proof that he didn't get this phone call? I mean there's no way to answer that question. But whether they called us on a cell phone or a land line there is a bill if they did it. You got ninety something exhibits but you don't have any proof they ever really called. Not there. So you need to think about that.

The other thing is they figured this out in 2010 it's a bad car and it's 2013 before we get sued. And I expected to get some explanation from Mr. Whitley about why and I didn't. So I said isn't it because you really wanted to wait until everybody forgot everything? And I still didn't get an answer. So we're not the people playing games here and you need to think about that.

Now, one last thing about the over all approach to the case and then I'm gonna talk about the facts and kind of do it chronologically. Y'all's job is to be the referee. Y'all's job is not to be emotionally swayed one way or the other. Your job is to be fair and impartial and I'm sure the judge is gonna tell you that. Every judge tells a jury that. So you know the fact that you may not like car people. That really doesn't - kind of cuts both ways here because we're both in the car business. He's been in it for twenty years. But your job is to be fair. The easiest way I find to explain that I played competitive tennis for a while and I ended up being partnered with a guy in a wheelchair and he's a lawyer in town and his name is Bob Macella. But I really admire him. We've gone out and whipped in doubles and he could run. But if I'm refereeing a match where he's playing I just can't let my personal feelings get in the way. I got to call it straight. So you're job here is just to call it straight.

Now, I want to talk about the facts and we'll start back in 2008 when this car came to the service department. We bought it from a lady and no question we had it in the service department and this guy name Terry Smith looked at it. How the heck he missed it I don't have a clue. But I got no evidence, I got nothing, because the guy died in 2011 and we didn't even know this claim was out there. So I got no evidence to give you and no way to explain it. But this case is really about what happened in 2010.

Now, you saw the note and not question we got this phone call from Mr. Ecklund. This is a clipped car. I told y'all when the case started it's been years and the guys who were there don't remember a whole lot and you saw that they didn't. I got what I got there. One thing we did know we had a note from Mr. Ecklund and no question it says this is a car there are two cars fit together I think is what the note said so we knew. Mr. Threatt knew and Mr. Farrell says Mr. Threatt tells me this car's been in a bad accident take it and sell it under the red light at the auction. And just like most folks who have a job and your boss tells you to do something you do it. And unfortunately for him and for us being here Mr. Threatt didn't say oh by the way this is a clipped car and two cars put together. Mr. Farrell simply didn't know. And that's the evidence we got and it's not perfect because the passage of time is what it is.

Now, about inspections and what happened to the car at our place there's no question, you know, we figured out and knew from that phone message this is two cars put together. So, its told go to the red light. And Mr. Threatt actually probably the best guy to explain it, ever since I been a kid red means danger. And the red light sale, while it's got all those rules attached to it, is an as is, buyer beware type of environment. This is not consumer's buying cars. This is limited to professionals. You have to be a car person to go there. You have to sign in and go through all this over all. Regular folks like everybody in this courtroom I guess except Mr. Nalewaja can't do it, can't do it. There are two parties I guess. So this is a unique place and it's not where somebody like me can go.

Now, I understand these cars they're not all gonna have body damage but there's gonna be a problem of some sort. Mr. Ecklund called it a fantastic car but obviously it's got problems. The things that go through the red light, you heard the guy from the auction go this is where cars go that have problems. The - probably the most telling thing for me the two guys who sat up here and say we have a lot on Two Notch Road but we sell used cars and I think they said it was Auto Pros; it's between Fontaine and Columbia Mall. They won't buy a red light car too risky. And you got guys in Columbia, South Carolina selling used cars on Two Notch Road who won't buy there. That's a pretty clear screaming sign to me you need to be really careful. It's a dangerous place to go buy a car.

Now, the auction rules. They're fifteen pages single spaced. There's a lot of stuff in there. It's Exhibit Fifty-two. But right there clear as day on the top of the first page in the left hand corner January 2010. Got a new set of rules. And the rules are there where they weren't and they weren't at Midland's Honda and they weren't at the Plaintiff's place. Nobody had those in 2010. I told you before the important thing is what you don't see. There is no letter, no email, no nothing from the auction transmitting those rules to Midland's Honda or to them. I don't know how they got 'em out. They didn't send 'em to us. And obviously you heard those two guys in short pants sitting up there going we didn't know about it. Didn't have the rules. And that's one of the reasons we're here didn't have the rules.

And we weren't the only ones who didn't have the rules. They didn't have 'em either. But it's fifteen pages of technical mumbo jumbo but there's not question those were their rules. And that's why we come in here and said, you know, if those are the rules we missed it - we missed them, we messed up. You were told by the other lawyer near the end of his chat with y'all that we're trying to miss lead you. I'll tell you that's personally upsetting to me. I don't mislead people. I was telling our bailiff over here, we were talking earlier, I had the misfortune of getting divorced. And I met another women - one woman that is my fiance. But she wouldn't even consider dating me because of what I do because she thinks people who are trial lawyers - She's a transaction lawyer - but she doesn't like people who do what we do. And I told her I do it different, I just tell the truth. So the reason we're here saying breach of contract, we did. We were in here yesterday and the other lawyer's going, you know, he's surprised he's never had a lawyer admit they messed up or their client messed up. Well, I'm different. So we're not trying to mislead anybody. We're here to admit what we did but we are gonna deny what we didn't do. Real simple.

Now, this car goes up for sale under the red light; goes through the lane and its sitting on the lot. And, you know, it's admitted that it's out in the lot and it's got cars on all sides and I think he said it was so close it was hard to get around in there. Well, the cars not going anywhere. He's got all the time in the world to look at it. And, you know there's something called a paint meter. You can stick it in your pocket and you just go around and touch it and it'll tell you how thick the paint is. And if the thickness's are different you know something's going on with the car. We've all seen all these pictures and all the body work on this car. All you got to do is go around this thing; I think it's pretty clear something's funny. I show you that picture Exhibit Twenty where you got grey paint and white paint. Something's funny. You want to look under a car it's real simple. You do not need to lay on your back or get dollies or lifts. It's called a mirror. It's real simple and they makes mirrors about yea big and the put 'em on a stick and you want to look under the car you just stand there and look. Why do you think they do - I've seen - This is from years ago. I mean you come across the border from Mexico they don't put your car on a lift to see if you got drugs under there. They take a mirror and walk alongside of your car. It's easy to look under your car. Easy. Doesn't cost money. It's a mirror on a stick. So he had all the time in the world; all he had to do was look. And this is a red light car got all this other damage on it and all kind of reasons he should have simply taken some time to look.

Most importantly what do the rules say? The rules say if it's a lot sale, which that's where we are, he is required to very carefully inspect it and verify that what was said in that auction when it came through was true. And that's his duty under the rules. Not mine. That's his.

And I - I mean I think y'all noticed he didn't know what his duty was and I had to point out where it was in the rules. So just like us he didn't know his duty under the rules; we didn't know our duty under the rules. They are just like us on that point. And again I'm not feeling well and I'm not functioning so I apologize.

One more thing I need to mention, once again something you didn't see. They didn't run a car fax and you can get 'em on phones and Ipads and all that kind of stuff and we got all these warning signs. They not only didn't look at it before they bought it; they never pulled one, never. So they're fussing at us like we stuck our head in the ground, they did the very same thing. All you got to do is pull a car fax and you can see prior accidents and when you see something that puts you on notice there's a problem.

We need to talk about the disclosure. That's Exhibit One. It's been yakked about and yakked about and yakked about. The problem is for them it wasn't really delivered until the title was delivered twenty-one days later. And there's two pieces of evidence on that. One is the auction guy. What was his testimony? Well you got the disclosure form when he received the receipt? That is I believe Exhibit Fifty-four. Answer: Big fat no. Would it come later? It would have come when he got the title. It would be attached to the title.

Now their the ones who told you this is a big auction. They put on all these pictures. The auction sells thousands of cars at a time. The auction's got a process. That's their process and I don't think they're gonna bury their process for a guy walking in to buy two cars. That doesn't make sense. And I kept picking at him a little bit on the stand about his story that he went in there and they just gave it to him. Because I knew this, I knew this wasn't right. And late in his testimony on an answer he just kind of blurted out that the disclosure form came with the title. And not all of you caught it. I didn't catch it right away cause I was trying to get over there and look at something. But a couple of 'em caught it. And it happened. So he's told you two different things about when he got that. And I think that ought to unsettle you a little bit and you need to think about that when you're weighing where the truth is and how to deal with the burden of proof.

But one of the key concepts you got to deal with in this case is the right to rely on things and you heard some of that from the other lawyer. But you can't rely on something you don't have and hadn't seen when he bought the car. It's that simple.

Now, reliance. The breach of contract claim on that verdict form is right up front. We admit it. We'll talk about the number to put on there in a minute. But every other claim to prove it they have to satisfy; they have the right to rely on everything. And there's lots of reasons they didn't. This is a red light sale of a car that's got bad - according to Mr. Ecklund - bad body damage. You can see two different colored paint clearly in this photograph. And he says he did a cursory inspection. The rules say you need to be very carefully inspected and verify. They gonna verify there's no frame damage if you don't lift it up and look at it. They not only didn't look under there with a mirror in the lot, they had the car. They never lifted it up to look for weeks and they should have. They had a duty to.

Now, they could have gotten a car fax, used the paint meter - And I know I'm repeating myself - and they just didn't do it. So if they don't have the right to rely on all of this for all these reasons, this is a simple breach of contract case, you need to tell 'em what we owe 'em, and then we're done.

Now, another element specific to this fraud case is we had to have the intent, the intent to mislead somebody. And you saw those guys say we thought the rules was as is means as is and that's what you do with cars. We're not trying to trick people. We thought that's what your - what its there for. And Mr. Farrell says I was told it was a wrecked car and sell it under the red light which he did. So as far as he knew that's just what he was supposed to do. There's no intent there to mislead anybody.

Now, we need to talk about damages. I did it sort of in a way it made sense to me. They had the car sold. That's how much they paid the auction. This is their gross profit. They had to pay the sales person and paid to make some repairs. A customer wanted her - I guess they fixed the door. That was their profit. Then they had to pay some money to undo the title with those folks, so, what they paid out and then their profit's Eleven Hundred bucks. This is what he paid for the car. You heard him say they'd sent us this written statement that the car was worth to them. The value is Two Thousand Dollars. You heard his lawyer say he said in his deposition Two Thousand Dollars so I kept the Two Thousand Dollars. It's been told to me twice. So that's a Thirty-two Hundred Dollar loss on a car plus your profit and expense. That's what I been told is Forty-three Hundred bucks. So to make 'em whole from the breach of contract they put the difference in the car, pay their cost, pay their profit, I owe 'em Forty-three Hundred bucks on a breach of contract case. That's - That's my view of the damages and how I got there. And it isn't intended to make 'em whole.

And, again, I'll freely concede I'm keeping the Two Thousand Dollars because it's been told to me twice over a period from late '13 so two and a half years. So that's why I'm relying on the Two Thousand Dollars not the Five Hundred.

Now, the burden of proof is important. All the claims in this case, all the elements they have to prove, the burden's on them. There is no burden on me to prove any of the elements of the case. It's all on them. And you find they haven't proved that it was justifiable for them to rely on what happened at the auction, even though it's a red light sale and a badly damaged car that's showing two colors of paint and they didn't really do anything but a cursory inspection for weeks, then once you award the breach of contract damages they don't have the right to rely in every other claim its for the defendant and you're done, you're finished with the case. If they don't have the right to rely they can't prove any other element of their claims and you're done and we go home.

One more thing I want to talk about and maybe more than one. Actually more than one. I think I told you when the case stated you can't decide a case based on the number of witnesses, number of exhibits, and it's never been truer than here, I didn't put in any exhibits and he called all my witnesses, so that's not how you decide a case. You decide a case on the facts.

Now, this is really kind of unique in my experience. I'll see if this will sit up here.

(ATTORNEY WALKER ADJUSTING EASEL.)

MR. WALKER: I -- We inspected the car in 2008 apparently missed this damage. They did the very same thing we did. They inspected the car they missed it. We're here because of two things one of which is we didn't know the rules. Well, they didn't know the rules either. They didn't have a copy of 'em. You heard me talking to Mr. Whitley about what his duties were. He didn't know the rules. Neither one of us had a copy of the rules. Now, I think we both broke the rules. He has a duty to do this very careful inspection to verify everything and a cursory walk around the car is not it.

You know we're taking our medicine for breaking the rules and I think that ought to go both ways. We - This disclosure form, you know, it was signed by - filled out and signed by some lady at the auction. I don't think they had it until weeks afterwards but we both sent out disclosures that were wrong and they sold the car. They filled it out and said, you know, everything was cosher. So everything we're getting shot at for both sides in this case have done.

Now, I've done my best even though I'm not feeling well to convey the truth to y'all. This - The verdict form its your's to fill out. The breach of contract claim it's extra short cause we admit we did it. So that is simply a fill in the amount. But everything after this you're gonna have to find they had a right to stick their head in the ground and walk around the car and do a cursory inspection and ignore all the warning signs. And they have to not just rely but justifiably rely to recover on anything else. And I think it's pretty clear they didn't do a careful inspection, didn't have a right to rely, and for that reason we owe 'em for a breach of contract and that's it. Thank you for your time, ladies and gentlemen, it's been difficult, take a long time, and sorry we been here so long.

Thank you, Judge.

THE COURT: Yes, sir.

CLOSING ARGUMENT BY MR. MOSKOS AS TO ACTUAL DAMAGES

MR. MOSKOS: Ladies and gentlemen, I'm gonna try to be brief. I know I told y'all before and it was probably very boring. I stayed up late last night trying to work on some legal matters to this case and I'm a little tired so I apologize if I'm putting any of y'all to sleep.

Now let me see if I can go through this really quickly. You know the other day Mr. Walker when he was talking to Roger he kept after him and Roger kept denying and kept denying when he received the damage disclosure form. Mr. Walker could have pulled out his deposition and questioned him but in his deposition Roger told him when he got --

MR. WALKER: Your Honor, I'll object to that. That's not in evidence.

MR. MOSKOS: Yes, sir.

THE COURT: I - I sustain that objection.

MR. MOSKOS: Yes, sir.

But Roger is a bit hard of hearing. He listened to the question and he answered the question and he answered it again. I think I know - I think I know what he's talking about. But then he was ask the same question again and again and he continued to remain steadfast that he got it at the time he bought the car. He buys and he's got a sales receipt and he gets the disclosure at the same time.

You know the part about banging out the door, the defendant didn't bang out the door. That means we weren't trying to hide anything. Well you know if you got a red light sale and you need to get rid of this car you just leave it in that condition and everybody thinks that's the reason it's at the auction. That helps perpetuate the fraud by leaving that there because now you say well oh that's the problem, that's the reason right there. I don't need to go with a mirror. Nobody testified that they ever used the mirror. Mr. Threatt and Mr. Farrell never did.

And so, you know, the fact that the damage was there actually helps support Roger's claim that he relied on what he saw and the announcements. The announcements, don't forget that. Mr. Walker wants you to totally forget that they had the obligation to tell the auctioneer what was going on with that car and they didn't do it. All they had to do was tell 'em and that would have been it.

Nobody ever testified that the rear door was open. That's the thing. This is a rear door I believe it's on the passenger side. Nobody talked about going over to the door and opening it up. Okay. That was never done. Roger got in the car at the auction and got in and drove it and put it back. That door was never opened. And no reason to suspect that there was any damage over there.

And the logical connection between Gee, we didn't throw away a note and we didn't lie at the auction is juts not there. Just because they didn't throw it away, yeah, they could have, I don't know why they didn't. Maybe somebody copied it and sent it before they really realized what they had done? Maybe a secretary simply copied it and sent it out. I don't know. But you know that talks about something else Mr. Walker mentioned. Nobody investigated this. They weren't worried about this. You know Mr. Walker wants you to assume that there is some clandestine method behind what Roger does; that he sat back on his rights and waited until the last minute and then when everybody had left and everybody's memory had faded he filed this law suit so that he could come in and score a bunch of money. That's the implication. But guess what? After the law suit's filed in 2013 nobody on their side of the fence ever picked up a phone and said, Brent, we got this law suit, what can you tell us about it? What's going on? Nobody picked up the phone and called Mr. Threatt and said, hey, what's going on? They waited until - They didn't talk to 'em until I wanted to talk to 'em.

Mr. Nalewaja he didn't do anything in the case either and he's in charge of it. They didn't care, they didn't expect to be here, they totally ignored it cause they didn't care. They thought they were gonna get away with it. And it wasn't until they had to face you that they finally came forward and said yeah, it's out there. Because if they had come back to Mr. Whitley when he called up in 2010 and say, hey, give me my money back, we wouldn't be here. Why didn't they do that? He never mentioned that. Why didn't they pay him his money back?

What is interesting is the CPO check list. Where is that? They never mentioned that. It's gone, it's in the papers somewhere, we don't know what happened to that.

You know these guys have a lot invested. This goes to credibility. These guys have a lot invested in this case. One: Mr. Farrell and Mr. Threatt they got caught and now they have to protect themselves. This is just self preservation. They gonna come in here say what needs to be said to protect themselves. The dealership obviously wants to continue it's practice so they're gonna try to do whatever they can to be able to continue acting this way. And one way you do that is you say all these cars are junk cars like the engines don't run, you know, five minutes later the transmission's gonna fall out, the brakes don't work. That's not the kind of cars that go across this auction. You heard what Roger said. Yeah, they got some dings and maybe, you know, high mileage. Some of 'em will have, you know engine sludge or transmission problems and you got to pay attention and you got to listen. That's why they have the announcements. But they're not all junk. That's another part of the lie. And he doesn't buy there and he doesn't buy from the guys that buy a car, you know, take it home wash it and maybe throw a little paint on it and run 'em back through. He doesn't deal with those kind of guys. These are - They're not brand new cars but they're not junk either.

And who does Roger buy these cars for? He buys them for his friends and family. He's gonna pay attention. Shelby is a small town. He doesn't want to get a bad reputation and, you know, it'll go through that community fast.

Now, he says Roger didn't have the rules; we didn't have the rules, you know, we're both at fault. Well that's not true. They didn't have the rules or because Roger didn't have, you know, a copy sitting in his hand doesn't' necessarily mean that you get to cheat people. That's not what that means. I understand what he's trying to do with this little statement here about verifying the announced conditions. The problem is how do you verify a negative. If somebody tells you something doesn't exist or lead you to believe that, why would you go around trying to verify that? Think about how many things you would have to do everyday to verify some - when somebody is telling you or not telling you than what you believe? It's really - I don't know how you do it. I don't know how to explain it. It's just you can't verify a negative like that like he's asking you to do.

One of the things he's asking you to do, the logical relationship is something like this. Well I'll skip over that. Now one of the things Mr. Walker talked about is the damage disclosure form and when that showed up. Roger testified he got it when he got the sales receipt. On the other hand Mr. Walker want you to believe that it came with the title. I understand what Mr. Guyer said but think about this. When Roger said the title - the deals not done until the title shows up. The deals not done until the title shows up. So even if it did come in with the title its still fraudulent representation. And he could have gone back and tried to get his money back. But because it is everything does say no, no, no, no, no, there wouldn't be any reason to go back until of course its too late when you find out about it. Which brings this up.

Mr. Walker wants you to believe that he and Midland's are on the same parr. And that is of course not true. And here is why? He says we inspected it and we missed it. Well that's Brent Farrell but you know what? You got a hundred and fifty-nine point inspection done by a Honda certified mechanic to make it a Honda certified pre-owned car. The next time you see a commercial for a certified pre-owned car think who's inspecting that car. Gee, is he missing something here?

MR. WALKER: Your Honor, he's not allowed to ask the jury to think about how they would react here. That's the Golden Rule.

THE COURT: I sustain that objection.

MR. MOSKOS: Yes, sir. All right.

So, you got a hundred and fifty-nine point inspection that they did; Roger did not do. Don't know the rules. Well you know what? Roger wasn't selling the car; they were. They had the duty to do it correctly. And they want you to believe that not having the rules is breaking the rules. That's not - That's not right. And hinted by him not doing some grand inspection like they did he gets nothing. Its his fault the whole burden's on him. Who had the information? They did but it's gonna - They're gonna place everything on him to check this car out.

The last thing that Mr. Walker talked about was that both of 'em sold the car without disclosing the damage. Roger relied on what they told him. He simply passed along their information. And when he found out that he was wrong he wouldn't give the car back. Not only that he paid 'em back not only what they were due but more money to keep them satisfied. When Roger ask for his money, his Fifty-two Hundred Dollar back, they ignored him and we're here today. Thank you, ladies and gentlemen, I appreciate your patience.

THE COURT: Okay, Ladies and gentlemen, the Clerks' office has ordered you all lunch. I got to take up some more legal matters before I can charge you on the law so

I"m gonna send you to the jury room. Hopefully she will have you a lunch back there in a few minutes. Then I'll bring you out and charge you on the law and give you this case to decide. But at this point you can't discuss it yet. All right. Hopefully lunch will be there in just a few minutes.

(JURY EXITS COURT ON LUNCH RECESS AT 12:31 PM.)

THE COURT: All right. Do y'all want to take a five minute break and come back and deal with the charges.

MR. REIBOLD: That's okay with me.

MR. MOSKOS: Yes, sir.

THE COURT: Okay. I'll give my court reporter a break and we'll quit and we'll come back.

(COURT IN RECESS AT 12:31 PM.)

(COURT BACK IN SESSION AT 12:37 PM.)

THE COURT: I guess the big issue is about the charges. You got any objection to those charges?

MR. MOSKOS: I haven't a chance to go through 'em.

THE COURT: Okay. I'll give you a few minutes then.

I mean I looked through 'em and they look reasonable.

MR. MOSKOS: Well you said negligence is out. Right?

THE COURT: Yeah. I think the negligence is out. Everything else seems to be in. And I was gonna add on the fraud part that section that you wanted into what they had presented from your brief that we agreed on earlier.

MR. MOSKOS: And I appreciate that, your Honor. I would ask if we could go through the request to charge that I'd given you. I think I've eight or nine. And then I had an additional --

THE COURT: Well, and most of yours seem to be covered under theirs.

MR. MOSKOS: And I don't know.

THE COURT: And unless they want to tell me it seems to me everything you wanted was covered under theirs plus I add that fraud issue. With the exception maybe the

MR. WALKER: Your Honor, I hope you don't mind me cutting through here.

THE COURT: No, not at all.

MR. REIBOLD: We have a few concerns about the proposed charges or about their proposed charges.

THE COURT: And I'll give you a few minutes to go over theirs. And I think most of its covered under what they've requested.

MR. REIBOLD: We haven't had a chance to see that yet cause we emailed that to you.

THE COURT: Okay.

MR. MOSKOS: Your Honor, just out of curiosity - Well, it's not just out of curiosity, Mr. Walker when he was talking to the jury said that they didn't have the burden of proof for anything. And I don't know if he's withdrawing all of his defenses but --

MR. WALKER: I said any element of the claim. I was very careful not to say -

MR. MOSKOS: Well the impression that came across was they don't have the burden of proof on anything and I want to make sure that your Honor's gonna tell the jury that there is - the reason that come up - this comes up is the request to charge number thirteen which deals with contributory negligence and they have the burden of proving contributory negligence I assume by the preponderance of the evidence. And I want to make sure that the jury gets charge that the defendant does have the burden of proof in defenses.

MR. REIBOLD: No objection to saying the defense has the burden of proof on this issue.

THE COURT: Okay. I thought that was -

MR. REIBOLD: Yeah, it's actually in number fifteen.

THE COURT: I thought it was already in.

MR. REIBOLD: Yeah, your right, your Honor, it is in number fifteen we say that.

MR. MOSKOS: I just hadn't gotten that far.

THE COURT: And I thought I read that in there.

MR. MOSKOS: I would think that would need to - Wait a minute. Number fifteen?

THE COURT: Yeah. The burden of proof is on - the second paragraph, third paragraph - on this issue the burden of proof is on the defendant. This means that the defendant must prove by a greater weight of the evidence that the plaintiff's were negligent and that such negligence was the proximate cause of plaintiff. It's in there.

MR. MOSKOS: The dilemma that I have is that it's so far in the back. I mean you start talking about defendant's request to charge contributory negligence and then there's no mention of the burden, you know, for two instructions --

THE COURT: I know that's the last they hear. You say it's in the back and I understand - I understand but I can't help its in the back it's just usually the things that are in the back are the things they remember. You know the first part of it they don't remember. It's usually the last thing I say. I understand I just don't know. Its in there it covers everything. I don't know.

MR. MOSKOS: Well first of all I don't think the contributory negligence comes in because we're dealing with negligent mis- we don't have negligence any more. We're dealing with negligent misrepresentations.

THE COURT: And in looking at negligent misrepresentation it's still - I looked at that and it seemed to me that if we're gonna charge negligent misrepresentation contributory negligence applies to that ---

MR. MOSKOS: And --

THE COURT: --- because the negligent misrepresentation was the Matrix. And your - and there's evidence in this that your guy didn't follow the rules either.

MR. REIBOLD: Correct.

MR. MOSKOS: Is your Honor gonna put in the - I thought I - I don't know. Maybe I sent it to your Honor last night. I had a - there was a - some information I wanted to put in dealing with the gross negligence and the fact - Oh, the *Dealus versus Hulsing Enterprises* case.

Did y'all get that?

THE COURT: Yeah.

MR. MOSKOS: And what I was asking the court to put into - put in was a provision from there and I don't know if it made it into your charge.

THE COURT: And ask how a plaintiff's ordinary contributory negligence not a bar for the recover age of the defendant's gross negligence or willful wanton conduct is the proximate cause of the injury. That's what you wanted in there?

MR. MOSKOS: Yes, sir.

THE COURT: What's your position on that?

MR. REIBOLD: I don't have an objection since we don't define gross negligence any where. Or willful wanton conduct cause that has to seek a meaning in North Carolina law. I think it's a request of the law but I think if you're gonna add that in the other stuff has to go with it.

THE COURT: You mean we have to define gross negligence and willful wanton conduct and I have to agree with that? I mean --

MR. MOSKOS: I agree too.

THE COURT: That means we just got to add that but somebody's got to get it to me. Willful wanton conduct is defined in the punitive damage statute. Is that what you want me to - is that the definition?

MR. MOSKOS: And I don't know the answer to that.

THE COURT: That's the only definition I've got at this point unless y'all got some other. Now I'll try to find the definition to gross negligence under North Carolina law. I'll put my law clerk on it but if y'all have one that would be great.

MR. MOSKOS: Yes, sir.

MR. REIBOLD: I'm ready to address his I just didn't know if he was finished.

THE COURT: I wasn't gonna charge any of his other than what he just said.

MR. REIBOLD: Oh, okay.

THE COURT: I was under the impression that yours covered everything in his except these exceptions that he's just brining up and I was gonna add those to that. Now if that's not true y'all let me know.

MR. REIBOLD: I'm fine --

THE COURT: Okay.

MR. MOSKOS: I do object to number fourteen, your Honor. Defense to request charge number fourteen.

THE COURT: Okay. Let me look at that.

Well you don't think that's the law?

MR. MOSKOS: Well it's the law but not in this case.

I would assume it's the law. I haven't had a chance to research it but what this is actually dealing with is the transaction between Mr. Whitley and Ms. Gorman; not his interaction with the dealership - with the auction and Midland's Honda. The way this is couched plaintiff's were required to inspect any vehicle for defects which might make it a menace to those who might use the vehicle or come in contact with the vehicle if they undertook to repair or recondition the vehicle. Well, I think what they've been arguing so far is the inspection at the auction. They weren't doing anything to repair or recondition the vehicle at the auction. This is when a used car dealer or a car dealer sells a car to a consumer and the consumer finds out about it and comes back and says hey, you know, you sold me a piece of junk. And this is on the original dealer; in other words, Midland's Honda in this case. Moreover dealer such as plaintiff's are charged with knowledge of any defects which are open and discoverable in the exercise of due care.

I mean what he's doing is he's unfairly singling out my client. I mean, you know, something that might be fairer would be moreover dealer such as the parties but to single out my client is - is - like I said he's trying to bring in an instruction that is more for a consumer dealing with a dealership. Down the line - It's a down the stream argument or charge. If Ms. Gorman - In other words if Ms. Gorman came in here and said I'm suing Mr. Whitley because I got cheated, yeah, this - and Mr. Whitley had reconditioned it and repaired it and what have you, yeah, this would apply but it doesn't apply here.

MR. REIBOLD: Your Honor, these are the duties, the legal duties we believe were imposed on the plaintiff's which support the contributory negligence charge. There's two parts to this charge. The first one is just the general duty to carry or what he owes to protect himself. I can't imagine there's a quibble with that general duty.

The second one absolutely does apply and that's because our contributory negligence contention is two fold. Yes, you did not do a proper inspection at the auction.

But also, before you sold this car to somebody else, North Carolina law required you to do this other inspection. Had you done that you would have avoided some of the damages that you claim. You contributed to your own harm by not doing this inspection.

MR. MOSKOS: Which inspection?

MR. REIBOLD: The inspection you do before you sell a car.

THE COURT: Before he sold it. Because you ask for damages after he sold it. You're asking for damages that he incurred after he sold the car to her because he wants to be reincouped for his profit as well as the expenses and so that applies there. He had a duty - Not only did he have a duty to inspect it at the auction under the rules, he had a duty to follow North Carolina law before he sold it to the sixteen-year-old girl and so it seems to me that's proper.

MR. MOSKOS: Yes, sir.

MR. REIBOLD: And I have no problem with saying such as the parties and such as the plaintiffs. We're not trying to be unfair.

THE COURT: What? It doesn't make any sense if you put parties everywhere.

MR. REIBOLD: Well I drafted it for plaintiff's because its supposed to be the plaintiff's duties. I understand it but I'm just trying to point it out. We're not trying to single anybody out. I think its proper as its written but -- and frankly we're not a North Carolina motor vehicle dealer so I'm not sure it would apply to us.

THE COURT: Yeah.

MR. REIBOLD: But I think it's just best to leave it the way it is.

THE COURT: Okay.

MR. MOSKOS: The next one number fifteen, well wait a minute.

THE COURT: Of course the problem with fifteen is --

MR. REIBOLD: This is essentially verbatim of the pattern jury instruction.

THE COURT: I know but the problem is negligence is off the board. This follows negligence and not negligent misrepresentation.

MR. MOSKOS: Right. That was my concern.

THE COURT: Negligent - Because negligence has been pulled --

MR. REIBOLD: Well your right. Now that we - if we want to say if you do not determine that the defendant made a negligent misrepresentation I'm fine with that change. But you're right, this was drafted when both plaintiff's were in the case.

THE COURT: All right.

MR. REIBOLD: And should be modified to reflect the ruling's you've made.

MR. MOSKOS: But I don't know that - I don't know that this is applicable to negligent misrepresentation. It may be but - and if it's a negligence and if it's in relation to negligence then it needs to go too.

MR. REIBOLD: I thought we had already crossed that bridge.

THE COURT: Let's see. You're asking if you do not determine that the defendant was negligent there's no need to consider whether the plaintiff was negligent. Well negligence is gone..

MR. REIBOLD: I agree this has to be modified to say if you - if you'll answer this question only if you've already determined if the defendant is guilty of negligent misrepresentation. I mean that modification would need to be made to make it less confusing.

THE COURT: And then the second sentence in that paragraph if you do not determine the defendant made a negligent misrepresentation there is no need for you to consider whether the plaintiff was negligent.

MR. REIBOLD: Yeah. It's just essentially find and replace negligence with negligent misrepresentation throughout the charge.

THE COURT: But that only - It not only replaces the defendant's negligent misrepresentation not the plaintiff's. Right? Everywhere --

MR. REIBOLD: You're right, you're right. The defendant's - We're not saying the defendant's made a negligent misrepresentation. We're saying they failed to inspect and contributed to their own negligence.

THE COURT: So everywhere it says defendant was negligent you say the defendant's negligent misrepresentation?

MR. REIBOLD: I believe that's -

THE COURT: And everywhere it says the plaintiff's negligent you need to put the negligence in there is what you claim?

MR. REIBOLD: I think that's correct.

THE COURT: So it would say the defendant was guilty of negligent misrepresentation --

MR. REIBOLD: Or made a negligent --

THE COURT: Huh?

MR. REIBOLD: I'm not sure I like the word guilty but made a negligent misrepresentation.

THE COURT: Okay.

MR. REIBOLD: Anything else?

MR. MOSKOS: Yes, sir. Number seventeen.

THE COURT: Okay.

MR. MOSKOS: It's duplicative of sixteen. Sixteen deals with reliance under the fifth element I guess. The plaintiff's reliance upon the false representation or concealment which reasonable - the plaintiff's reliance would be reasonable if, and then it goes on. The next one seems to put a higher duty on my client.

MR. REIBOLD: Number seventeen certainly goes into more detail about the reliance element but that's a correct statement of North Carolina law and the facts support it.

MR. MOSKOS: Well I haven't seen it so I don't know the context with --

THE COURT: That's State versus --

MR. REIBOLD: It's at head note nine which would be on the fourth page of the opinion, top of the page.

MR. REIBOLD: I'm getting hungry.

THE COURT: Has the jury's lunch showed up?

THE BAILIFF: I don't think it has. Let me check.

It's on the way, your Honor. It isn't here yet but it's on the way.

THE COURT: Okay. Im gonna charge twenty-five.

MR. REIBOLD: You're skipping ahead? Oh, okay.

THE COURT: How is that an issue in this case?

MR. REIBOLD: Well we talked about it yesterday in arguments. The --

THE COURT: I know but that deals with contract. Right?

MR. REIBOLD: I think the provision that says barred from any remedy applies to any remedy.

MR. MOSKOS: Is that - Did you give that today?

MR. REIBOLD: These last three are the ones we gave this morning, yes.

THE COURT: Yeah.

MR. MOSKOS: So let me track those down.

THE COURT: And it seems to me fourteen is the law from what I can tell. But if this deals with the acceptance. Is this dealing with - is this contract law?

MR. REIBOLD: It's --

THE COURT: Or UCC?

MR. REIBOLD: It's UCC.

THE COURT: Okay. I got it.

MR. REIBOLD: Cause this is a sale of goods.

MR. REIBOLD: Now the charges - I gave you the statutes almost verbatim from the statute.

MR. MOSKOS: Your Honor, this deals with a contract claim. We're not dealing with a contract claim. I'm not even sure how this relates to the case.

MR. REIBOLD: And the answer to that question is that the UCC provides that if you accept and don't notify the seller of the defect within a reasonable time, or, thereafter properly revoke your acceptance, you are barred from any remedy. It doesn't say contract remedies, --

commercial program; it says any remedy. We think that's a defense to essentially every claim if the facts support it. And the facts are - it's certainly a factual question about whether this will satisfy his case.

THE COURT: All right. And having said that then how does -- what information is this gonna benefit the jury? How are we gonna know that? I mean if that's not on the verdict form how are we - what difference is it gonna make?

MR. REIBOLD: Well I think the jury can consider it in deciding whether they're going to find for the plaintiff on any of the claims other than the one we've conceded.

MR. MOSKOS: Now you're talking about rejection and maybe even revocation of acceptance and all of that gets into the contract claim. I mean we're getting way far afield.

THE COURT: Does that get into the contract claim? I mean y'all conceded liability in the contract claim.

MR. REIBOLD: So we're not trying to undo that but all of these other remedies - Like I said, the statute itself says the words barred from any remedy.

THE COURT: All right. So they're bared from any remember on the contract claim.

MR. REIBOLD: We could have taken that position but --

THE COURT: And the fact that you didn't how could we put it in now?

MR. MOSKOS: Wouldn't they be estopped from --

MR. REIBOLD: We're estopped from saying it bars us from the contract remedy, certainly. But why would our limited admission on that claim cover everything?

THE COURT: And assuming you're right, how does the jury --

MR. REIBOLD: I mean the problem is you can't rule on it as a matter of law because they have to decide whether acceptance was made in a reasonable time or whether there was actually a telephone call that constitutes revocation.

THE COURT: I understand that. But how are we gonna know they did that? How is it gonna be on the jury form?

MR. REIBOLD: I think it just shows up in their - their decision to render a verdict in favor of a particular party.

THE COURT: How are we gonna explain that to 'em? I mean if I read this as you - -

MR. REIBOLD: Well the answer would - the explanation would be jury if you conclude that these events happened then you're verdict must be for defendant on the other place.

MR. MOSKOS: The problem is this is so intertwined with claims that have not been made. We didn't ask for revocation of acceptance. We didn't make a 608 Claim. And yet here it's talking about acceptance of the goods precludes a buyer from rejecting the good. And if acceptance is made with knowledge of a nonconformity cannot be revoked that's a totally different claim.

MR. REIBOLD: Our argument is that yes they did not ask for revocation. And so they've accepted the goods and their barred from other remedies.

MR. MOSKOS: No. No, no, no, no, no, no. No. Okay.

MR. REIBOLD: Yes.

MR. MOSKOS: Here's - No, no. Here's the problem. The law requires us to sue for the difference in the value of what we got and what we should have gotten. They don't get the property back and we're out Five Hundred bucks. We have to retain the item, in other words, accept the item. You don't - What he's asking is makes it a circular argument. If we retain the items to be able to sue for fraud and get the difference in the value of the property and our consequential damages, then we're barred because the UCC says you kept the item. If we give it back - Well I don't even know because we haven't even thought about giving it back.

MR. REIBOLD: Your Honor, that's just not happened.

And first of all the argument is incorrect. What the law requires is that you notify the seller of the breach; once you do that you have another right under the UCC to retain the goods while the dispute is pending. It's a separate code section. The dilemma he's talking about simply does not exist. So in this case they didn't just keep the car, they sold it to someone else. They clearly did an act of ownership; that's acceptance as a matter of law. We think they accepted it prior to that time but when they did that they accepted the vehicle.

MR. MOSKOS: We didn't find out about the fraud until after the car was sold. That doesn't mean we accepted the car in the condition of a clipped car. We had no knowledge of that and that's evident. There was no testimony that he knew anything about it until that lady brought it in. And then we did notify them to buy it back and Mr. Ferrell - This is - this is a red herring designed to confuse the jury and it is going to - they will not understand what is happening and it's going to confuse them and throw them off and they're gonna come to a bad result based on a bad charge. I would ask that any of this stuff dealing with the UCC be excluded.

THE COURT: Okay.

MR. REIBOLD: If you look at charge number twenty-five, Items A and B of the situations that he's talking about, we didn't know about it and therefore we can't be charged with acceptance. But Item C which are all equal alternatives under the statute says when the buyer does any act inconsistent with seller's ownership, and that is clearly established, there is an acceptance in this case. In fact I could have ask for a directed verdict on that issue.

MR. MOSKOS: But the other side is this is when you know something is non-conforming. You buy it - Let's put it this way. Mr. Whitley could not have gone back to Midland's and said hey, I was standing - I walked around this thing and I saw the damaged door and I thought about it now I want to give it back. No, no, you bought it, you knew what you were getting and you accepted it. There has been no testimony whatsoever that he knew that he was buying a clipped car. None whatsoever. In fact just the opposite. And this is - this isn't even applicable to the case. This is where there is a discussion between the parties or a representation between the parties that they know there is a damaged goods.

MR. REIBOLD: Your Honor, I think the UCC clearly is imposing a duty to inspect until the point in time where you do an act inconsistent with ownership. At that point in time you should have inspected it by then. There's no - there's no inconsistency here. They certainly accepted the vehicle. The statute says if they did that and they didn't notify the seller of the breach as called for their barred from any remedy. That's our position.

THE COURT: You don't think by calling - by calling the dealership and notifying them it was a car - -

MR. REIBOLD: Well I think that's a question of fact.

THE COURT: Right. And it is a question of fact.

MR. REIBOLD: And if they did that then maybe it satisfies it. If they didn't do it then the defense is valid.

MR. MOSKOS: How do you put toothpaste back in the tube, Judge? I mean once you start talking about all this the jury's not gonna understand it and they're gonna come to the wrong conclusion because this is too confusing. And it's dealing with a cause of action that's not even in the pleadings much less been argued in this case.

MR. REIBOLD: We raised an affirmative defense in our answer a long long time ago. And it's certainly the facts.

MR. MOSKOS: But revocation is not a claim in the case. They never made out a claim for revocation of acceptance.

MR. REIBOLD: Well, look, if you're not gonna claim that you didn't revoke acceptance then we can get rid of that charge. You know we don't have to charge on that if you're not gonna try to get out of your acceptance by revoking acceptance. That one can go if his position is what he says it is but the other two are still in play.

MR. MOSKOS: No.

THE COURT: Well, and most of this - I'm gonna charge twenty-six. Doesn't that usually deal when you order something in the mail and you accept the goods and not send it back you got to pay for 'em?

MR. REIBOLD: I'm sorry, say it one more time.

THE COURT: If I order, you know, a pair of waders from Cabela's and they send 'em to me and I don't send 'em back and reject them then I owe Cabela's for the waders. Right?

MR. REIBOLD: Yeah.

THE COURT: But he's already paid for 'em. In this situation he's already paid the purchase price. Right?

MR. REIBOLD: He's paid the purchase price.

THE COURT: Usually this applies when they hadn't paid the purchase price.

MR. REIBOLD: Well --

THE COURT: I paid for 'em and I didn't send 'em back though so I don't owe for 'em.

MR. REIBOLD: There's two elements to it. The first is on twenty-six, the buyer's accepted goods he or she must pay the contract price. I think that's the part you're discussing.

THE COURT: Right.

MR. REIBOLD: But the part that I focused on is paragraph number three.

THE COURT: Of twenty-six?

MR. REIBOLD: Yeah.

THE COURT: If a buyer fails to notify the seller of the breach within a reasonable time the buyer is barred from any remedy.

MR. REIBOLD: That's what the statute says. It doesn't say contract remedies, commercial, commercial code remedies. It says a remedy. Meaning where the UCC applies it's exclusive. That's your rights.

THE COURT: So the question - and you say you're arguing that it's a question of fact.

MR. REIBOLD: About whether - on twenty-six - it's a question of fact is where --

THE COURT: All right. Then my line is short of that one line.

MR. REIBOLD: I'm fine with that.

THE COURT: Now the jury could understand that cause it's a question of fact as to whether he called and did that. But if you do all this other stuff what's gonna be confusing.

What do you say about that, Mr. Moskos?

MR. MOSKOS: Well, as I said, your Honor, I don't think it applies. I think this relates to the - when they say any remedy I think what they're saying is any remedy under the UCC not any remedy whatsoever. I'm trying to -

We could have had different remedies under the UCC.

MR. REIBOLD: I think that's the crux of it, your Honor. If you conclude it applies to other remedies that you'd charge. If you conclude it does not apply to remedies outside the code it should not be charged.

THE COURT: Okay.

MR. REIBOLD: Obviously we have different opinions on that.

THE COURT: Then back track a minute. As far as all the other charges are concerned are we comfortable with those? Are we ready to go on that?

MR. MOSKOS: Well there was one more that I was gonna ask the court to consider.

THE COURT: Okay.

MR. MOSKOS: This is from the case of *Barry Levine versus Park Chevrolet*. And frankly all my documents have been scattered around and I'm not sure if I got one or three copies. I apologize. It is a North Carolina case. '76 North Carolina appellate case. N.C. at 44 on page 48. It is a 1985 North Carolina case and it says, --

MR. REIBOLD: That was in his charges, his proposed charges.

MR. MOSKOS: And it may be.

THE COURT: Okay.

MR. MOSKOS: It says here "the court" in this case is quoting another case, another court, the court stated "we hold that a transferor who lacked the actual knowledge may still be found to have intended to defraud and thus may be civilly liable for a failure to disclose that a vehicle's actual mileage is unknown." Obviously we're not dealing with mileage. "A transferor may not close it's eyes to the truth if a transferor reasonably should have known that a vehicle's odometer reading was incorrect. Although he did not know to a certainty the transferee would be defrauded the court may infer he understood the risk of such an occurrence." So I would ask that we modify this language a little bit. I don't know which one.

THE COURT: What is y'all's position on that?

MR. REIBOLD: You know at some - It's clearly this is a correct statement of the law. Some version of it I think is fair; the facts support it. I don't - I think but not all of it is a little repetitive.

THE COURT: Right. And if we can figure out - If you can kind of highlight one or two lines that makes sense and not be repetitive and not deal with that then I'll be glad to put it in here.

MR. MOSKOS: Yes, sir.

MR. REIBOLD: Anything else?

MR. MOSKOS: Your Honor, did you just take the pattern instructions?

THE COURT: Huh?

MR. MOSKOS: Are you just using the pattern instructions?

THE COURT: I'm using those instructions that he gave me that are copied after that that you have gone over.

MR. MOSKOS: Yeah. Assuming you took the whole - Like 813.21 you took the whole thing.

MR. REIBOLD: I don't know if I did it every time their in here. I don't want to represent to you that it's a verbatim copy; it's close. All the charges are in here. Everything that we cited is in here for backup. I'm sure there were occasional times ---

THE COURT: I'll --

MR. REIBOLD: --- where I changed the wording a little bit to make it more readable.

THE COURT: I'll go back in chambers and take them and give you a minute to look over everything and I'll come back and I - And y'all need to look at this verdict form and see if it --

MR. REIBOLD: Yeah. I know he hadn't had a chance to see it yet. That was my first stab, I'm not married to the language but.

THE COURT: Okay. And I hadn't even looked at it but, you know, y'all go over this and over that and I'll come back and we'll talk about it in a few minutes while the jury's eating and see if we cant' - Next time y'all have a North Carolina case give it to Judge Benjamin or somebody.

If you come up with something that you want to change just come to chambers.

MR. MOSKOS: Yes, sir.

MR. WALKER: Thanks, Judge.

(COURT IN RECESS AT 01:19 PM.)

(COURT BACK IN SESSION AT 01:49 PM.)

THE COURT: All right. You're on the record. Do you object to that?

MR. MOSKOS: Yes, sir. At this point for clarification there are - the defendant has presented two request to charge number twenty-six, just a numbering error. The one we're discussing the defendant's request to charge twenty-six UCC effectiveness of the acceptance. I understanding is that the defendant wants the third paragraph which states if a buyer fails to notify the seller of a breach within a reasonable time the buyer is barred from any remedy. I would - First of all I don't think that's applicable to this case. The defendant has already admitted liability in a contract case and this is what applies simply to the contract case. I don't think the UCC saying - I think the remedies that are referred to here relate solely to the UCC remedies none of which we are - are currently issues in the case. We haven't revoked the acceptance. In other words we haven't filed a 2-608 claim and as I said they've already consented; stipulated to the breach of contract claim. So I think it's inapplicable and should be taken out so it doesn't confuse the jury.

THE COURT: Do you want - the question was do you - His request was to charge the whole thing. I thought that was one of the things we reached by not charging if the buyer accepts the good then he must pay for the goods and charge the whole UCC and just charge that one to the jury.

MR. MOSKOS: Well, no. I understand that that was - was what y'all had agreed that he had agreed to have that one sentence in there. I still don't think its applicable at all.

THE COURT: Okay. I note your objection.

MR. REIBOLD: We've plowed this ground and I hate to repeat myself at this point.

THE COURT: Okay.

MR. MOSKOS: And then did your Honor charge my request to charge number eight? That's the one from Huff versus Auto Zone Limited.

THE COURT: Yeah, I think that's in here. I thought we added that to their charge on - charge on fraud?

MR. REIBOLD: Well this is - He was gonna do some language from that case which I think covers this.

THE COURT: Right.

MR. REIBOLD: And so he added --

MR. MOSKOS: No.

THE COURT: I thought we would add that language into their - And the language I thought you wanted to add in was North Carolina has long recognized and has said where material defect is known to the seller and he knows that the buyer is unaware of the defect and that it is not discoverable in the exercise of the buyer's diligent attention or observation the seller has a duty to disclose the existence of the defect to the buyer. And a failure to disclose the truth can support a fraud claim and in as much as an affirmative false representation.

I thought that's what you wanted in ---

MR. REIBOLD: That was my understanding.

THE COURT: --- to take care of that number eight.

MR. MOSKOS: Well, I - And I apologize, your Honor. I don't know which one's you've included in your charge. I haven't seen the whole thing. I understand you're using a lot of the pattern instructions and I don't know which ones. If you put in eight that is fine with me. In fact I prefer number eight because I think it's a little more applicable to what we're dealing with.

MR. REIBOLD: But I think eight goes a little further than what we propose. I have no problem with what we've just talked about being the charge but eight first of all talks about pleading which isn't relevant. And I think if you went from - I mean there's a couple of sentences you know that are virtually equivalent and I don't have a problem with that but this sort of belabors the point and give it undue emphasis if we charge the whole thing.

THE COURT: Yeah, it's stuck its head in the sand in that one. That's more of a somewhat facts that y'all have talked about so I think what - His - The books definition of fraud, as well as the language you want to put, I think covers all that. Okay.

MR. REIBOLD: Could it be that we're done?

MR. MOSKOS: Huh?

MR. REIBOLD: Could it be that we're done?

MR. MOSKOS: Well, actually what I'm asking for is really just a couple of sentences, Judge. I know eight looks kind of long but its maybe about four sentences.

THE COURT: Okay.

MR. MOSKOS: Five.

THE COURT: So give me - Come take mine and highlight what you want in there and I'll look at it and see if I can incorporate it in ---

MR. MOSKOS: Yes, sir.

THE COURT: --- and see how much we gonna be able to give this jury.

(PAUSE AT 02:00 PM.)

MR. REIBOLD: Your Honor, he's highlighted three sentences. The first two I don't have a problem with although I think they're addressed by the other language we talked about. The third one I think goes a little too far into charging on the facts.

THE COURT: And I kind of agree. We kept talking about sticking your head in the sand in that.

MR. MOSKOS: Well, I would - I would really like to have the last couple of sentences.

THE COURT: But I think that because that's exactly what you all argued I would be commenting on the facts.

MR. MOSKOS: But the last little bit there deals with a defendant which deliberately closes it's eyes and that's what we're talking about.

MR. REIBOLD: Same concern.

THE COURT: Okay.

MR. MOSKOS: I mean their position is it's a mistake and we say it's deliberate.

MR. REIBOLD: And they argued it.

MR. MOSKOS: Yeah.

THE COURT: You ask me to define gross negligence. The Supreme Court case we found, we define gross negligence as wanton conduct done with conscious or reckless disregard for the rights and safety of others. And then this statute that defines willful and wanton conduct which is in the punitive damage statute means the conscious and intentional disregard of and indifference to the rights and safety of others which the defendant snowed or should know is reasonably likely to result in injury, damage, or other harm. Willful and wanton conduct means more than gross negligence.

MR. REIBOLD: Suits me.

THE COURT: That's what the statute said. Okay.

So if I do your portion number eight then I don't need to do that case we dealt with in the other insert from fraud?

MR. REIBOLD: I think it's either or.

MR. MOSKOS: Is that the --

THE COURT: That's when we first dealt with that I read to you a minute ago.

MR. MOSKOS: The *Levine* case?

THE COURT: Huh?

MR. MOSKOS: *Levine* that I read earlier ---

THE COURT: Yeah.

MR. MOSKOS: --- dealing with the odometer statute? Yes, sir, we don't have to do that one.

THE COURT: Okay. So I can leave this out and insert this in. Okay. All right.

MR. MOSKOS: And your Honor is gonna read those items that I had to list out this morning?

THE COURT: Right. Right. I am.

MR. MOSKOS: Oh, your Honor, one more thing.

THE COURT: I'm listening.

MR. MOSKOS: Yes, sir. On Monday I had ask the court dealing with the - I had ask the court to require the defendant to supplement it's discovery responses as far as document production. We previously ask for and received documents dealer financial statements.

THE COURT: Uh-huh.

MR. MOSKOS: These dealer financial statements go to the franchise or the - go to the manufacturer and these were produced to Honda and then produced to me. These to to 2011, 2012 and 2013. I ask for '14 and '15 and yesterday I was given a slip of paper, a yellow notepad piece of paper with two numbers on them and the problem is those numbers are half of what's on these. So in 2013 the dealership had a net worth and then in 2014 it winds up being half that maybe even less than that. So I would like to actually see the documents that went to Honda '14 and '15.

THE COURT: Okay.

MR. WALKER: Your Honor, I've hand wrote - Actually my client hand wrote the numbers yesterday. I put them on his desk; that's what he wanted. He mentioned the financial statements. I told my guy this morning to email them to me so they're on my computer and let me look at them and be sure there is not any kind of issue. But assuming there's not I'll just email them again.

THE COURT: Okay.

MR. MOSKOS: Well, I don't have any way to print them off. I mean I'm not even sure my email will work in here.

THE COURT: Well as soon as I get the charge we'll take a break and figure that out.

MR. MOSKOS: Yes, sir.

THE COURT: Okay. All right. All right, are we ready for the jury?

MR. REIBOLD: I think so.

MR. WALKER: Yes, sir, thank you.

THE COURT: You want to check this verdict form? Be sure to change --

MR. MOSKOS: I would also add to my comments and request that the part dealing with the UCC being a bar to any remedy; that the court take into consideration 25-1-305. It actually deals with remedies to be liberally administered. However it states the remedies provided by this chapter shall be liberally administered. Obviously it's the remedies in the UCC that are being dealt with and as a result taking 606 and implying that remedy means any and all remedy allowed by any claim goes too far. It's only one that the UCC claims.

THE COURT: Okay. I guess we will make - We can obviously argue that as to what remedies are barred based on after we get a verdict.

They finished eating. I'm gonna bring 'em in and totally confuse 'em.

(JURY REENTERS COURTROOM AT 02:09 PM.)

THE COURT: Ladies and gentlemen, I am going to now charge you on the law that you are to apply in this case.

Okay, I apologize. This case has been somewhat unusual in that the North Carolina applies, so, I've had to get up to speed. I didn't know anything about North Carolina law when I got here Monday. But as the trial judge I have certain duties to perform in this trial and one of which is rule upon the admissibility of the evidence; that evidence that you are to hear. My other duty is to charge you on the law that you are to apply and so if you've got an opinion of what you think the law is and what the law should be, and it differs from what I now tell you the law is you are to disregard your opinion and apply the law exactly as I give it here.

Now the same law and constitution that makes me the exclusive judge of the law makes you the exclusive judge of the facts. Under our law I'm not allowed to have an opinion about the facts in this case. That is totally up to you. So if I've said anything or done anything in this case that you think I have an opinion about the facts, you are to disregard that because I'm not allowed to have an opinion about the fact; that is solely up to you.

Now the burden of proof in this case is by a preponderance of the evidence. A preponderance of the evidence simply means the greater weight of the evidence. It is evidence is taken as a whole shows that the facts sought to be proved is more likely true than not. This can be illustrated by imagining a set of scales. When the case beings the scales are even. After all the evidence has been presented if the scales remain even or even tip slightly in favor of the defendant the plaintiff has failed to meet his burden of proof and would not be entitled to recover in his case.

If on the other hand the scales are tipped either slightly in favor of the plaintiff, the plaintiff would have met his burden of proof and you should return a verdict for the plaintiff. The preponderance of evidence is not determined by the number of witnesses; instead it must be determined by the greater weight of all of the evidence.

And there are two types of evidence that's generally presented during a trial. Direct evidence and circumstantial evidence. Direct evidence is testimony of a person who claims to have actual knowledge of a fact such as an eyewitness. It is evidence which immediately establishes the main fact to be proved. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred.

Circumstantial evidence is based on inference and not on personal knowledge or observation. It is proof that does not allow actually the establishment of the fact in question, but the search or describes something else from which you may either reasonably infer the truth of the fact or at least reasonably infer an increase in the probability that the fact was true. For circumstantial evidence to be sufficient to warrant a finding of a fact circumstances must lead to that fact with reasonable certainty. The facts and circumstances should be considered in the light or ordinary experience and common sense. The existence of a fact cannot be based on speculation, surmise, or conjecture.

Now, you know, to give you an example of what I just read, we've been in this courtroom at least that doesn't have anyone that's in it. When I came in this morning it wasn't raining. When you leave this courtroom this afternoon if the ground is covered in water you could assume that sometime while we were in here it rained outside. That's circumstantial evidence. If you saw it rain, that's direct evidence, and the law makes absolutely not distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is there a greater weight of certainty required of circumstantial evidence than that of direct evidence.

Now, necessarily you must determine the credibility of the witnesses' who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to evaluate the evidence and determine which evidence convinces you of it's truth. In determining believability of the witnesses' who have testified in this case, you may believe one witness over several witnesses, or, several witnesses over one witness. You may believe part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in it's entirety, or, reject the testimony of the witness in it's entirety. You may consider whether a witness has an interest in the result of the trial; whether the witness is prejudice either for the plaintiff or the defendant, and the opportunity for the witness to have seen the matters and things about which the witness may have testified, and the way the witness acted on the witness stand.

Now rules of evidence do not ordinarily permit a witness to testify to opinions or conclusions. An exception to this rule exist when witnesses we call expert witnesses. A witness who by education and experience has become an expert in some art, science, or profession may give an opinion as to the subject that that witness claims to be an expert in, and may also give reasons for that opinion. You should consider any expert opinion given by a witness like any other evidence and give it the weight you think it deserves. And if you decide that an expert's opinion is not based on sufficient education and experience, or if you decide that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion in it's entirety.

An expert witnesses testimony is to be given no greater weight than that of any other witness simply because the witness is an expert. And you do not have to accept the expert's opinion even though it is uncontradicted.

Now, in our court's no distinction is made between corporations and individuals. A corporation is a person in the eyes of the law. A corporation is entitled to the same fair and impartial consideration and to justice by the same legal standards as an individual.

Now, the plaintiff alleges that the defendant has breached a contract. The defendant contends that no disclosure requirements imposed by the auction but concedes that it did fail to make certain - of the newly required disclosures and therefore in the breach of - and therefore is in breach of the contract in this case. It is therefore your task to determine what if any actual damages should be recovered by the plaintiff in connection to the breach of the contract.

Actual damages are the fair compensation to awarded for any economic injury resulting from a breach of contract. In determining the amount of actual damages, if any, you award the plaintiff you will consider the evidence that you have saw and heard to each of the following types of damages. Direct damages, incidental damages and consequential damages. Direct damages are the economic losses that result or - I'm sorry - economic losses that usually are customarily the result from a breach of a contract. In this case the measurement of direct damages is the difference between the sale price of the goods or the vehicle at issue and the actual fair market at the time of the sale.

The incidental damages include cost reasonably incurred by the plaintiff, if any, prior to being able to respond to the defendant's breach. Cost reasonably incurred by the plaintiff in response to the defendant's breach and cost reasonably incurred by the plaintiff, if any, to minimize the lost resulted from the defendant's breach.

Consequential damages include any loss resulting from the plaintiff's circumstances if the defendant knew or should have known about those circumstances at the time that the parties entered into the contract. Consequential damages do not include losses from which the plaintiff may reasonably have prevented.

Parties injured by a breach of contract may be entitled to recover special or consequential damages; that is, actual or economic losses that occur because of the special damages tending to the breach of the contract such as the loss of profit from other transactions. Before you may award such damages the plaintiff's must prove two things by a greater weight of the evidence.

One: They must prove that as a result of the breach of the contract they suffered consequential damages or loss of profits other than transactions, and, that this loss was within the common placement of the parties in the time they made the contract. Consequential damages or loss of profits would be withing the contemplation of the contracting parties if the parties were aware of the special circumstances or conditions from which would give rise to consequential damages, or loss of profit, and, the damages for loss of profits were reasonably foreseeable to one who was aware of the special circumstances or condition.

Number Two: The plaintiff's must prove the amount of consequential damages or loss of profits withing a reasonable degree of certainty. This does not mean the plaintiff's must prove the amount of their loss with mathematical certainty. It does mean however that these damages if any may not be based on conjecture, speculation, or guess work. An award of damages for loss of profit must be based on actual fact from which the reasonable accurate conclusion regarding the amount of loss can be logically and rationally drawn. The plaintiff may recover damages only for the damages that are direct and proximately caused by the defendant's breach of contract.

Causation from damages is an essential element of the plaintiff's case. Stated differently there can be no recovery of damage for a breach of contract when those damages are a direct - I'm sorry - direct and incidental or consequential unless the plaintiff proves by a preponderance of the evidence that those damages were actually caused by the defendant.

A proximate cause is defined as a cause which a natural and continuance consequences, unbroken by any new or independent cause, produced the plaintiff's injury without which the injures would not have occurred.

A person who - A person has a duty to exercise reasonable care or compentence in obtaining or communicating information to others, or, a group of persons that he knows will rely on that information supplied by him. A breach of this duty is a negligent misrepresentation. One of these - One of the issues of the burden of proof is on the plaintiff - I'm sorry - on this issue the burden of proof is on the plaintiff just like it is on the other issues I talked to you about.

This means that the plaintiff's must prove by a greater weight of the evidence six things.

First, is that the course of - that in the course of his business the defendant supplied information to the plaintiff. Second, that the defendant intended for the plaintiff to rely on the information for guidance or benefit in a particular business transaction. Third, the information supplied by the defendant was false. Fourth, that the defendant failed to exercise reasonable care or competence in obtaining or communicating the false information. Reasonable care of competence means that degree of care, knowledge, and intelligence, or judgement which a prudent person will use under the same or similar circumstances.

Fifth, the plaintiff would actually have relied on the false information supplied by the defendant and that the plaintiff's reliance was justifiable. Actual reliance is direct reliance upon false information. Reliance is justifiable if under the same or similar circumstances a reasonable person in the exercise of ordinary care would have relied on the false information or would not have discovered the information was false. And Sixth, that such reliance proximately caused the plaintiff to incur financial damage.

The amount - What amount is the plaintiff entitled to recover from the defendant as his damages for negligent misrepresentation? You have - If you have determined that the defendant is liable for negligent misrepresentation the plaintiff's are entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amounts such as one dollar in recognition of a tangible injury to the plaintiff.

The plaintiff may also be entitled to recover actual damages. On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove by a greater weight of the evidence the amount of actual damages proximately caused by the negligent misrepresentation of the defendant. The damages recovered for a negligent misrepresentation are those necessarily to compensate the plaintiff for his pecuniary loss proximately caused by the misrepresentation of the defendant.

A pecuniary loss is a financial or monetary loss suffered by the plaintiff. A pecuniary loss may include the difference between the value of what the plaintiff has received in the transaction and it's purchase price, or, other value given for it and financial or monetary loss suffered otherwise as a consequential - of the consequences - I'm sorry - to the plaintiff's reliance upon the misrepresentation.

The plaintiff's damages are to be reasonably determined from the evidence presented. Your award must be fair and just and you may not award any damages based on speculation or conjecture. In this case the defendant contends that the plaintiff and the plaintiff denied that the plaintiff themselves were negligent in one or more of the following respect.

In failing to conduct a sufficient inspection of the automobile and discover it's condition when the vehicle was sold under a red light before purchasing the vehicle, and or, failing to conduct a sufficient inspection of the automobile and discover it's true condition after the delivery of the vehicle but within the arbitration period provided by auction rules. The defendant further contends and the plaintiff deny that the plaintiff's negligence was the proximate cause of and contributed to the plaintiff's own injury or damage.

Contributory negligence is not to be assumed from the mere fact of injury or damage. Just as the law imposes certain duties upon the defendant the law also imposes duties upon the plaintiff. The plaintiff like all persons have a legal duty to exercise due care for their own protection.

Additionally as retail car dealer's in North Carolina plaintiff's are required to inspect any vehicle for a defect from which might make it a menace to those who might use the vehicle or come in contact with the vehicle if they undertook to repair or recondition the vehicle. Moreover dealer's such as the plaintiff's are charged with the knowledge of any defect from which are open and discoverable in the exercise of due car.

Now, in considering contributory negligence did the plaintiff's own negligence contribute to their injury or damage? You will answer this question only if you've already determined that the defendant made a negligent misrepresentation. If you do not determine that the plaintiff had made a negligent misrepresentation, there is no need for you to also consider whether the plaintiff was negligent.

On this issue the burden of proof is on the defendant. This means that the defendant must prove by a greater weight of the evidence that the plaintiff's were negligent and that such negligence was a proximate cause of the plaintiff's own injury or damage.

The test of what is negligent as I have already defined is explained. It is the same as the plaintiff is the defendant. If the plaintiff's negligence joins with the negligence of the defendant, and the proximate cause of the plaintiff's injury or damages, it is called contributory negligence and the plaintiff cannot recover on their claim when negligence or negligent misrepresentation.

A plaintiff's ordinary contributory negligence is a bar to recover from a defendant who commits an ordinary act - I'm sorry - who commits an act of ordinary negligence. It is also well established that a contributory negligence is a part of - on the part of the plaintiff is available as a defense in an action which causes the defendant within to violations - with violation of the statute or negligence per s e. However, a plaintiff's ordinary contributory negligence is not a bar to recover when a defendant's gross negligence or willful or wanton conduct is the approximate cause of the plaintiff's injury. Only gross negligence - On gross contributory negligence by the plaintiff precludes recovery by the plaintiff from a defendant who was grossly negligent.

Now gross negligence is defined as a wanton conduct done with conscious or reckless disregard for the rights and safety of others. Willful or wanton conduct means the conscious and intentional disregard of and indifference to the rights and safety of others which the defendant knows or should have known is reasonably likely to result in injury, damage, or otherwise. Willful or wanton conduct means more than gross negligence.

Now, one of the elements to the plaintiff's claim is fraud. On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove by a greater weight of the evidence six things.

First, the defendant made a false representation of or concealed a material past or existing fact. A concealment occurs when a person fails to disclose that which under the circumstances he should disclose. A person has a duty to disclose all facts and materials to a transaction or event when he is a fiduciary. He has made a partial or incomplete representation or he's especially - or he is specifically questioned about them. In an arm's lengthy transaction a person has a duty to disclose if he is taking affirmative steps to conceal material facts from the other party.

Second, the false representation or concealment was reasonably calculated to deceive. A representation is calculated to deceive when the person who makes it knows it to be false. Or makes it recklessly or without any knowledge of it's truth or falseness as a positive assertion.

Third, false representation was made or the concealment was done with the intent to deceive and with the intent to be acted upon.

Fourth, the plaintiff was and in fact deceived by the false representation or concealment and acted upon it.

Fifth, the plaintiff's reliance upon the false representation or concealment was reasonable. The plaintiff's reliance would be reasonable if under the same or similar circumstances a reasonable person in the exercise of ordinary care of his own affairs would have relied upon the false representation or would not have discovered it - discovered the concealment.

Now, when a plaintiff claims - whether there is a claim upon the plaintiff to establish the defendant's intent the defendant's knowledge can be shown where the defendant had limited information but failed to inquire further because he was afraid of what the inquiry would yield. Willful blindness is knowledge enough. A person engaged in knowing - engages in knowing conduct when he intentionally avoids actual knowledge by closing his eyes to the fact which should prompt him to investigate.

Intentionally avoiding knowledge implies something verifying own knowledge combined with a degree to escape the consequences of that knowledge. A defendant which deliberately closes his eyes so that he will not discover what is suspected when he suspects is going on can be charged with a form of knowledge or reckless disregard for the truth.

And sixth, the plaintiff's has suffered damages as the proximate cause of the defendant's conduct.

Reliance is not reason if the plaintiff fails to make an independent investigation or if the plaintiff is informed of the true condition of the property. To support a fraud claim a plaintiff must demonstrate it was denied the opportunity to investigate the property or should not discover the truth about the property's condition by exercising reasonable diligence. A plaintiff must also show that it was induced to forego additional investigation by the defendant's representative. I'm sorry, by a defendant's misrepresentation.

If you determine that the defendant committed fraud, as I had defined, then the plaintiff is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as a dollar in recognition of a technical injury to the plaintiff. The plaintiff may also be entitled to recover actual damages on this issue and the burden of proof is on the plaintiff and this means that the plaintiff must prove by a greater weight of the evidence the amount of actual damages caused by the fraud of the defendant.

Damages recoverable for fraud consist of an amount of money that in so far as possible to put the plaintiff in the same position or condition as if the fraud had not occurred. The amount of that amount may include the difference between the value of what was received and the value of what was promised. Because a person inquiring about the property by virtue of a commercial transaction who has been defrauded by a false representation or concealment may recover as damages the difference between the actual value of the property at the time of the transaction and the value would have been at the misrepresentation or the representation had been true or concealed in the form of a concealment information disclosed.

The amount also may include financial or monetary losses suffered by the otherwise - suffered otherwise by the plaintiff as a result of the fraud. The plaintiff's damages can be reasonably determined by the evidence presented. Your award must be fair and just. You may not award damages based on speculation or conjecture.

Now, the plaintiff has made a claim under the North Carolina Unfair Trade Practice Act. Here the plaintiff contends that the defendant committed unfair trade practices by failing to inspect the car prior to putting it up for sale. Failing to disclose the damage of the vehicle and the reconstruction of the vehicle by - and by affirmatively checking on the vehicle block that the vehicle was not damaged more than twenty-five percent. And failing to disclose under body damages per the Matrix. And failing to disclose the recondition nature of the car. Or the reconstruction nature of the car I guess.

Failing to follow state law and failing to disclose under the North Carolina Common Law practices. In order to establish the defendant's liable for committing an unfair or deceptive trade practice a plaintiff must show that the defendant did at least one of the following things. In those you must find that at least one of the things that I just read to you that the plaintiff - I mean the defendant is guilty of. And on this the burden of proof is on the plaintiff which simply means that the plaintiff must prove by the greater weight of the evidence that the plaintiff did at least one of the acts that I have described to you.

Assuming you find that the defendant's committed an act or actions described above then you would consider whether the defendant's actions were in commerce or affecting commerce. On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove by a greater weight of the evidence that the defendant's conduct was either in commerce or that it effected commerce.

Conduct is in commerce when it involves business activity. Conduct affects commerce whenever a business activity is adversely and substantially effected. To establish that the defendant is responsible for committing an unfair and deceptive trade practice under North Carolina law the plaintiff must also establish that the alleged unfair or deceptive act or practice was the proximate result of the injury of the plaintiff. On these issues the burden of proof is on the plaintiff to prove by a greater weight of the evidence two things.

First, that the plaintiff's business had been injured. And two, that the defendant's conduct was the proximate cause of the injury of that business. Approximate cause is the cause which in a naturel and continuous - I'm sorry - a natural and conscientious sequence produces the injury and that it is a cause which a reasonable and prudent person would have foreseen would probably produce such an injury or some similar injurious results. There may be more than one approximate cause of an injury therefore the plaintiff need not prove the plaintiff's conduct was the sole proximate cause of the plaintiff's injury.

The plaintiff must prove by a greater weight of the evidence only that the defendant's conduct was the proximate cause. However the defendant's conduct would not be considered a proximate cause of injury to the plaintiff's business for purpose of claiming under the North Carolina Unfair Trade Practice Act unless the plaintiff can also prove that they actually relied on the misrepresentatoin made by the defendant and the reliance was reasonable. Actual reliance requires that the plaintiff affirm to incorporate the alleged misrepresentation into the decision making process and that is that if it were not for the misrepresentation the plaintiff would likely have avoided the injury all together.

The plaintiff's reliance would be reasonable if under the same and similar circumstances a reasonable person in exercise of ordinary care of his own interest would have relied on the misrepresentation. The reliance is not reasonable but the plaintiff should have discovered the truth of the matter to the reasonable degree of - to the reasonable diligence but failed to investigate.

If you have concluded that the defendant committed an unfair trade practice upon the defendant upon which the defendant actually and reasonably - I'm sorry - from which the plaintiff actually and reasonably relied then you should determine the amount by which the plaintiff's business had been injured. The plaintiff's are entitled to recover nominal damages even without proof of actual damages. Nominal damages is as I've told you three other times consist of trivial amounts such as one dollar in recognizing the technical damages caused by the wrongful conduct of the defendant.

The defendant may also be required to prove the actual damages and I defined actual damages to you in the past is the amount of actual damages sustained as a result of injury to the plaintiff's business.

Such damages would not include the loss of the bargain to the plaintiff as well as any other incidental or consequential damages such as the proper result of the defendant's alleged conduct. The loss of the benefit of the plaintiff's bargain is measured by the difference between the sale price of the goods or the vehicle at the issue and their actual fair market value at the same time.

If a buyer fails to notify the seller of the breach within a reasonable time the buyer is barred from any remedy.

Now, Madam Foreman, I have a probable verdict form that I'm gonna send back with you. It's the caption of the case and it's a number of questions that y'all need to answer. And they're pretty well self-explanatory. One deals with breach of contract. On the count of breach of contract you simply state the amount if any of the actual damages that the plaintiff has proven.

Number two deals with negligent misrepresentation. On that count you determine - you find either for the plaintiff or for the defendant. If you find for the plaintiff you need to fill in the amount of those damages if any. Number three is fraud. On the count of fraud you either find for the plaintiff or the defendant. And if you find for the plaintiff on that count you simply would fill in the amount in the actual damages that you think the plaintiff has proven. Count four deals with unfair trade practice. And if you find that they violated the North Carolina Unfair Trade Practice Act on this you check yes or no. If you check yes then you would fill in the amount of damages if any. On number five - and the question you have to decide is when do you find that the North Carolina Damages Disclosure Statement that was presented into evidence provided by the plaintiff was at the time of the transaction or sometimes after the plaintiff paid for the car. I need you to make that finding and check which ever one those y'all find as the truth.

Now, if you find in favor of the defendant on the plaintiff's claim for negligent misrepresentation, fraud, or unfair trade practice, then your deliberations are complete. However if you found in favor of the plaintiff on all of these or any of these then you are to move like A negligent misrepresentation. If you find in favor of the plaintiff on this claim was you base only on the North Carolina damages disclosure you need to put yes or no.

If you find that was based on that disclosure sheet you'd answer that yes or no. And it's the same way with fraud and it's the same way with the unfair trade practice.

Now, you - your decision on each one of these has got to be unanimous. I mean all twelve of you got to agree. And so you can't write down the verdict on each form until y'all deal with it. When you do - when you have reached a verdict simply knock on the door I'll bring you back out and we'll receive your verdict. Now, I got to go over my charge with the lawyers to be sure I haven't left out anything. I know it was long and I may have. But if I have I will bring you back out and clear that up. If I've covered everything then I will send this verdict form back with you along with all the evidence. When you get this verdict form that will be your indication to begin those deliberations. If at any time during your deliberation one of you need to be excused and need to go to the restroom or whatever you got stop talking about the case. You can only talk about it when all twelve of you are in the room. You come back and continue your deliberations.

If you have a question if you will write it down on a piece of paper and give it to the bailiff I will bring you back out and try to answer it. Having said that I can only answer a question of law. I can't answer a question of fact so if you have some factual question about some testimony I can't answer that. You've heard all you're gonna hear and I can't - I can't answer those questions fo you. I can only answer questions of law. If you have a legal question I can bring you back out and try to explain the law to you. But a factual question you've heard all the evidence you can't reopen the case and present any more so you've got to decide on what they gave you. Okay.

I'll send you back. Don't start yet. When you get this and the evidence that will be your indication to start. If I've left something out I'll bring you back out. Okay.

(JURY EXITS COURTROOM FOR DELIBERATIONS AT 02:48 PM.)

THE COURT: Okay. Any exceptions or deletions on behalf of the plaintiff?

MR. MOSKOS: Well, no, sir. The only issue that I would have is just simply the - with all due respect the way the UTPA those items that I had to give to you, I'm not sure that they came across. They were kind of abbreviated.

THE COURT: I know and I wrote 'em down. I guess after you forgot to write 'em down. I mean I took -

MR. MOSKOS: I mean they got the idea. I mean it only takes one. I'm just not sure what to do about it whether me to give you my sheet and make sure you can read my handwriting, or, maybe wait until they have a question or. I mean the down side is if they come out and find against me there's no way - I don't know. I'm not even sure that that's - Frankly I'm not sure that's an issue because they have all the facts anyway.

THE COURT: I know. And they did and they had those issues and if they believe -- I don't know how to put in there other than I make a -- I was trying to be as brief as possible simply because I didn't want to comment on the facts.

MR. MOSKOS: Yes, sir.

THE COURT: I spent the last thirty-five years training not to do that in dealing with that and you didn't want me to do that.

MR. MOSKOS: Yes, sir.

THE COURT: I don't know - I understand it was brief. I was just scared if I get too far it seems to have led in with the other and that's how I ended up where I did.

MR. MOSKOS: Yes, sir.

THE COURT: All right.

MR. MOSKOS: As far as the defendant's, your Honor, we would incorporate by referencing our prior objections but nothing new.

THE COURT: Okay. I'll take all of those we covered. Now what I need for y'all to do is get the evidence together. Be sure because --

MR. WALKER: The court reporter's done a very good job.

THE COURT: But if something gets missing I want y'all to get blamed and not her so I want y'all to agree with what she's got and here's the verdict form.

(WHEREUPON, PLAINTIFF'S EXHIBIT ONE THRU FORTY-SEVEN; FORTY-NINE THRU NINETY-THREE ALL IDENTIFIED AND PREVIOUSLY MARKED, ENTERED INTO EVIDENCE.)

MR. WALKER: And, your Honor, the only remaining loose end, before we keyed the case up I had a motion to compel and to produce this settlement with Nationwide, we're at that point, so ---

THE COURT: Okay.

MR. WALKER: --- I move to compel --

MR. MOSKOS: And I would object because I have a confidential settlement with them that does not relate to any of the amounts paid in this or that the defendant is responsible for.

MR. WALKER: The damage here is in solito, it's one loss.

MR. MOSKOS: Not necessarily.

MR. REIBOLD: Our rights can't be comprised by a private agreement between two other people.

THE COURT: Well if the only issue is as to the verdict. Right? You're entitled to a set off.

MR. REIBOLD: Yeah.

THE COURT: So we'll deal with that I guess when we get there.

MR. WALKER: I just didn't want to wait and get the jury back in and you feel surprised, Judge.

THE COURT: I understand. Gentlemen, this has been a difficult case simply because we've been dealing with other jurisdictions but I think y'all both did a very good job and I appreciate it.

MR. MOSKOS: Thank you, Judge.

MR. WALKER: Well, we really appreciate your help.

THE COURT: Okay. You got the verdict form?

All right. If y'all take it back and ask them to deliberate. And then we'll come back and deal with whatever we need to deal with.

(COURT IN RECESS AT 02:58 PM.)

(COURT BACK IN SESSION AT 03:45 PM.)

(WHEREUPON, COURT'S EXHIBIT NUMBER ONE, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

THE COURT: I'm told we have a note from the jury. They got a question.

MR. MOSKOS: Can you tell me what they're asking or do we have to wait 'til Clay gets here?

THE COURT: I don't know that. They want me to re-charge them on fraud, unfair trade practice. And then, they want both Plaintiff and Defendant's calculation on expenses and losses. I can't give them that.

MR. MOSKOS: Are you talking about like attorneys' fees and costs?

THE COURT: What did you all put up in closing arguments, those numbers you all wrote down.

MR. MOSKOS: Oh. Can we show 'em again?

THE COURT: No.

MR. MOSKOS: No.

THE COURT: Not under the rules, that I know of. You see, it's not in evidence. They just have to use their recollection.

MR. MOSKOS: Even by stipulation? Clay puts up his, I put up mine, no objection?

THE COURT: I don't know? I guess you can do almost anything by stipulation. We get him in here we'll see.

MR. MOSKOS: That's a -- Okay. You've obviously tried more cases than I have, Judge. So, I don't -- I don't know.

THE COURT: If it's not in evidence, and you know, they didn't have it. Its in evidence -- but I can't, I can't tell them anything that wasn't in evidence.

MR. MOSKOS: Yes, sir.

(ATTORNEY WALKER ENTERS COURTROOM.)

THE COURT: Okay, gentlemen, we have a question from the jury. They want -- We need a legal explanation of fraud, and an explanation of unfair trade practices and they want me to recharge them on that. And then, they need both the Plaintiff and Defendant's calculation of expenses and losses.

Now, that's something that I normally can't give them, but that's what y'all did in closing arguments. It's not in evidence, so. So, I propose we bring them back in and re-charge them on those two issues.

MR. WALKER: Yes, sir.

MR. MOSKOS: And I suggested that -- or I suggest that one thing we could do is to just put them up on the easels and let the jury look at them and without any comment.

And side-by-side.

THE COURT: And that's something both of y'all got to stipulate to, because that's not normally something I can allow.

MR. WALKER: Your Honor, I think mine's probably on two pages, so, we've got three easels. So, I mean --

THE COURT: And if y'all want to agree to that and stipulate to it, I guess we can present it to where they can see it. Is that what both sides want to do?

MR. WALKER: We can.

MR. MOSKOS: Yes, sir. Otherwise, it would be doing it off --

THE COURT: So, can you all figure out how to do that before I bring them in here?

MR. WALKER: I don't know if mine's on one page or not. I don't remember.

MR. MOSKOS: Well, the ultimate number is. Mine is.

MR. WALKER: Your Honor, we may block your view doing this.

THE COURT: That's fine. Well, what if you get it ready, and after I charge them on this, I'll just let y'all show 'em? You just can't say anything. Will that work? Because I'm not really sure they can understand me if they can't see me.

MR. MOSKOS: Oh, I have no problems. You tell me when to stand up, and I'll put it up. That's fine with me.

THE COURT: And what I'll do is, you all stipulate to them; I'll re-charge them on this issue; and then, I'll say, ladies and gentlemen of the jury, both attorneys will now show you their poster board that they presented in closing arguments, and you all just show that. That suit?

MR. MOSKOS: That's fine.

THE COURT: Okay. Bring them in.

(JURY RE-ENTERS COURTROOM AT 03:55 PM.)

THE BAILIFF: Jury panel is entered, your Honor.

THE COURT: Okay. Thank you.

Madam Foreman, it's my understanding that you need another charge, for me to repeat the charge on fraud and the unfair trade practice law. Is that correct?

MADAM FOREPERSON: Yes. Yes, sir.

THE COURT: Okay. All right. And I'll just basically read you all the charge, and the same thing I read you before on fraud. And then, -- and I understand, Ms. Foreman, so.

On these, the burden of proof is on the plaintiff. This means that the plaintiff must prove by a greater weight of the evidence six things. This is on fraud.

First, that the defendant made a false representation of, or, concealed a material past or existing fact. A concealment occurs when a person fails to disclose that which, under the circumstances, he should have disclosed. A person has a duty to disclose all facts material to the transaction or event when he is a fiduciary. If he has made a partial or incomplete representation, or if he is specifically questioned about them in an arm's-length transaction, a person has a duty to disclose if he has taken affirmative steps to conceal material facts from the other party.

Second, a false representation or concealment was reasonably calculated to deceive. A representation is calculated to deceive when the person who makes it knows it to be false, or makes it recklessly, without any knowledge of its truth or falsity, as a positive assertion.

Thirdly, the false representation was made or the concealment was done with the intent to deceive, and with the intent to be acted upon.

Fourth, the plaintiff was, in fact, deceived by the false representation or concealment and acted upon it.

Fifth, the plaintiffs' reliance upon the false representation or concealment was reasonable. The plaintiffs' reliance would be reasonable if, under the same or similar circumstances, a reasonable person, in exercising ordinary care for his own welfare, would have relied on the false representation; or would not have discovered the concealment.

Now, while a claim arises -- a claim requires the plaintiff to establish the defendant's intent. The defendant's knowledge can be shown when the defendant had limited information, but failed to inquire further because he was afraid of what the inquiry would yield. Willful blindness is knowledge enough. A person engages in knowing conduct when he intentionally avoids actual knowledge by closing his eyes to the fact which should prompt him to investigate. Intentionally avoiding knowledge implies something verging on knowledge, combining with the desire to escape the consequences of knowledge. A defendant which deliberately closes his eyes so that it will not discover what it suspects is going on can be charged with a form of knowledge, or reckless disregard for the truth.

And six, the plaintiff suffered damages as a proximate result of the defendant's conduct.

Reliance is not reasonable if Plaintiff fails to make an independent investigation, or if the plaintiff is informed of the true condition of the property. To support a fraud claim, the plaintiff must demonstrate it was denied -- I'm sorry -- must demonstrate it was denied an opportunity to investigate the property; or could not discover the truth about the property's condition by exercising reasonable diligence.

A plaintiff must also show that it was induced to forego additional investigation by the plaintiff -- by the defendant's misrepresentation.

If you determine that the defendant committed fraud as I have defined it, then the plaintiff is entitled to recover nominal damages and nominal damages could be a trivial amount, such as a dollar, in recognition of a technical injury to the plaintiff.

He's also entitled to recover actual damages. You all, I went through actual damages before. You want me to go through it again? Okay.

Now, under North Carolina Unfair Trade Practice Act. Here, the defendant is contending that the defendant committed -- was guilty of committing an unfair trade practice. And this is where the plaintiffs contend the defendant did wrong. The defendant failed to inspect the car prior to the sale in North Carolina. That was number one.

Number two: The defendant failed to disclose damage about the vehicle.

Number three: The defendant failed to affirmatively check the vehicle, check the black that the vehicle was damaged more than twenty-five percent.

Number four: The defendant failed to disclose -- I can't read my own writing. Oh, underbody damage, as per the matrix.

Number five: The defendant failed to disclose the reconstructive nature of the car.

Number six: Defendant failed to follow state law.

And number seven: The defendant failed to disclose under North Carolina common law. Those are the factors that the plaintiff claims that the defendant did wrong.

In order to establish that the defendant's libel for committing an unfair trade, or deceptive trade practice, the plaintiff must show that the defendant did at least one of those following things. And the burden of proof, as I have told you, is on the defendant -- I mean, on the plaintiff, and they must prove that the defendant did one of these things by a preponderance of the evidence.

Assuming you find that the defendant committed an act or acts as described above, then you will consider whether the defendant's actions were actions in commerce, or affecting commerce. One of the issues and the burden of proof is on the plaintiff, and this means that they must prove by a greater weight of the evidence that the Defendant's conduct was either in commerce, or that it affected commerce.

And the definition of commerce, conduct -- commerce is conduct in commerce when it involves a business activity. Conduct affects commerce whenever a business activity is adversely and substantially affected. To establish the defendant is responsible for committing an unfair or deceptive trade practice under North Carolina law, the plaintiff must also establish that the alleged unfair or deceptive practice was the proximate result of the actual injury to the plaintiff. And the burden of proof is on the plaintiff, as I said, to prove this.

And first that the business -- the plaintiffs' business was injured, and the conduct was the proximate cause of that injury; and that the proximate cause is a cause which is in the natural or continuous sequence produces the injury, and is a cause which reasonably -- which a reasonable and prudent person could have foreseen it would be probably -- probably produce such injuries or similar injuries resulted.

And there may be more than one proximate cause of the injury. And then, but Plaintiff need only to prove that the defendant's conduct was the sole cause of the injury to the business, the plaintiff. They don't have to prove that it was the sole cause.

The plaintiff must prove by a greater weight of the evidence only that the defendant's conduct was a proximate cause. However, the defendant's conduct will not be considered a proximate case of injury to the plaintiffs' business for purposes of claiming under the North Carolina Unfair Trade Practice, unless the plaintiff can also prove that they actually allowed the representation made by the defendant, and their reliance was reasonable.

Reliance requires that the plaintiff firmly incorporated the alleged misrepresentation into their decision-making process. That is, if it were not for the misrepresentation, then the plaintiff would likely have avoided the injury altogether. The plaintiff's reliance would be reasonable if, under the same or similar circumstances, a reasonable person, in the exercising of ordinary care in its own interests, would have relied on the misrepresentation. But reliance is not reasonable when the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate.

Then, if you find that the defendant committed an unfair trade practice, which the defendant actually reasonably relied on -- the plaintiff actually relied upon, then it's just a question of damages. And it's the same damage principle, you will award one dollar, or actual damages, and I'll be glad to explain that to you again, but you all told me last time you had that covered. Okay?

That is the law on fraud. Well, one other thing. If the buyer fails to notify the seller of a breach within the time frame, the buyer is barred from any remedy under the law. Now, normally -- y'all have also asked that both the plaintiff and defendant's calculation on expenses and losses. Is that correct?

JURY FOREPERSON: Yes, sir.

THE COURT: That's not something that was introduced into evidence. But by stipulation of the attorneys, I'm going to allow them to show you their boards that they calculated in closing arguments. Okay?

And if y'all would just simply show the jury y'all's calculations that you came up with in closing arguments.

MR. WALKER: I'm going to try to get this out of your way, Judge.

THE COURT: No problem. I hope we've done -- I can stand up if I get to talk anymore.

MR. WALKER: Your Honor, I'm going to flip over to the second page.

THE COURT: Okay. No problem.

MR. WALKER: Thanks, Judge.

THE COURT: When you all have seen enough ---

JURY FOREPERSON: We did.

THE COURT: --- let me know, and you all can go back to the jury room.

JURY FOREPERSON: We did.

THE COURT: Thank you.

JURY FOREPERSON: Thank you.

(JURY EXITS COURTROOM AT 04:08 PM.)

THE COURT: Okay.

MR. MOSKOS: I have two things, your Honor.

THE COURT: Okay.

MR. MOSKOS: The first thing, and Mr. Reibold and I had mentioned it beforehand, and you got into the jury charge the first time, and talked about commerce. We've already stipulated to that. The parties stipulated that this is a case in commerce, and that's not a decision that they have to make. I didn't think this was going to come up, so I didn't think to mention it again, so.

THE COURT: Well, I --

MR. MOSKOS: So.

THE COURT: And now -- if you told that, I don't remember it, but I -- I think it's pretty clear from the facts that this is a case in commerce, and I don't think the jury can dispute that, but.

MR. MOSKOS: Well, that's why I didn't make a big deal of it, so.

MR. REIBOLD: That's why we stipulated to that. I can't see the harm to the charge.

THE COURT: I know.

MR. REIBOLD: But we did agree.

THE COURT: This said they must -- and I defined commerce as business, and this clearly was in business, so.

MR. MOSKOS: The second thing is, when you were -- your Honor went through the items that I gave you on the UTPA, you got to the second one, and you talked about failing to disclose ---

THE COURT: Right.

MR. MOSKOS: --- the damage, but you didn't mention that it was failing to disclose the reconstructed nature of the car under the North Carolina Disclosure Statement. It was just kind of like.

THE COURT: Okay.

MR. REIBOLD: You did say reconstructive nature of the car but I don't think you mentioned the statement.

THE COURT: And then you got the statement.

MR. MOSKOS: Right.

THE COURT: You want me to bring them back in and explain that? Because I didn't write statement on my notes, and I should have.

MR. WALKER: And my concern is gonna be we're going to bury the charge that was given to them the first time.

THE COURT: Of course it -- I mean, the statement is the whole reason -- that's the whole box they check.

MR. MOSKOS: Yes, sir.

THE COURT: I'll try to correct that if you think -- I don't know.

MR. MOSKOS: Other than just to read them all again.

MR. REIBOLD: I wouldn't want to read them all again.

THE COURT: I know.

MR. REIBOLD: That would --

MR. MOSKOS: Well, I mean, as opposed to singling one out. I don't know.

THE COURT: Well, I mean, --

MR. MOSKOS: I wanted to say something while you were saying it, but I thought I would get into some serious trouble.

THE COURT: Well, the fact that they didn't disclose it, period, they didn't disclose it on the statement, they didn't disclose it at all, they checked no on the statement. They had that into evidence.

MR. MOSKOS: Yes, sir.

THE COURT: I read that. One of the issues is they didn't disclose it. They didn't disclose it on the statement nor did they disclose it verbally, so, maybe I guess that would have covered it.

MR. MOSKOS: You know, I don't know what a juror latches onto. They may say well, you didn't talk about that last item, so that must not be part of it. I don't know.

THE COURT: If I bring them back, then I feel they're going to do the whole thing again. At least that part, versus if I read them that one line. I think it'll probably be all right. If I'm wrong -- I think they -- that covered it. And I -- Let's talk about the next phase. It is -- are we going into phase two tonight? And I understand you got a plane to catch and I'll be glad to -- How long -- if it gets that far. And let's -- If they check block one on contract and nothing else, and my understanding on the law, that's it, we don't get to punitive.

MR. MOSKOS: I would think that is correct.

THE COURT: Now, if they check anything else, I assume they do get punitive.

MR. REIBOLD: Your Honor, I think if they check unfair trade practices, obviously there's no punitive damages, in addition to trible damages on that claim.

I didn't think if they were to check negligent misrepresentation, I don't think, under North Carolina law, they get to the -- gross negligence isn't enough, that just -- just like you were talking about earlier. So, I think if it's for punitive, it's going to have to be the fraud.

THE COURT: Okay. Do you have an issue on that?

MR. MOSKOS: As I think I've said before, Judge, I was up late last night, so I'm pretty tired. I think we've discussed that already with the negligent misrepresentation issue.

THE COURT: And I don't think it gets -- and we discussed that yesterday before I read the statute. But under the definition of punitive damages statute you've got those criteria.

MR. MOSKOS: Yes, sir.

THE COURT: And they have to -- you know, and it's got to be wanton and willful conduct, so. And then, I guess ---

MR. MOSKOS: Well, and that --

THE COURT: --- and if they do find fraud, then -- then I need to charge them on that.

MR. MOSKOS: Well, now, thinking about it, I mean, that would have been the reason to have willful and wanton on there. Maybe specifically under negligence or something. I don't know.

THE COURT: But willful and wanton is not an element, is it?

MR. REIBOLD: No, it's not.

THE COURT: It's not an element under North Carolina law. That's why it wasn't in there. It's my understanding it was not one of the elements, so, under that. So, fraud is what gets you there. He didn't do an unfair trade practice you treble damages. Okay. So, from a practical standpoint, if we get a verdict -- we will get one tonight, I assume, or we'll get a hung jury. If we get a verdict, do you want -- I mean, how are we going to bifurcate? Are you all going to -- we going to put up evidence and worth and all that kind of stuff, and breach -- and you all can argue and and we gonna re-charge?

MR. MOSKOS: Yes, sir. That's what I would expect.

THE COURT: And you all want to do that tonight?

MR. WALKER: I've got no clue how long the plaintiffs' case would be, and that might influence things.

THE COURT: I know. And I don't know, either.

MR. MOSKOS: Well, shouldn't be too long. I mean, we're dealing with one issue. And we've got to get the -- the net worth, the official document.

MR. WALKER: I've emailed my office to make a copy and bring it over here.

THE COURT: All right.

MR. MOSKOS: And then, -- and then, I guess argue.

THE COURT: Well, do you think it's going to take an hour, an hour and thirty minutes, twenty minutes?

MR. MOSKOS: Judge, every time I say, you know, thirty minutes, it winds up being two hours. I would say --

THE COURT: Well the log --

MR. MOSKOS: I mean.

THE COURT: I mean the logical thing at this time I'd bring 'em back in the morning, and start at it in the morning. Simply because --

MR. MOSKOS: They look tired.

THE COURT: I know they do. Now, if you -- You got somebody? Can you cover for him tomorrow, and let him go catch a plane?

MR. WALKER: He's got a doctor's note.

MR. REIBOLD: I'm scheduled for surgery in the morning.

MR. WALKER: So, I'm going to be re-booking my plane if I have to.

THE COURT: Okay. I mean, I --

MR. WALKER: I understand.

MR. MOSKOS: You -- I'd be willing to move it up to nine o'clock, I mean, instead of starting at nine thirty, maybe nine o'clock, and knock it out.

THE COURT: I mean, I'll be glad to accommodate you any way I.

MR. WALKER: Well, if we could do that, that would be great, Judge.

THE COURT: Sure. I'll get here early. I got here this morning. You all didn't give me much sleep, but I'm gonna take the North Carolina bar. We can do it -- I mean, it obviously depends on what box they check.

MR. MOSKOS: Well, sure. It may be a non-issue.

THE COURT: I assume, at this point, it's too late to settle this thing, y'all.

MR. MOSKOS: I don't have any money, Judge. I'm broke.

THE COURT: I understand. But you're a long way apart from where they were. That's up to you all. I don't --

MR. WALKER: I understand. And I -- you know, we were -- can we go off the record?

THE COURT: Sure.

(OFF THE RECORD AT 04:16 PM.)

(COURT IN RECESS AT 04:18 PM.)

(WHEREUPON, COURT'S EXHIBIT NUMBER TWO, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

(COURT BACK IN SESSION AT 05:22 PM.)

THE COURT: If there is one charge that we cannot agree upon, does that make the remaining charges -- I can't read it -- null and void -- something null and void.

In regards to the fraud charge, must all six points be met? So, how do you all want me to answer that?

MR. MOSKOS: Well.

MR. WALKER: On the second part, the answer is pretty obvious.

MR. MOSKOS: And I would probably ask that we send it back, and make sure that -- that you can read whatever they're saying.

THE COURT: You all can come and try. If there is one particular charge that we cannot agree upon, does that make the remaining charges -- I just don't know what that word is right there. Bring them on in.

MR. WALKER: Yeah, it -- does that make the remaining charges agreed upon null and void?

MR. MOSKOS: Except I think she left off the D.

MR. WALKER: Well, more important. That's what I'm saying, obviously on the second part, obviously. But on the first part, I'm assuming it's got to be a complete and unanimous verdict as to all or a mistrial.

THE COURT: Do you agree with that?

MR. MOSKOS: I think that's probably right.

THE COURT: All right. Bring them in. You going to get 'em?

(JURY RE-ENTERS COURTROOM AT 05:23 PM.)

THE BAILIFF: Jury panel all seated, your Honor.

THE COURT: Thank you. Madam Foreman, I've got two questions from y'all. If there is one particular charge that we cannot agree upon, does that make the remaining charges agreed upon null and void? The answer to that is, you got -- you got to make a finding on all charges before I can receive your verdict.

In regards to the fraud charge, must all six points be met? The answer to that is yes. Okay?

MADAM FOREPERSON: Okay.

THE COURT: And you all go back and try some more.

MADAM FOREPERSON: Yes, sir.

(JURY EXITS COURTROOM AT 05:24 PM.)

THE COURT: All right. Now, let me run this by y'all.

How -- If they can't reach a verdict tonight, are y'all in agreement to have them come back in the morning, or do you want me to keep them all night? I mean, or you want to send them home, and let them reconstitute in the morning? And at some point, I mean, I can order them supper, and we can stay here a reasonable amount of time. If it comes to the point where -- and I've had juries come out and say Judge, we're tired, can we go home and start back in the morning. What is your all's position on it?

MR. MOSKOS: I'm find that jurors, as a general rule, really try to do a good job. And -- But I also know that being tired, being hungry because it's now five thirty, may cause some people to capitulate, when they wouldn't otherwise. And I don't know if that works for me or against me.

THE COURT: And I don't -- And they may not ask, but I need to have an answer for them because under the rules, I'm not really sure I can let them go home. At least that's the situation in the criminal rules. But -- and we've had this discussion, if both sides agree that they can go home, I think that's not a problem. If you don't agree that they can go home -- Now getting County to put them up in a motel and do it like they do a death penalty is usually expensive, and it's really complicated. So, I don't know if we can go down on this particular case without prior notice and all that. So, we either let 'em work.

And I've had, you know, arrangements where both sides agree, Judge, if they come back and ask, we're tired, can we go home, I need at least to discuss that with y'all, and see y'all's position on that. If they don't ask, I'm not going to volunteer that, at least at this point in the game, you know. But.

MR. MOSKOS: Judge, I hate to put you on the spot, but

I've not really had this issue before. Is there a particular rule that deals with this?

THE COURT: It's in the criminal rules.

MR. MOSKOS: Oh. All right.

THE COURT: I don't know if there's any in the civil rules at all. And I'll note it and y'all may know better than I do, the civil rules are silent on that. But normally, in criminal rules, I'm not supposed to -- you know, I'm supposed to keep the jury together until I get a verdict. And that's in a murder case or something like it. They usually always let 'em go home and the parties stipulate. But in a civil arena -- you know, the lawyers say Judge, we don't have any problem with you letting them go home tonight if they come back and request that and start back in the morning. I just wanted to know what y'all's position, you know. I think some of my colleagues take the position they'd do it whether you agreed to it or not. I'm not sure about that, because I don't know. They're silent on that unless y'all know something different. I was just running that by you, and you can think about it.

MR. WALKER: Let me think about it.

THE COURT: Sure. I mean.

MR. WALKER: And I'm hopeful, within the next hour.

THE COURT: And I hope they will, too. And I'm not encouraging that. You know if they come back in here at eight or nine o'clock but I need, having said that, in a little while I need to start thinking about ordering them supper. If their not going to let them go home. But I -- but it's fife thirty, let's give them a little bit and see. I'll at least talk to the Clerk's Office and see what's involved in getting them supper and how long it's going to take, because some counties I go to, it's a major job, you know.

And some of them don't even have any places to eat, you know. And I had a jury one time before in Orangeburg when they all ask where you gonna get it from, the clerk told me no, we don't want to order from there.

If we have to order supper tonight, can you deal with that and how long is that gonna take and what's the possibility? You all normally don't do that?

MADAM CLERK: No. The only place I would be able to order from in the evening would be Lizard's Thicket, and you're probably talking about an hour and a half, maybe two hours.

THE COURT: What if they serve --

MR. WALKER: Order pizza from Lizard's Thicket?

MADAM CLERK: Huh?

MR. WALKER: It's about four blocks away and it's a meat and three where it takes about if you're sitting there about five minutes to get your food.

MADAM CLERK: But it's Thursday night in downtown Columbia, too, and I'm calling in about twenty-something dinners, so.

MR. WALKER: Ah. And I apologize if I sounded argumentative.

MADAM CLERK: Oh, no, that's -- I understand.

THE COURT: What about -- it's --

MADAM CLERK: We don't have anybody that we're contracted with to do pizza, Judge.

THE COURT: Really?

MADAM CLERK: Really.

THE COURT: Everybody knows that's the only thing they ever serve here is pizza.

MADAM CLERK: I would love order --

THE COURT: As soon as we go order it, they'll have a verdict. And I've had some -- in Clarendon County they want to stay and eat but most jury's now as soon go home.

I've had 'em stay to get a meal and then get a verdict. All right, we'll give 'em a little while. I just wanted to see -- I was hoping you were gonna tell me you could get a pizza here in twenty or thirty minutes.

MADAM CLERK: I wish I could.

THE COURT: Okay. Everything's hard up isn't it?

MADAM CLERK: Yes, sir. I'd say. Now, what I have done before, to try to be as discreet as possible, is knocked on the door and told the jury, you know, don't tell me anything about what's going on, but if you need me to order something to eat, it's going to be about an hour and a half to two hours before it would get here. Knock on the door -- you know, you all talk about it, knock on the door and let me know if you need to do that. And that would give us -- sometimes gives you an idea about whether they're close, or I don't have to do that.

THE COURT: Yeah. And I've done that, too. And you want to give them a few more minute before we ask them that, or give them 'til quarter 'til six or six?

MR. WALKER: I've got --

THE COURT: I mean, if it's going to be an hour and a half or two hours, it's going to be seven thirty or eight o'clock before we can feed them.

MADAM CLERK: Yeah.

MR. WALKER: How about a quarter 'til?

THE COURT: Okay. Let's give them fifteen or so minutes, and then we'll ask them that question. Okay.

MADAM COURT REPORTER: Are we off the record, Judge?

THE COURT: Good.

(OFF THE RECORD/COURT IN RECESS AT 05:35 PM.)

(COURT BACK IN SESSION AT 05:58 PM.)

(WHEREUPON, COURT'S EXHIBIT NUMBER THREE, IDENTIFIED

AND MARKED, RECEIVED INTO EVIDENCE.)

THE COURT: Six points only for fraud. They want me to go over those six points again. Okay.

MR. WALKER: Yes, sir.

THE COURT: Bring in the jury.

(JURY RE-ENTERS COURTROOM AT 5:58 PM.)

THE BAILIFF: Jury panel all seated, your Honor.

THE COURT: Madam Foreman, it's my understanding that you want me to go over the six points of fraud again?

MADAM FOREPERSON: Yes.

THE COURT: Okay. The first, that the defendant made a false misrepresentation of, or, concealed a material past or existing fact. A concealment occurs when a person fails to disclose that which, under the circumstances, he should have disclosed. A person has the duty to disclose all facts material to the transaction, or, admit when he has a fiduciary; he has made a partial or incomplete representation; or he is specifically questioned about it. In an arm's-length transaction, a person has the duty to disclose if he has taken affirmative steps to conceal material facts from the other party.

Number two. The false representation or concealment was reasonably calculated to deceive. A representative is calculated to deceive when the person who makes it knows it to be false, or makes it recklessly, without any knowledge of its truth or falsity, as a positive assertion.

Number three. The false representation was made, or the concealment was done with the intent to deceive, and with the intent that it be acted upon.

Number four. The plaintiff was, in fact, deceived by the false representation, or concealment, and acted upon it.

Number five. The plaintiff's reliance on the false representation or concealment was reasonable. And the plaintiff's reliance would be reasonable if, under the same or similar circumstances, a reasonable person, in the exercising of ordinary care for his own affairs would have relied on the false representation, or would have not discovered the concealment.

Number six. The plaintiff suffered damages proximately caused by the defendant's conduct.

Those are the six points, and you must find all six present. Okay?

MADAM FOREPERSON: Okay.

MR. WALKER: Your Honor, may we approach the Bench?

THE COURT: Yes, sir. And I must have left something out. Hold on a minute.

(BENCH CONFERENCE, OFF THE RECORD, OUT OF HEARING OF THE JURY, AT 06:00 PM.)

THE COURT: From my understanding, there are some other parts of this, but from my understanding, you all wanted those six points. Is that correct?

MADAM FOREPERSON: Yes, sir, that's correct.

THE COURT: Okay. All right. If you'll return to the jury room, and let us know.

(JURY EXITS COURTROOM AT 06:01 PM.)

THE COURT: I only covered those six points, because that's what they asked for. I didn't get into those other two points. Which I understand you all -- but they didn't ask for that, and obviously I didn't want to confuse them any more than I already have.

MR. WALKER: And I totally understand the Court's position. And for the record, we ask the Court to also charge the language of Defendant's request to charge number seventeen.

THE COURT: And I understand that you wanted to charge number eight. They didn't ask for that. And then, if I feel like -- if I charge them something more than what they ask for, I feel like I got to charge the whole fraud thing. So, that's why I only charged them what they asked for.

MR. WALKER: And for the record, our position is, number seventeen is part of our number six.

THE COURT: Number six. Okay.

MR. MOSKOS: And your Honor, I would also ask that, obviously, my, I guess it's request of charge -- request to charge number eight had been charged, also.

THE COURT: Okay. And I understand y'all's position. I didn't think that either one were part of six, even though they weren't part of the fraud charge. But they didn't ask for the kind of Fraud charge. They only asked for those six points, so.

MR. MOSKOS: You know, -- Oh, are we still?

THE COURT: You want to be off the record?

MR. MOSKOS: Yes, sir. I was going --

THE COURT: Okay.

(COURT AT EASE AT 06:03)

(BACK ON RECORD AT 6:12 PM.)

(JURY RE-ENTERS COURTROOM AT 6:13 PM.)

THE BAILIFF: Jury panel is seated, your Honor.

THE COURT: Okay. Madam Foreman, I understand y'all have reached a verdict?

MADAM FOREPERSON: Yes, sir, we have.

THE COURT: Is it unanimous?

MADAM FOREPERSON: Yes, sir, it is.

THE COURT: If you would pass it up.

MADAM FOREPERSON: Oh, you want me to stand up? I'm sorry.

THE COURT: No, you're fine. Just pass me the verdict.

(VERDICT RECEIVED UP BY THE COURT.)

THE COURT: Okay. You may publish the verdict.

MADAM CLERK: In the Court of Common Pleas, in the State of South Carolina, the County of Richland, Civil Action Number 2013-CP-40-0319, in the matter of Daniel O'Shields and Roger W. Whitley, a partnership doing business as O And W cars, versus Columbia Automotive Company, LLC, doing business as Midlands Honda, Number one, breach of contract. On the count of breach of contract, please state the amount of actual damages below. Actual damages are Six thousand, six hundred and forty-five dollars.

Number two, negligent misrepresentation. On the count of negligent misrepresentation, how do you find? For the plaintiff. And the actual damages are Six thousand, six hundred and forty-five dollars.

On the count of fraud, how do you find? For the plaintiff. On the actual damages, Six thousand, six hundred and forty-five dollars.

On number four, the unfair trade practices, do you find that a violation of the North Carolina Unfair and Deceptive Trade Practices occurred? Jury answers yes. Jury finds -- and the actual damages are Six thousand, six hundred and forty-five dollars.

When did you find the North Carolina Damage Disclosure Statement was provided to the plaintiffs? The jury answers, at the time of the transaction.

In the negligent misrepresentation, was your verdict based only on the North Carolina Damage Disclosure? No.

Fraud. Was the verdict based only on the North Carolina Damage Disclosure? No.

Unfair trade practices. Was your verdict based only on the North Carolina Damage Disclosure? The jury answers no. This is the true verdict of the jury, signed by Kiruth Brown, Foreperson.

Madam Forelady, is this your verdict, and the verdict of the entire jury?

MADAM FOREPERSON: Yes, it's.

MADAM CLERK: Thank you.

THE COURT: Okay. Anything else from this jury on this issue?

MR. MOSKOS: Nothing from the plaintiff, your Honor.

MR. WALKER: No, your Honor.

THE COURT: Okay. All right, ladies and gentlemen. I need you to be back at nine thirty in the morning, because there's another issue that I need you to decide. Oh, I'm sorry, that's right. We start at nine in the morning. So, if you'll be back at nine in the morning, I have one more issue I need you to consider on this case. Okay? I'll see you at nine o'clock. Thank you so much.

(JURY EXITS COURTROOM ON EVENING RECESS AT 06:17 PM.)

THE COURT: Okay. I think we've covered, as far as the charge is concerned, on punitive damages, haven't we? Was there any issue about that? It's just we're going to charge the statute in which y'all --

MR. WALKER: Yes, sir.

THE COURT: Okay.

MR. MOSKOS: Well, we -- I don't think we ever went over it, because we hadn't gotten to that point.

THE COURT: Okay.

MR. REIBOLD: I think the statute tells what's supposed to be covered.

THE COURT: The statute covers the whole nine yards, so. And you're the one that submitted -- sent me that statute, so, I'm going to charge the statute.

MR. REIBOLD: There's actually a specific provision. Under that statute it says these are what gets -- this is what gets charged to the jury and it list the provisions.

THE COURT: Right.

MR. MOSKOS: I mean, I understand that. I just -- I haven't read this.

THE COURT: And it may -- sure. And it's relatively simple. And I'll be here fifteen minutes early or if you want to meet tonight. But the statute pretty well lays it out.

MR. MOSKOS: Yes, sir.

THE COURT: And I was just going to read what they say charge.

MR. MOSKOS: Okay.

THE COURT: And so -- and I won't nec -- I'm not going to charge them when you get here. You all got a right -- you got to put up whatever presentation you want to.

MR. MOSKOS: Yes, sir.

THE COURT: Unless you all get it settled. If y'all do, call me. All right. I'll see y'all.

MR. MOSKOS: Thank you very much, Judge. Appreciate it.

THE COURT: Thank you. And again, you all need to look at the verdict form.

(COURT IN EVENING RECESS AT 06:25 PM.)

(COURT BACK IN SESSION FRIDAY, APRIL 22, 2016 AT 09:00 AM.)

THE COURT: Okay. Anything before we bring the jury in?

MR. WALKER: Not from the Defense, your Honor.

THE COURT: Okay.

MR. MOSKOS: No, sir.

THE COURT: Now, do you all want to make from closing arguments after this to the jury or you gonna argue to the jury?

MR. MOSKOS: Yes, sir.

THE COURT: Okay.

MR. WALKER: Yes, sir. Briefly.

THE COURT: So, you're not gonna have any opening statements. I'll just tell 'em why we're here and you can call your witnesses.

MR. MOSKOS: Yes, sir.

THE COURT: And then, we'll make closing arguments, and I'll charge them on this law and see. Okay.

MR. MOSKOS: Got it.

THE COURT: All right. Bring me a jury, please, sir.

(JURY RE-ENTERS COURTROOM AT 09:08 AM.)

THE BAILIFF: Jury is seated, your Honor.

THE COURT: Thank you, sir.

Ladies and gentlemen, I know y'all are kind of wondering why y'all are back today. And we had to bifurcate this trial, basically divide it into two parts. And before we moved to the second part of the trial, you had to make decisions on the first part, and you did that last night, you know, and you dealt with the damages issue.

Now, we're dealing with punitive damages. I mean, you must determine whether or not to award punitive damages. So, -- And I will explain to you what punitive damages are on the law, and what your responsibilities are when I charge you on the law.

This should not be near as long as the other aspects that you all have dealt with. The parties have a right to put up witnesses. Then, they will make a closing argument to you, and I will charge you on the law on punitive damages, and then you will decide whether or not to award punitive damages in this case. Okay? So, if you'd pay close attention to the attorneys, we'll get started.

MR. MOSKOS: Yes, sir. At this time, I would call Mr. Nalewaja to the stand.

THE COURT: All right.

THE BAILIFF: Place your left hand, raise your right.

(WHEREUPON, GREG NALEWAJA, BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

MADAM CLERK: Thank you. Have a seat in the witness stand, please. State your name please.

A. Greg Nalewaja.

MR. MOSKOS: I guess I need to be very clear. I'm calling Mr. Nalewaja as Midlands Honda.

THE COURT: Okay.

MR. MOSKOS: Thank you.

DIRECT EXAMINATION

GREG NALEWAJA BY MR. MOSKOS:

Q. Mr. Nalewaja, you've been here all week, correct?

A. That is correct, yes, sir.

Q. And you are here on behalf of Midlands Honda?

A. Yes.

Q. And so, you're aware that Midlands Honda -- Well, I think the other day we talked about the auction and the process, all that. We don't need to go through that again. But when Midlands Honda sells cars to -- at the auction, they know they're going to other dealers, right?

A. Yes.

Q. It's a dealer-only auction, right?

A. Yes, sir.

Q. And those dealers turn around and they take them, and they put them on their lot and sell them, right?

A. Some do, yes.

Q. And when you all sell cars at the auction, green light, red light, whatever, you don't think about the consequences of what happens with those cars. They go and they get sold, and they go wherever they go, right?

A. Yes.

Q. And the other day, you told us that you didn't think that Midlands Honda owed any duty to Roger or anyone else when they sell cars at the auction, right?

A. Yes.

Q. And you all still don't think you all did anything wrong in the way you sold the car, right?

A. No. They should have known the rules. I did say that.

Q. Okay. And at the time of the -- back in 2010, when this car was going through the red-light auction, Mr. Ferrell was the used car manager, who had full authority to sell the cars at the auction, right?

A. Yes.

Q. And he did his job the way that Midlands Honda wanted him to do it, right?

A. At that time, the process that they used, I can't say if that was what Midlands Honda wanted at that time. Now, no. My guys, they know the rules.

Q. No, no. I'm sorry. Maybe my question wasn't clear. What I'm asking is, Mr. Ferrell sold cars the way Midlands wanted him to sell cars, right? I mean, he didn't get punished for this, did he?

A. I've been with Midlands since 2013. I wasn't there in 2010. I don't know if -- I can't represent -- Greg Nalewaja cannot represent what Midlands Honda was doing at that time, because I don't know. I wasn't there at that time.

Q. Now, well, let's talk about that for just a quick second. You came from Indian River. We discussed this the other day. And that's a sister company with Midlands Honda, right?

A. It's Indian Trail.

Q. I'm sorry?

A. Indian Trail.

Q. Excuse me, Indian Trail. And it's a sister company, right?
A. It is another store that is owned in the Automotive Group.
Q. Right. That's the PCS Automotive Group?
A. PSC.
Q. And there are two other sister corporations, right?
MR. WALKER: Your Honor, these are -- this is Columbia Automotive Company is a defendant, and this is irrelevant.
MR. MOSKOS: Not necessarily. I'm trying to get to the way they operate their business.
MR. WALKER: Well, we can talk about the way they operate Columbia Automotive. That's the defendant.
MR. MOSKOS: No. He says he can't -- he doesn't know the way they were operating. I'm trying to test that.
A. We are separate entities.
Q. And I appreciate that. But you all get together and talk, right? You all have conferences and retreats, where you all get together and talk about your businesses, right?
A. The general manager is the general manager of the store, of each store. So, you know, how Randy was running Midlands back in 2010, or when he was there with his guys and, you know, with Midlands Honda at that time, is maybe different from the way I was running Indian Trail.
Q. So, the bosses there weren't -- weren't having

consistent or uniform -- or telling you all about consistent and uniform ways to handle your businesses?

A. Well, they want business done with integrity and done correctly, and that's how we do our business.

Q. I -- right. I understand that.

A. Certainly we --

Q. I understand that. My question, though, is, were the bosses trying to keep everything uniform and consistent across the four dealerships?

A. There are guidelines with, I mean, within -- how to do business correctly, yes. I mean, Honda has guides and laws and rules.

Q. And during the --

A. We want to stay within those.

Q. And during the retreats that you all would have, and the times that you all would talk to -- talk to each other, did anybody say Randy, you're not doing this right?

A. I don't know. I mean.

Q. You're not aware of anything, right? You don't remember anything like that?

A. No, because I was at a different store, in a different entity. I mean, I'm not --

Q. No, sir. I'm talking about -- you all -- you had a retreat last week, right, where you got together with the other managers and bosses, and talked?

A. Once every six months we get together, but we aren't talking specifically about used cars going to red-light sale, and if they're in this situation. We're talking more broader spectrum of how we're doing, and are we meeting our goals, are we meeting our objectives, things like that.

Q. And any of these -- And you met last week, right, too?

A. We had a meeting with our service department to discuss our fixed operations, which is our whole service area.

Q. Okay. And during any of those retreats, for whatever departments, did you ever hear anybody say Randy, Brent, you guys aren't doing it right, we want you to change the way you're selling cars at the auction?

A. I don't recall that in any meetings.

Q. Well, you heard Mr. Ferrell the other day testify, right?

A. Yes.

Q. And when you listened to his testimony, you didn't have any problem with the way he handled things, did you?

A. Do I personally have a problem, or are you asking ---

Q. Well --

A. --- with Midlands? When you say you.

Q. Well, you're up there for Midlands, or as Midlands. So, I'll ask Midlands.

A. Well, I'm sure Midlands would not, at that time, have

-- would definitely have wanted him to know the rules, to follow the rules, and do business correctly. Absolutely.
Q. So, Mr. Threatt would have surely made sure that Mr. Ferrell knew the rules?
A. I can't speak for what Randy did, but I would assume that he would have definitely wanted him to follow the process and procedures correctly.
Q. But you don't know?
A. I wasn't there, but.
Q. But you don't know Mr. Threatt outside of this case, do you?
A. I mean, through meetings and acquaintances. I mean, I'm not like, friends with him, or.
Q. Right. You don't go to church with him, or social events, or anything like that?
A. No.
Q. And it's your understanding, from a review of the file and all the testimony, that Mr. Threatt is the one who sent this car to the auction? Told, not sent, actually, you know, called the transporter and sent it, but he's the one that directed this car to go to the auction, after his conversation with Mr. Ecklund?
A. I've heard from the testimony that he instructed Brent to do it. I have nothing from the deal, I mean, just from what we've all heard together here.

Q. So, he's the one who made the decision to sell it at the auction, right?

A. I think, from what I heard, was he instructed Brent to dispose of the car through a red-light sale. Brent took it and disposed of it through a red-light sale. That's what I heard in the testimony.

Q. So, the answer is yes?

A. That answer would be yes, if I'm answering that correctly, according to what I heard.

Q. Now, if Brent had wanted to, or Mr. Threatt had wanted to, they could have sold it at a salvage auction, right? They had that authority?

A. They can sell the car. It's their decision, through whatever auction. That auction is the best auction that they were using at that time. I think that that's what their consideration was, was when you sell it through a red-light sale, that they're disposing of it properly. That's what their thought pattern was, I thought, at that time.

Q. They had the authority to sell the car at a salvage auction, correct?

A. Correct. They could sell at any auction.

Q. Now, by taking this car in and selling it, to Mr. Ecklund and at the auction, the dealership made a profit, right? Made money on this car?

A. The --

Q. Is that a -- just tell me yes or no and then you can explain.

A. Which transaction are you talking about?

Q. The whole transaction in dealing with this car.

A. I don't know exactly what the complete profit would be.

Q. Okay.

A. Can I grab my glasses?

Q. Sure.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBERS NINETY-FOUR AND NINETY-FIVE, REMARKED FOR IDENTIFICATION.)

MR. MOSCOS: Without objection?

MR. WALKER: Yes, sir.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBERS NINETY-FOUR AND NINETY-FIVE, IDENTIFIED AND MARKED, RECEIVED INTO EVIDENCE.)

MADAM COURT REPORTER: Ninety-four, and Ninety-five, Mr. Walker.

MR. MOSKOS: Now, the first page, Ms. Wanda, you say is Ninety-four --

MADAM COURT REPORTER: Yes, sir.

BY MR. MOSKOS:

Q. The first page, Exhibit Number Ninety-four. Now, down at the bottom, on the corner, it says there's a gross profit amount. How much is that?

A. Forty-one, one-seven.

Q. Four thousand, one hundred and seventeen dollars and fourteen cents, right?

A. Correct.

Q. And this is the dealer recap sheet, where Midlands Honda sold the car to Mr. Ecklund, right?

A. Yes.

Q. And this document is used by you all to be able to understand whether you're making a profit or a loss on your cars, correct?

A. Yes.

Q. And at that time, you had a gross profit of Four thousand, one hundred and seventeen dollars and fourteen cents. Apparently, something was taken out. You wound up with a net profit of how much?

A. Three thousand, three hundred and one dollars.

Q. Okay. So, you took this car in, and it's got the price of the vehicle, the cost you had in it, and the cost includes buying it and washing it, and any parts or inspections, and all that kind of stuff you did, right? That goes into the cost of the vehicle.

A. Yes.

Q. All right. And then, you've got, down below, the commissions and managers commissions, profit from the sale, et cetera, right? That's all on the left-hand side of the page?

A. Yes.

Q. And then, the net profit's on the right-hand bottom?

A. Yes.

Q. All right. So, let's look at Number Ninety-five.

Same type sheet, the dealer recap sheet, that's printed -- or that was printed when Mr. Ecklund returned the vehicle to Midlands Honda, right? I mean, this is -- excuse me. This is actually the sale of the Accord to Mr. Ecklund; isn't that right? I mis-spoke. Mr. Ecklund came into the dealership. Mr. Threatt traded him out into a 2000 Honda Accord; isn't that right?

A. Okay. Okay.

Q. Does that make sense now?

A. Yes, yes.

Q. Okay. And the -- the Civic was included on the left-hand side of this document, down at the bottom, right? As the trade-in?

A. Yes.

Q. And then, over on the right-hand side, it says gross profit, right?

A. Correct.

Q. It says a negative Nine hundred and thirty-seven dollars and fifty-eight cents. Is that what the document says?

A. Yes.

Q. Now, I've done the math. I'm more than happy, if you'd like -- if you want to do the math. But it appears that, at this stage, by selling Mr. Ecklund the Accord and the Civic, Midlands has already made Two thousand, three hundred and sixty-four dollars and seven cents; is that correct?

A. Correct.

Q. And then, Midlands took the car up to the auction, and sold it to Mr. Whitley, Roger, for Fifty-two hundred dollars?

A. That is correct.

Q. And at that time, -- Let me show you Exhibit Fifty-five, which is the seller's receipt from the auction. Now, when you sold it to Mr. -- to Roger, you didn't get Fifty-two hundred dollars. You had to pay some to the auction, right? How much did Midlands Honda receive selling this car at the auction?

A. Five thousand, sixty-five dollars.

Q. Any change?

A. No.

Q. Okay. Okay. Again, in doing the math, if you want to do the math I'm more than happy to let you do so, it looks like the total that Midlands Honda made off of this car is

Seven thousand, four hundred and twenty-nine dollars and seven cents.

A. No, you have to subtract out the cost of the car, which is Seven thousand. We paid Seven thousand for the car.

Q. Right. And that is in -- You talking about at the beginning, with Ms. Watkins?

A. No, right here. When you traded him in on the Accord, he paid -- he gave him ten thousand loan, seven thousand as ACV. He gave him in actual cash Seven thousand for the car.

Q. So Seven thousand needs to come out, that's your position?

A. Yes.

Q. Okay. Midlands Honda is still in the positive, isn't it?

A. Yes, Four hundred and twenty-nine dollars.

Q. All right. So, at the end of the day, this rebuilt, wrecked, unsafe, dangerous car made a Four hundred and twenty-nine dollar profit for Midland, right?

A. Yes.

Q. And in -- and when they sold it at the auction -- excuse me -- and when they sold -- never mind.

Now, are you aware of nineteen -- excuse me -- a 2005, maybe 2006 lawsuit that occurred here in Richland County, called *Wright versus Craft Auto*, that -- that was tried here, involving a twenty-year-old fellow buying his first truck, that wound up being an unsafe, rebuilt, wrecked car?

A. No, I'm not.

Q. Are you aware that there was a punitive deterrent verdict in that case of a fairly sizeable amount?

MR. WALKER: I'm -- your Honor, I'm going to object. That's not relevant to anything.

MR. MOSKOS: Yes, sir. One of the factors that the jury has to consider is the degree of the defendant's awareness, and of the probable consequences of its conduct. The question is, does it know the consequences of its conduct. And in doing that, I need to know what knowledge it had of other deterrent verdicts from other counties. It's completely relevant to how they conduct themselves. If they know about it and they continue to conduct themselves this way, that's wrongful. If they don't know about it, the jury needs to know that, so that the verdict is appropriate, and that dealers like this get the message.

MR. WALKER: Unduly prejudicial by a long shot.

THE COURT: You know, unless it's knowledge that he has and he was involved with it, I'll sustain the objection.

MR. MOSKOS: Well, I'm asking about Midlands Honda in 2010. He's the representative.

MR. WALKER: Then, he can ask him what he knows about other verdicts like this.

THE COURT: Right.

MR. MOSKOS: Okay.

Q. Are you aware of other verdicts in South Carolina, or North Carolina for that matter, -- Well, let's -- let's do it this way. Do you know of any other verdicts in North Carolina involving -- Well, we're dealing with Midlands Honda. I'm going to stick with Midlands Honda. So, Midlands Honda is not in North Carolina. Midlands Honda, does it know of other verdicts? How about one in Manning, South Carolina, where there was a deterrent verdict of fifteen percent of the net worth that would be --

MR. WALKER: Your Honor, I'll object.

MR. MOSKOS: It's all part of what they know. Do they know about these?

THE COURT: I understand that. But first, before you can get into all that, you need to ask him whether he knows about it.

MR. MOSKOS: I'm sorry, your Honor. I didn't understand your direction.

Q. Do you know about any cases in South Carolina where deterrent -- a deterrent verdict was issued, a punitive damages verdict was issued, against a car dealer?

A. I don't. I'm not familiar with the case law, and --

and, you know, cases going on and have gone on. No.

Q. Okay. So, you haven't heard anything in the newspapers about punitive damage verdicts against car dealers in South Carolina? In just the newspapers.

A. No.

Q. How about industry newspapers and publications?

A. Yes.

Q. You have heard about those in South Carolina?

A. Not in South Carolina.

Q. That's what I'm talking about, South Carolina. Have you heard about any in South Carolina?

A. No. And how about at these retreats that you go to, does anybody talk about the punitive damage verdicts in South Carolina?

A. Not in South Carolina.

MR. MOSKOS: Your Honor, I apologize, I only have one copy of my next exhibit.

THE COURT: All right. Show it to Defense Counsel.

MR. WALKER: And your Honor, may we approach the Bench?

THE COURT: Yes, sir.

(BENCH CONFERENCE HELD OFF THE RECORD, OUT OF HEARING OF THE JURY AT 09:33 AM.)

THE COURT: Mr. Moscow, I'll sustain the objection.

MR. MOSKOS: Yes, sir. Let me do that. Let me just mark this for identification purposes as, I guess, Ninety-six.

(WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER NINETY-SIX, PREMARKED FOR IDENTIFICATION.)

MR. MOSKOS: Thank you.

Q. All right. Mr. Nalewaja, I'm going to hand you what's been marked as Plaintiff's Exhibit Number Ninety-six for identification. And I apologize, I don't have another copy, so I may have to come up there in a second. Can you tell us -- Well, you were the general manager at the dealership last year, right? 2015?

A. Yes.

Q. And that document that I've handed you is a financial statement that was run on January -- or in January 2016, January 11, 2016?

A. Yes.

Q. And the -- that contains information about everything that the dealership did last year, right? Well, a lot of information about the financial aspects of the company, right?

A. Yes.

Q. And that document is required to be sent to Honda ever year, correct?

A. Yes.

Q. And that's part of your franchise agreement, that they get to know what you're doing, to make sure that you're not hurting their brand?

A. Yes.

Q. And can you -- would you please tell us, in 2016 what was the revenue of Midlands Honda?

A. 2015?

Q. Well, it's 2015?

A. It's for --

Q. That's for 2015, right?

A. Yes. This is printed on 2016, but it's for 2015.

Q. My apologies. You're absolutely right. What were the revenues at Midlands Honda for 2015?

A. Two -- two point three eight one.

Q. Is that million?

A. Yes.

Q. Two million -- what was it?

A. Three hundred and eighty-one thousand.

Q. Just even?

A. Yes. No. Eighty -- sorry, it's really fine print.

Q. Sure.

A. Normally not this. Two, three, eight, one, eight, eight, eight.

Q. Okay. Two million, three hundred and eighty-one thousand, eight hundred and eighty-eight dollars. That was revenue, right?

A. Correct.

Q. And you understand the net worth is if you took everything that the company owned and sold it, and paid off all the bills, all the debt, all responsibility, what you have left in cash is the net worth, correct?

A. I think you're referring to the effective net worth.

Q. No, sir. I'm talking about net worth. Isn't that right? If you sold -- Let's just talk about the general concept of net worth for a second. Mr. Nalewaja.

A. Yes.

Q. I'm not talking about the paper. What I'm saying is, in order to determine net worth, you take all of your liabilities, and then you take all of your assets, you sell your assets, convert it to cash, pay off all the expenses, all the assets, and at the end of the day what you have left is your net worth. Do I have the concept right?

A. I think the concept is right, yes.

Q. Okay. And can you tell us, based on the document in front of you, Ninety-six, what the net worth is as listed with Honda?

A. Not with certainty, because I'm not sure if it's the effective net worth or the net worth total.

Q. Well, wouldn't it be the net worth total? I mean, let -- well, let me help you out.

A. Sure.

Q. Excuse me one second. Where it says total net worth, what is that number right there, right in the middle there?
A. That number on line sixty-eight is Ten million, nine sixty-nine, three eighteen.
Q. So, at the beginning of this year, Midlands Honda sent the information to Honda, corporate, and said you all are worth Ten million, nine hundred and sixty-nine thousand, three hundred eighteen dollars. Is that true?
A. Yes.
MR. MOSKOS: I believe I'm finished, your Honor. Thank you, very much.
THE COURT: Okay.

CROSS-EXAMINATION

GREG NALEWAJA BY MR. WALKER:
Q. Mr. Nalewaja, I -- I don't have a whole lot of questions for you. I need to hand that to you. Since you've been managing the Midlands Honda location, are you aware of any complaints from any purchasers at auction about the condition of the vehicles you've sold?
A. No.
Q. Have you had any complaints from the auction itself about any of your conduct at the auction ---
A. No.
Q. --- since you took over the store?
A. No.

Q. You were talking with Mr. Moskos about duties owed people who buy at the sale. Okay? Do you remember that?
A. Yes.
Q. Now, do your salesmen -- excuse me -- does your used car manager need to follow the rules when he sells car at an auction?
A. Absolutely.
Q. How do you know he's doing that?
A. I've instructed him to.
Q. You were asked about punishing Mr. Ferrell. Do you remember that? When you were talking with Mr. Moskos.
A. Yes.
Q. Mr. Ferrell's testified he left the store in 2011, and this suit was brought in 2013. After this suit was brought in 2013, how could you have punished Mr. Ferrell if you had wanted to?
A. I mean, he wasn't employed there. So, there's really no way to punish him.
Q. I want to talk to you about -- You had this discussion with Mr. Moskos about who made money here.
A. Right.
Q. You with me?
A. Yes.
Q. Could you pull that exhibit back up in front of you? And this is the -- the document that it accounts for the

transaction 2010.

A. Okay.

Q. Do you see that piece of paper?

MR. WALKER: Your Honor, may I approach?

THE COURT: Yes, sir.

MR. WALKER: Just to be sure we're looking at the right thing.

Q. This is Exhibit Ninety-five. And there's some numbers in the left-hand column, right?

A. Yes.

Q. You talked to the jury about a figure of Seven thousand dollars?

A. Yes.

Q. Is it in that column?

A. Yes.

Q. Would you highlight it, please?

(WITNESS COMPLIES.)

Q. Is that -- That was the amount of the value assigned to the vehicle at that time, right?

A. Correct, yes.

Q. Now, do the words dealer cash also appear next to that column?

A. Yes.

Q. Is there a figure called over-allowance?

A. Thirty-six, ninety-two.

Q. What was that?
A. That was the over-allowance. In other words, they -- they gave this gentleman Three thousand, six hundred and ninety-two dollars allowance on this car.
Q. Well, can you -- I couldn't hear.

THE COURT: I'm sorry, can you repeat that, please, sir? Your answer.

A. Thirty-six ninety-two, dealer cash, was added to the seven thousand to give him a trade allowance. In other words, they gave him Ten thousand, six hundred and ninety-two dollars towards this 2000 Honda Accord that he bought.
Q. So, we were down to a figure of Four hundred and twenty-nine dollars and Midlands Honda put how much cash in here?
A. In the transaction they showed him Ten thousand, six hundred and ninety-two -- Oh, you want me to break it down? Seven thousand for the car; Three thousand, six hundred and ninety-two dollars dealer cash, which, you add those together, they gave him Ten thousand, six hundred and ninety-two dollars for that vehicle against this Accord, 2000 Accord.
Q. But before this Three thousand, six hundred and ninety-two dollars in cash, we were plus Four twenty-nine.

Now, we're negative Three thousand, two hundred dollars and change?

A. Yes, sir. Yeah, the dealer cash is lost profit. That's right.

MR. WALKER: I don't have any more questions, Judge. Thank you.

THE COURT: Okay.

MR. MOSKOS: Just a clarification, your Honor, real quick.

REDIRECT EXAMINATION

GREG NALEWAJA BY MR. MOSKOS:

Q. Mr. Nalewaja, let's talk about that document that you just marked on right there. Okay? On the left-hand side of the page, down at the bottom, the way this works is, you've got the price of the vehicle, the cost of the vehicle, trade allowance, ACV, over-allowance, a bunch of other things. And you add in certain expenses, and you subtract -- or you add in things, and you subtract things, and at the end of the document you come up with your profit or loss, right?

A. Yeah, but that doesn't include the dealer cash amount.

Q. Well, you've got profit of sale at the bottom. Okay? So, if you're adding, subtracting, adding, subtracting, whatever you're doing with the numbers above, it always comes out to the bottom line of profit of sale, right?

A. If they're losing Twelve hundred and thirty-seven dollars like that sale, that's including giving him Thirty-six, ninety-two in dealer cash.

Q. Right. Oh, I agree with you. The number you talked about is in that. The number is in -- but it's -- but unlike what Mr. Walker -- what Mr. Walker is saying is this Thirty-six, ninety-two is in addition to the Nine thirty-seven.

A. It is, because they gave him Ten thousand, six hundred and ninety-two for his trade-in.

Q. But you've got gross profit over here. The document's not right?

A. The gross profit doesn't include the Thirty-six, ninety-two. That's dealer cash. That's not a customer rebate.

Q. So, -- So, when y'all do your numbers, y'all don't include certain numbers?

A. Well, dealer cash is not a customer rebate. It's dealer cash on a car and it's -- It's an incentive. All manufacturers do that if you have an excess of cars, or it's a clearance sale, or whatever. They'll give them additional support.

Q. Well, my question is this. My experience has been, dealers are very conscious of the numbers that are going on at their dealership. True?

A. Yes.

Q. And you have to be, because you've got a bunch of numbers, and you have to be paying attention to them very closely. So, this bottom-line number, right here, where it says profit of sale ---

A. Negative twelve --

Q. --- takes into consideration the Thirty-six, ninety-two, right?

A. It does not.

Q. It does not?

A. It does not.

Q. And that's the only place it shows up in this document, is where everything is added up and subtracted. Isn't that right?

A. No. That number does not include the Thirty-six, ninety-two. That is dealer cash.

Q. Right, right.

A. They gave that dealer cash to this customer at ten thousand -- they gave him Ten thousand, six hundred and ninety-two for his car. That's seven thousand in cash, thirty-six in the dealer cash. They combined it, and gave Mr. Ecklund that amount of money against that car.

Q. Right. And what they had in the car and all the other expenses, they added it all up, and when it was all finished washing, you lost Nine hundred and thirty-seven dollars and fifty-eight cents.

A. Plus the dealer cash, Thirty-six, ninety-two.

Q. And that's not listed on the right-hand side of the page, is it?
A. No. Because it's not considered a profit. It is directly -- Salesmen are paid a gross profit. That's dealer cash. That's different.
Q. Is it on the right-hand side of the page?
A. It's not included in that loss.
Q. Is it on the right-hand side of the page?
A. That's gross profit on -- Okay. It is -- The total loss -- If you're asking me if nine thirty-seven is a gross profit on that type, yes. But, it's not including Thirty-six ninety-two.
Q. What I'm asking you is, is Three thousand, six hundred and ninety-two on the right-hand side of the page?
A. It is not in that Nine thirty-seven loss. No.
Q. Is it -- Is the number on the right-hand side of the page?
A. Is what number on the right-hand side of the page?
Q. Is Three thousand, six hundred and ninety-two on the right-hand side of the page?
A. Nine thirty-seven does not contain the Three six, ninety-two.
Q. Is the number three hundred -- Three thousand, six hundred and ninety-two, on the right-hand side of the page?
A. The number's not typed on there, no.

MR. MOSKOS: No further questions, your Honor.

THE COURT: Okay. You can step down. You can step down, sir. I'm sorry.

(WITNESS LEAVES WITNESS STAND.)

MR. MOSKOS: That's all I have, your Honor.

THE COURT: Okay. Do you have anything?

MR. WALKER: No, sir.

THE COURT: Okay. Anybody need a break? You all ready to go into closing arguments?

MADAM FOREPERSON: Yes.

THE COURT: All right.

CLOSING ARGUMENTS AS TO PUNITIVE DAMAGES BY MR. MOSKOS:

MR. MOSKOS: Why we're here today is because you have already found that Midlands Honda intentionally misrepresented this car. That they knew it was dangerous, that it should not be operated on the road.

The law, for hundreds of years, have always had two kinds of damage. One is compensatory, the other is deterrent, and the deterrent is not simply to deal with the defendant alone. The deterrent is also for others.

Your verdict yesterday was well thought out, it was well-deliberated. It was fair, it was just. But today, we're here to talk about the punitive deterrent damages.

Now, you've heard the evidence, and you've seen some new stuff that you weren't entitled to know about until today. Now, you have to determine what amount is necessary to punish and what amount is necessary to deter this type of conduct. Throughout the trial, the defendant has denied some things. They blamed others. They haven't really accepted any responsibility, or accountability for that -- for what they did.

Now, let's see if they will. Since the beginning, they haven't taken this case very seriously. Now, what amount of money would it take to send a message to these folks that you all will not tolerate, that we won't tolerate, this kind of conduct? In order for that to work, in order for a deterrent amount to work, it has to be big enough, and that means each and every one of you have the power to right the wrong, and ensure that it doesn't happen again. This is the one and only time to do it. There's not going to be another jury that comes in, gets assembled, and hears this case. You all are it. You all are law enforcement today. You all enforce the laws of South Carolina.

The verdict, this verdict, although it is meant to punish the defendant, it's also meant to deter others. And this type of conduct, if your verdict is enough, it will be heard across the state, and others will act to prevent this kind of thing. Remember, conduct rewarded is conduct repeated. Make our communities safer. Take your time. I know you didn't expect to be here today, but we are here. Please take your time.

A just assessment of punitive deterrent damages is an expression of its moral condemnation. This isn't about Roger any more. He's done. You all dealt with him yesterday with your verdicts. What we're doing now is dealing with our community. You have the opportunity to make our community safer. And if you don't speak loud enough, other jurors will have to sit in that box and hear more of these kinds of cases, until Midlands and other car dealerships get the message that they can't be doing this kind of thing.

And if it -- if your verdict is anything less than the full measure of justice, you will fail to change the way Midlands Honda does business, or any other dealership in South Carolina. Instead, what they'll do is, they'll say -- They'll go outside and high-five each other and say, now we know what the cost of business is, factor it in. Business as usual. And if you deny a substantial verdict, I deserve the blame, because I haven't done my job well enough.

Now, this is just the tip of the iceberg, what we've heard. And I want to help you do your job, the job that you're here to do, so that you can give effect to the intention of the laws of South Carolina and North Carolina. And if we fail here, all that we've done, all the work that you have put in, will be wasted.

Now, Wednesday night I left this courtroom, and I was -- I all of the sudden realized I was pretty upset. I was frustrated, I was pretty angry. And I've thought about that and it occurred to me that, as I was asking Mr. Threatt and Mr. Ferrell questions, I was thinking about my children. I've got a fifteen-year-old who is now learning to drive, and it's an interesting experience going to school. And I started thinking about, what happens when he gets to drive, and if he gets a car, and it's -- and it's one of these. Or maybe he has friends with him and they're driving down the road --

MR. WALKER: Your Honor, I'm going to object. There's no personal injury in this case. This is a business dispute between the two car dealers.

MR. MOSKOS: The impact on the public, your Honor. I get to talk about it. It's part of the case. It's the- it's the affect that this can have on people.

THE COURT: All right. Go ahead.

MR. MOSKOS: Thank you. And all kinds of things can happen on the road. You know that. You can get in an accident, take your eyes of the road, deer run out in front of you and run off the road and hit a tree. What happens if the welds just give out? You hit a bump too hard. And he's -- But I think about my son, and he's with his friends, and what if somebody's in the back seat of this car? All of the sudden, they're on the road. And I think about, what if I'm the person behind this car? And all of the sudden, the car in front of me breaks in half, and people are spilling out onto the street, what am I going to do? I'm going to slam on my brakes as hard as I can. Well, now I've got the guy behind me about to hit me; or maybe I swerve, but I hit the person next to me. God forbid, I run over one of those children.

And I think about the people on the side of the road, whether a bicyclist or a motorcyclist or somebody just walking, and they get hit by a tire flying. And then, I think about my son. I get a call, and I go the scene, and I see what I did, because I got the car. I got the car. And there are all of these people who are hurt because I bought this car. And I think -- I don't know that I could stand that.

Now, my dad passed away a long time ago. I would give anything, all my money, for another day with him. I would give even more to protect my children. But they didn't seem to care about that.

Ladies and gentlemen, the DOT, right now, is running an amazing ad. It's called Target Zero. Maybe its running up here; it's running in the low Country. And they go around, and they ask people questions, and the ad I saw had four questions. How many traffic fatalities do you think there were in the U.S. last year? What is a reasonable goal for reducing traffic fatalities in South Carolina? What is a reasonable goal for traffic fatalities in your family? Should we have the same goals for our state as we do for our family?

Now, ladies and gentlemen, the judge is going to read you some more jury instructions, and I want to go over those with you real quick. First, North Carolina has stated a purpose for punitive deterrent damages, and that is to punish a defendant for egregiously wrongful acts, and to deter the defendant, and others, from committing similar wrongful acts. Okay. That's the purpose.

And in discussing this matter when you all go back, you have, I believe, it's nine things that you can consider. Only nine. If it's not listed on these -- in these nine items, you can't consider it. It's not allowed. The first thing is the reprehensibility of the defendant's motives and conduct. Motive and conduct. What was the motive here?

Money. Money over safety. Mr. Threatt made that real clear. He got real defensive on me, and he was real clear that it's about the money. And he's not going -- it doesn't make any sense to spend money on an inspection when you're going to get rid of the car. Those were his words. And Mr. Ferrell didn't care about the cars and what happened 'em. They're just a bunch of metal to him. That's money.

But remember the conduct. Mr. Threatt was in control. He was the general manager. He dealt with Mr. Ecklund. He told Mr. Ferrell what to do. Mr. Ferrell was a used car manager. He knew what the rules were. Those guys have been in the business a long time, and they knew what was going on, and they knew what their responsibilities were. They were just simply totally indifferent to the needs of the people of our state. And that's clear, because I asked them, I said, did you think about what was going to happen with these cars? No, we just get rid of them. We just sell them. That's not our problem, that's the buyer's problem.

Now, the interesting thing is Midlands had three opportunities to deal with this. Mr. Ferrell could have told the auction about the announcements, or made the announcements. Hey, tell them this is a clipped car so they know. Didn't do that. Roger went to them to buy the car after it came off the block. They had another opportunity when the auction called. He could have said, oh, yeah, that's the -- that's the one that's been wrecked and rebuilt, make sure to tell them. Strike number two.

And then, Roger called them. Give me my money back, give me my Fifty-two hundred dollars and we're done. And they didn't. Strike number three.

The second thing, the second factor, is the likelihood at the relevant time of serious harm. The likelihood at the relevant time of serious harm. Mr. Allen got up here, and he did a marvelous job. He explained it very well. Okay. A lot of -- a lot of mechanics tend to get all caught up in the jargon, and I thought he did an outstanding job of explaining how the structural components had been modified from what the Honda engineers, who spent millions of dollars, trying to figure out.

In fact, some of it was so bad, the pieces of metal weren't even touching. The likelihood of serious harm is huge with this vehicle. It's dangerous to the occupants, of the drivers on the road, and it could be dangerous to pedestrians.

The third item is the degree of the defendant's awareness, and of the probable consequences of its conduct. Okay. Now, that's a -- there's a couple things in here that you need to consider. One is the probable consequences. I asked all those guys, what do you think's going to happen with all those cars? We don't know, we don't care. But all it takes is five seconds to know if you put a dangerous car out on the road somebody could get hurt. It's real simple, but they didn't think about it. And the other side of it is, what if we do sell this? What are the consequences to us? Midlands Honda doesn't even know. Hadn't even registered to them. They don't know what the consequences are.

To them, the consequences of putting this car out on the road is a profit. They're not aware of any other lawsuits in the State of South Carolina that dealt with deterrent awards. They're not getting the message.

The duration of the defendant's conduct. Now, a couple days ago, when they weren't too worried about this, all of them, I called everyone who was involved said, this is the way we do it. This is the way business is done in the automotive industry. You get the car, you're not going to sell it on the lot, you send it to the auction, and you sell it, and you move on. They all said it. They were proud of saying it, too.

But now, oh, well, you know, now they show up and they got to your verdict, it's well, you know, we don't want to do that kind of thing any more.

The duration of the defendant's conduct I think also includes where they're selling the cars. Now, they were selling them up at the auction in North Carolina, which has *North Carolina's Damage Disclosure Act*. That's great.

South Carolina doesn't have that. So, where were they selling cars, at least until a short time ago? South Carolina. Don't have to tell. We don't know what the auction rules are, but if it's as Mr. Ferrell expected, there's no requirement to tell anybody. You sell it at a red light, it's gone. It's the buyer's problem.

Now, they say they've gone back to North Carolina, and then Mr. Nalewaja the other day said, well, we sell all over the place. So, there's no telling what's happening at those other auctions.

The actual damages, you all know what that is. You all dealt with that yesterday. Any concealment by the defendant of the facts or consequences of their conduct. Did they conceal what they were doing? I'm sure Mr. Walker will say absolutely not. In fact, here's the note. If we wanted to get rid of the evidence, we would have destroyed this note. Maybe. On the other hand I think just the opposite is true.

They came in here, and they were very proud of the way they handled this matter, Mr. Ferrell, Mr. Threatt, this is the way we do it. We did everything right, did it the way we should. That was Mr. Nalewaja's testimony, too, 'til he started hearing about all the bad things that were going on. Which, again, shows that they didn't take this very seriously, because it's been going on since 2013. And you heard him today, he said, oh, well, now that I've heard all the evidence and all the information, now, I guess, yeah, we did something wrong.

The existence and frequency of any similar past conduct by the defendant. The existence and frequency of any similar past conduct by the defendant. Mr. Ferrell testified the other day that he was selling them when he was there, over two thousand cars a year. How many were trade-ins? I don't know. But you know lots of people trade in their cars, whether it's five hundred or a thousand, and they do it every year.

Some of them they send to the green-light sale, some of them they send to the red-light sale. But they do it, and they do it a lot. And they all know that the cars have been in accidents. We all get in accidents. They've got repair shops and everything, and they're in the business. They know.

The next item is whether the defendant profited from the conduct. Did the defendant profit from the conduct? You'll have the dealer recap sheets, and you look at the profit, right there, on the right-hand side of the page. And when you add it all up, frankly, it looks like you get Seventy-four hundred dollars. Mr. Nalewaja says oh, well, we had seven thousand we got to deal with too. Four hundred and twenty-nine dollars. They didn't lose any money. They still made money. May not have been as much as they wanted, but they made money, which is what Mr. Threatt and Mr. Ferrell wanted to do. And Midlands Honda, for that matter.

And the last item that you can consider, the revenues and the net worth. Two point three million dollars last year, net worth. If that company were to go out of business, the owner said hey, we're tired, we're not going to do this any more, we're going to sell everything off, pay off all of our bills, they would still split Ten million, nine hundred and sixty-nine thousand, three hundred and eighteen dollars. Almost Eleven million dollars.

Now, ladies and gentlemen, a corporation is a piece of paper. Doesn't have a conscience, doesn't have a heart, doesn't have a soul. But it can feel pain. But there's only one place that it feels pain, and that's in the wallet. You've got to get these guys' attention, because money is the only thing that they understand.

Now, the question is, how do you come up with a number? What's sufficient? What's okay? Now, I want you to understand, we are not asking you to put them out of business. That is not the purpose of today. We are trying to change conduct. We are trying to deter conduct. So, the question becomes, how much is enough? I would urge you to consider between fifteen and twenty-five percent of ten million or eleven million dollars. Fifteen percent to twenty-five percent. That's one point five to two point seven five million dollars.

Now, that's going to get somebody's attention, and hopefully it will be in the newspapers. Hopefully, when these fellows go to retreats, they'll talk about it. And hopefully, other dealers will hear about it. I can guarantee you they're going to hear about it. This is not a vacuum. When we walk out of here, these fellows are going to talk. The people in the courthouse are going to talk, and it's going to get out what you all did. So, you all have a choice.

Here's your Sixty-six hundred dollars, Mr. Whitley. We think it's okay. Or Midlands Honda, the rest of you guys, knock it off. Do the right thing by the people of South Carolina. And if you'll remember one thing, remember this. A hundred years from now, it's not -- it's not going to matter what my bank account was; the sort of house I lived in, what kind of car I drove. But the world may be a different place because I was important in the life of a child. You can be important in the lives of the children of South Carolina and North Carolina, through your verdict today. Thank you very much.

<u>CLOSING ARGUMENT AS TO PUNITIVE DAMAGES BY MR. WALKER:</u>

MR. WALKER: Thank you, Judge.

Before I talk about the facts and the circumstances, I need to share one thing the judge is going to tell you. This is a different piece of the trial, because there is a different rule, a different standard. And yesterday, Mr. Moskos stood up here and explained that the burden of proof was a preponderance of the evidence, and then you balance the evidence. And if it was slightly in favor of the plaintiff, as you determined, that was your verdict.

Today we have a very different rule and it's specifically applies to this fraud claim. And before you can award any punitive damages today, you have to decide that the proof of fraud was more than this preponderance. You have to decide -- it's -- the judge is going to tell you it's called clear and convincing evidence. And he's going to explain that to you, and he's going to explain that it has to be stronger evidence than this preponderance.

Now, I don't know exactly what words he's going to use, but he's going to tell you they're going to have to do more than establish liability, like they did yesterday. It's got to be clearer, stronger, and more convincing for you.

Now, I want to talk very briefly about some of the facts and circumstances here. I think, first of all, it's clear we're here about one sale six years ago. Six years ago. And it was a sale where two people participated in it that haven't worked for Midlands in five years. Those people are gone from Midlands. You've seen Mr. Nalewaja. He didn't show up in shorts and flip-flops, and he sat here today and told you we make sure our used car people know the rules. That's what we're supposed to do. We're here because Mr. Ferrell didn't know the rules. So, we've done what we're supposed to do to try to remedy that problem, be sure our people know. So, in terms of duration and future conduct, we've done what we can do to solve that problem within our walls.

This was the sale of a six-thousand-dollar car; about concealing facts. I'm absolutely gonna tell you -- and you saw the note -- that wasn't very pretty for us, that got produced. The documents that Mr. Nalewaja was questioned about today involving finances, this has been a pretty open book, so, there's nothing been concealed.

Mr. Moskos has obviously been very thorough. He's turned over every rock. He's got the auction guy and put up all this testimony for y'all. If there was any other time where Midlands had had this problem with anybody, he would have found it, and you haven't heard about that. This is an isolated event from six years ago. Talking about his expert, he came here and explained about the repairs to the vehicle. That guy said years and years ago, people would put these cars together, but they don't do it any more. This is a rare situation. That's from his own witness, who said this happened years ago. It doesn't happen now, for the reasons he explained. So, it's not like you've got to take a stand to prevent that from happening again. His own people say it's rare; it doesn't. So, this is a one-time thing. It was done by people who were here five years ago. They're not with us now.

Fortunately, I understand why Mr. Moskos wants to talk about somebody getting hurt, but nobody got physically hurt, which would be awful. But physically, nobody got hurt in this case. They're not going to get hurt. The car's off the road. We are -- Even before Mr. Nalewaja got involved and Mr. Ecklund brought the car back and they traded him out, I'm -- I'm not great with numbers, but I do understand the words dealer cash and three thousand dollars. And the company put three thousand dollars of its money in there, in addition to this other stuff, to make this go away. So, they lost a hunk of money.

But that's in my view not really the most important thing. The most important thing is, this was a one-time event six years ago, by people who haven't worked there since 2011. And we've got new leadership. Mr. Nalewaja's been there awhile. If there had been any problems out there these people they looked everywhere; they told you all about 'em and done it. So, two things. You all -- We don't know what happened while you all are talking; but you all focused on this fraud thing and now you are right back focused on it again. This balancing, if it's -- this time if it's been in their favor that is not the rule any more. You got to be firmly convinced by clear evidence that fraud was perpetrated by these people six years ago who don't work for us anymore. And I would submit to you, it's a lot closer than that, and we've done what we ought to do to be sure our people know the rules. It's all we can do.

So, we've taken the steps we need to take. Those people don't work for us any more. I don't think there's fraud by clear and convincing evidence. I respect your verdict, but you all struggled with it, and I understand that. So, I'm not going to suggest any numbers to you. I'm going to just tell you, if you think it's clear and convincing, y'all do what's fair to deal with the Fifty-two hundred dollar sale six years ago by people who aren't with us any more. And I'm grateful for your time, and so is Mr. Nalewaja.

MR. MOSKOS: Nothing further, your Honor.

THE COURT: Okay. Will you take that down?

<u>CHARGE TO THE JURY AS TO PUNITIVE DAMAGES:</u>

THE COURT: Okay, ladies and gentlemen, I'm gonna charge you on the law. It will not be near as long as yesterday.

To prove -- I mean, to recover punitive damages, the plaintiff must prove the existence of fraud by clear and convincing evidence. Clear and convincing evidence means evidence that is clearer, stronger, more cogengent -- cogent, I'm sorry, more cogent and convincing in its character or weight than the greater weight or preponderance of the evidence. Stated differently, Plaintiffs must show more to recover punitive damages than they were required to establish liability for compensatory or actual damages.

Further, to award punitive damages, it's a matter within the sound discretion of the jury. Punitive damages are not awarded for the purpose of compensating the plaintiff for damage, nor are they awarded as a matter of right. If you decide, in your discretion, to award punitive damages, any amount you award must bear a rational relationship to the sum reasonably needed to punish the defendant for any egregiously wrongful acts committed against the plaintiffs, or plaintiff; and to deter the defendant and others from committing similar wrongful acts.

In making this decision, you may consider only the evidence which relates to these nine factors Number one: The reprehensibility of the defendant's motives and conduct.

Number two: A likelihood at the relevant time of serious harm to the plaintiff or others similarly situated.

Number three: The degree of the defendant's awareness of the probable consequences of its conduct.

Number four: The duration of the defendant's conduct.

Number five: The actual damages suffered by the plaintiff.

Number six: Any concealment by the defendant of the facts or consequences of its conduct.

Number seven: The existence and frequency of any similar past conduct by the defendant.

Number eight: Whether the defendant profited by the conduct.

And number nine: The defendant's ability to pay punitive damages, as evidenced by his revenue or its revenues or net worth.

Finally, if you determine, in your discretion, to award punitive damages, you may then award to the plaintiff an amount which bears a rational relationship to the sum reasonably needed to punish the defendant for an egregiously wrongful act, and to deter the defendant and others from committing similar wrongful acts.

And Madam Foreman, if you determine or you decide to award punitive damages in this case, you will simply write down the amount on this new verdict form that I'm going to be giving you. If, on the other hand, you determine, in your discretion, not to award the plaintiff any punitive damages, you're simply to write the word none in this blank. Okay? And this verdict, as the other verdict, must be unanimous. All twelve of you must agree.

Now, I am going to send you back to the jury room, be sure I've covered everything with the attorneys. If I have, I will send you this verdict form, along with the new evidence that was introduced, and you can begin your deliberations. Just simply knock on the door, and we'll receive your verdict. Okay?

MADAM FOREPERSON: Okay.

(JURY EXITS COURTROOM AT 10:26 AM.)

THE COURT: Any exceptions deletions, happy to hear from you?

MR. MOSKOS: Your Honor, no, sir, I don't have any exceptions. I just want to make sure what we're talking about. Mr. -- I'm assuming you read from Defendant's requests to charge A and B that were given to us today by Mr. Walker.

THE COURT: Yes, sir.

MR. MOSKOS: Okay. I just wanted to make sure.

MR. WALKER: B and C, your Honor.

THE COURT: B and C. I'm sorry. C is the clear and convincing. And I -- and you said --

MR. MOSKOS: Right.

THE COURT: And I know from --

MR. MOSKOS: I made a mistake. I'm sorry.

THE COURT: B.

MR. MOSKOS: Right. B and C. I just wanted to make sure that's the ones we're dealing with.

THE COURT: Because I left A out, because you said it was repetitive, and it was. And you all look at the verdict form. You're welcome to but if not if you'll look at the evidence.

MR. MOSKOS: Yes, sir. That's fine with me.

THE COURT: All right, if you'll hand that to the bailiff, along with the evidence, please, sir.

MADAM COURT REPORTER: Judge, does all the evidence go back this time, too?

THE COURT: No.

MADAM COURT REPORTER: Just these?

THE COURT: Just what's was entered.

MADAM COURT REPORTER: Please verify this is what you want -- I'm sorry to interrupt you, sir.

THE COURT: No problem. Just what was introduced today.

MADAM COURT REPORTER: Yes, sir. And here's the one marked for ID. It does not go back.

THE COURT: No, it doesn't go back.

MR. MOSKOS: And that's Ninety-six, right?

MR. WALKER: Just those two?

MADAM COURT REPORTER: Yes.

MR. MOSKOS: Your Honor, he -- well, that's fine.

MR. WALKER: He didn't --

MR. MOSKOS: He talked about this. But that's all right. Well, your Honor, actually, they -- they did talk about -- or Mr. Nalewaja did refer to Exhibit Fifty-five. Can that go back, too? It wasn't introduced today, but he --

MADAM COURT REPORTER: Referenced it.

MR. MOSKOS: It was referenced, yes.

THE COURT: Okay. I mean, what's your position on that?

MR. WALKER: I think just the new documents ought to go, your Honor. It's -- What he's talking about is essentially the bill of sale that was referred to, simply to verify a number.

THE COURT: I mean, they had that yesterday. If they want to see it back, we'll give it to them; but I'd just leave it out, and submit what we --

MR. MOSKOS: Very good, your Honor. Thank you.

THE COURT: Okay.

THE BAILIFF: That's it?

THE COURT: Okay. And you can tell them they can begin, and let us know ---

THE BAILIFF: Yes, your Honor.

THE COURT: --- when they've reached their verdict.

(COURT IN RECESS AT 10:28 am.))

(COURT BACK IN SESSION AT 11:15 AM.)

THE COURT: You can bring them in. I'm sorry.

(JURY RE-ENTERS COURTROOM AT 11:15 AM.)

THE BAILIFF: Jury is seated, your Honor.

THE COURT: Thank you. Madam Foreman, I understand you've reached a verdict?

MADAM FOREPERSON: Yes, sir, we have.

THE COURT: Is it unanimous?

MADAM FOREPERSON: Yes, sir, it is.

THE COURT: Okay. If you will pass it up here, please.

(VERDICT RECEIVED UP BY THE COURT.)

THE COURT: Okay. You may publish the verdict.

MADAM CLERK: In the Court of Common Pleas for the State of South Carolina, in the County of Richland, Civil Action Number 2013-CP-40-0319, in the matter of Daniel O'Shields and Roger W. Whitley, a partnership doing business as O and W Cars, versus Columbia Automotive Company, LLC, doing business as Midlands Honda, punitive damages are found in the amount of Two million, three hundred and eighty-eight thousand, eight hundred and eighty-eight dollars. This is the true verdict of the jury, signed by the forelady.

Madam Forelady, is this your verdict and the verdict of the entire jury?

MADAM FOREPERSON: Yes, it is.

THE COURT: Okay. Anything before I release the jury?

MR. WALKER: No, sir.

MR. MOSKOS: No.

THE COURT: Okay. Ladies and gentlemen, I want to thank y'all. This completes your service for this week. You don't have to do this again for three years.

The Clerk's Office is going to mail you a huge check for your services. And we can't come anywhere close to pay you for what you're worth, because if we did, you couldn't pay your property taxes, so. But I want to thank y'all. You all listened hard, and I understand that this is a difficult case. It was a difficult case for me, because we had to apply North Carolina law, and when I got here Monday I didn't even know North Carolina law. So, but you all were conscientious and paid close attention, and I want to thank you.

I've been telling you all week you couldn't talk about this case. Now, you can talk about it to anybody you want to. You don't have to if you don't want to, but you can go