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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

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

Therese Hood Appellant,

v.

United Services Automobile Association Respondent.

RECORD ON APPEAL – VOLUME 2

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1 **Q Okay.**

2 A Maybe not that long.

3 **Q Who was your manager before her?**

4 A Alisa Sumner.

5 **Q Okay. And do you know --**

6 **What's your actual title now?**

7 A Examiner.

8 **Q Examiner?**

9 A Uh-huh.

10 **Q I know I was messing that up.**

11 **How many examiners does Lisa manage?**

12 A Currently I think she has, I think there
13 are seven of us.

14 **Q Okay. And is that pretty average, the**
15 **examiner team is generally groups of five, seven,**
16 **eight, in that range?**

17 A Yes. I think between seven and eight.
18 That's -- Yes, examiner teams.

19 **Q Who does Lisa report to?**

20 A Crystal McDaniel.

21 **Q What's her -- What is Crystal's title?**

22 A Director.

23 **Q All right. And do you know how long she's**
24 **been director?**

25 A Fifteen plus years --

1 **Q Okay.**

2 **A -- she's been director for.**

3 **Q What do we call a group of managers and**
4 **examiners, like that team?**

5 **A M.S.T., Member Service Team.**

6 **Q Do you know how many Member Service Teams**
7 **Crystal has responsibility for?**

8 **A I do not.**

9 **Q Okay. Is Crystal in your office?**

10 **A She is.**

11 **Q Who does Crystal report to?**

12 **A It just changed. His name --**

13 **Q Who was the last person, if you know?**

14 **A His name is Matt, Matt Smith I believe his**
15 **name is.**

16 **Q Who was before Matt? You said it just**
17 **changed.**

18 **A Carol Witherow, W-I-T-H-E-R-O-W.**

19 **Q What is Matt's title?**

20 **A Executive director.**

21 **Q Is he in your Office?**

22 **A No, he's not.**

23 **Q Is he in Texas? Do you know?**

24 **A No, no. He's not.**

25 **Q Okay.**

1 A Maybe Colorado.

2 **Q Okay. How many directors are in the Tampa**
3 **office?**

4 A Claims' directors?

5 **Q Claims directors.**

6 A I -- injury claims between the two
7 buildings, I'm going to say possibly four to five,
8 but.

9 **Q That's an estimate. We're not going to**
10 **hold you to it.**

11 Have you ever worked on Member Service
12 Teams under any of those directors?

13 A No.

14 **Q Okay. So your director, prior to Crystal,**
15 **left the company or moved on or something?**

16 A Crystal has always been my director for
17 many years.

18 **Q Right.**

19 A And I think when I first got into,
20 promoted to injury, which was a long, long time
21 ago, it wasn't initially her, but --

22 **Q Okay.**

23 A But, again, that was --

24 **Q Pretty quickly thereafter?**

25 A Correct.

1 **Q Okay. Where did you start at the company?**
2 **What was your first position?**

3 A It was called a customer account
4 professional cap, entry level.

5 **Q Okay. Where did you go from there?**

6 A To not handling non-injury claims.

7 **Q What's the -- Can you give me an example**
8 **of a non-injury claim.**

9 A Okay. So a entry-level claim would be
10 no -- one vehicle. You're not really having to
11 make too much of a liability decision when you have
12 two vehicles. No property damage, really,
13 exposure.

14 **Q Right.**

15 A Just comp loss of a collision loss.

16 **Q Okay.**

17 A So when you get to the non-injury level,
18 it's, for the most part, it would -- it could be a
19 one vehicle as well, occasionally. But you're
20 looking at two vehicle accidents where you're
21 having to do an investigation, but there's no
22 injuries related. But you're investigating and
23 you're handling property damage along with the
24 collision piece.

25 **Q Okay. Then from there you went to your**

1 **current position?**

2 A From there I went to injury, which was
3 just minimal soft-tissue type injuries.

4 **Q Okay.**

5 A And then --

6 **Q That's not all of them? I'm kidding.**

7 A No.

8 MR. WHELAN: In some perhaps it is.

9 A Then from there, eventually, I went to --
10 it got to examiner, which is where I am now
11 handling severe injuries.

12 **Q Okay. How is at USAA, how is a severe**
13 **injury claim? How does it meet that cap, or that**
14 **threshold?**

15 A What is considered a severe injury?

16 **Q Right. What's the difference between soft**
17 **tissue and severe, according to USAA?**

18 A We look at it --

19 MR. WHELAN: Object to the form.

20 Go ahead. I'm sorry.

21 A We look at it as with -- Examiners handle
22 surgery cases, death cases, severe scarring,
23 paraquadriplegic, so something with that type of
24 severity.

25 **Q Does it have a, like, a medical special**

1 **dollar amount affixed to it, or is it more**
2 **subjective?**

3 A It's based on the injury itself.

4 **Q Okay. Who decides that, decides how to**
5 **classify or assign a claim?**

6 A The -- it could be the person taking the
7 claim who -- if somebody's calling in and saying,
8 either I'm the one hurt and this is the, this is
9 the severity of my injury, or I've had surgery or
10 this is what's happened. Or, this is something
11 happened; I know, I'm aware this has happened to
12 someone else, so they would know it right away.
13 Or, potentially, you know, it changes down the
14 road.

15 So you may -- It could be through life of
16 the claimant. It may get transferred once.
17 Additional information is known, or becomes a more
18 severe injury case at that time, later on down the
19 road.

20 **Q Okay. And when someone just calls in to**
21 **make a claim, who -- where does that call go? I**
22 **mean, I assume, for example, you don't take all**
23 **those calls, right?**

24 A No. So they, when they call in, there is,
25 like, it kind of -- it asked you, it prompts you

1 to, hey, what is your, what type of -- does it
2 involve an injury, the severity. And so sometimes
3 it can be routed to us just like that, and we may
4 pick the call up based on that, what's being told.

5 **Q Automated?**

6 A Correct. And sometimes it can be, if it's
7 overnight or something, later hours, we have a
8 company -- or within USAA that's kind of our
9 reporting unit that may take it in and just assign
10 it, based on what they're being told.

11 **Q Okay.**

12 A Now, it could be that they go to the
13 automated system, the person puts in the wrong
14 information and they -- it gets taken. And it just
15 gets assigned correctly, based on the person that's
16 keying it in, because they find out, oh, it's worse
17 than we thought that we have here. So multiple
18 different ways.

19 **Q If a claim ends up being -- comes to you,**
20 **for example, and you say this is not a severe**
21 **claim, how does it get kicked back down?**

22 A That doesn't.

23 **Q It doesn't. Do you --**

24 A I would just keep it.

25 **Q Okay.**

1 A For customer service.

2 **Q Okay. That's good.**

3 **The lower -- What's under examiner again?**

4 A It's Adjuster-I is under.

5 **Q Adjuster-I.**

6 **Okay. So for Adjuster-I, if they get a**
7 **claim and then they say, no, this is a, this is**
8 **more severe than was reported, how do they kick it**
9 **up?**

10 A Depending on when they find it out. They
11 can go through their manager or they can just
12 transfer it themselves.

13 **Q Just by changing it in the system?**

14 A We have -- There's a way that you can, say
15 reassign claim, reassign claim. And it prompts you
16 to examiner.

17 **Q All right. Are you able to see on the**
18 **software all of the claims in your Management**
19 **Service Team?**

20 A I am not, no.

21 **Q Okay. Are you only able to see claims**
22 **that are officially assigned to you, or are you**
23 **able to see claims in addition to that?**

24 A Let me -- Can you clarify. Do you mean
25 like what's, what I'm currently handling, am I the

1 only one that can see what I'm currently handling?

2 Is that what you mean?

3 **Q No, no. Are you able to see claims in**
4 **addition to what you're currently handling, is what**
5 **I'm asking?**

6 A If I was to -- If I needed to go into
7 someone else's pending?

8 **Q Right.**

9 A Then, yes, I can. But I would have to go
10 in, literally, go into that. So --

11 **Q Right.**

12 A -- I think I might have misunderstood your
13 previous question.

14 **Q No. I think we're on the same page.**

15 A Because I had said before that I couldn't
16 see, so maybe --

17 **Q No. And I'm not trying to trick you.**

18 A Okay.

19 **Q I mean, I understand -- Correct me if I'm**
20 **wrong.**

21 When you sit down, you call up your
22 computer, you call up the software. What you
23 initially have on there are just your claims --

24 A Correct.

25 **Q -- correct?**

1 A Yes.

2 Q But you are able to, through the software,
3 go and see someone else's pending claims?

4 A If I change the information, yes.

5 Q Yes. And when you say change the
6 information, you just mean there's a way, I assume,
7 to change it from seeing your pending to seeing
8 John Smith's pending?

9 A Correct.

10 Q Okay. And is that a company-wide process?
11 In other words, you can see pending claims that are
12 not part of your M.S.T., if you change the
13 information?

14 MR. WHELAN: Object to form.

15 A I would assume, yes.

16 Q Okay. Not something you do --

17 MR. WHELAN: I'm sorry.

18 When he interrupts her, are you
19 getting the little dash?

20 THE COURT REPORTER: Yes. If I
21 don't, trust me, I will speak up.

22 MR. WHELAN: No --

23 THE COURT REPORTER: But I know what
24 you're saying. Yes. I'm dashing off when
25 she's cutting him off, the same way when

1 he's cutting her off.

2 MR. WHELAN: Okay. Thank you.

3 MR. WILLEY, IV: I'm not trying to do
4 that. Sorry.

5 THE COURT REPORTER: If it's to the
6 point I can't get it, I will let them
7 know.

8 MR. WHELAN: Yeah. I mean, I just
9 want to make -- So she's not done with her
10 answer and then he asks a question, I just
11 want to make sure that's noted.

12 Thank you.

13 MR. WILLEY, IV: He's just trying to
14 make a good record. I'm bad at that,
15 'cause I feel like you've answered and
16 then still want to say something.

17 BY MR. WILLEY, IV:

18 **Q So if I do cut you off and you're not**
19 **done, just say so, okay. I'm not trying to -- It's**
20 **not a strategy to it where I'm trying to cut you**
21 **right there in the middle of the sentence to get**
22 **you to say something that you don't want to say.**

23 **So my understanding is that's not**
24 **something you do on a daily basis, correct, go and**
25 **look at other people's claims?**

1 A No.

2 Q Okay. But you're able to?

3 A Yes.

4 Q Okay. Does USAA, to your understanding,
5 have any sort of ethos or code of ethics, you know,
6 that the company asks employees to abide by?

7 MR. WHELAN: Object to form.

8 A Yes.

9 Q Okay. What is that?

10 A Integrity, honesty. I know they're two
11 more. I'm sorry. Those are the ones I can
12 remember.

13 Q That's okay. If they come back to you at
14 some point, just let me know.

15 A Okay.

16 Q And that's, like I said, I'm not trying to
17 trick you. I'm certainly not going to type up the
18 transcript and say, hey, Missy forgot two of these.

19 Where would you find those? You know, and
20 what I'm asking is, like, some companies put them
21 up on the wall, you know. Sometimes they're on a
22 poster in the bathroom or whatever.

23 A They are, I believe, on one of the walls
24 when you first come in the build -- or like on one
25 hallway.

1 **Q Okay.**

2 **A Loyalty I think is one of them.**

3 **Q Makes sense. Okay.**

4 **Is there, is there a different training**
5 **that you go through for moving into an examiner**
6 **position from an Adjuster-I position?**

7 **A There was some. It's just been a while.**
8 **So there was some form, some form of training as**
9 **some of it was O.J.T., kind of like on-the-job.**
10 **But there was a little bit of both.**

11 **Q Okay. Do you remember what, specifically,**
12 **the additional training consisted of?**

13 **A It had to do with partially homeowner**
14 **liability claims, because that's something totally,**
15 **totally new.**

16 **Q Right.**

17 **A And then just the handling of serious**
18 **injury cases and what you're to do with those when**
19 **that's recognized.**

20 **But that's the -- Mainly, I remember so**
21 **much about the homeowner liability because that was**
22 **something so new.**

23 **Q Right. Does the company give you any kind**
24 **of manual or handbook to outline, you know, how to**
25 **do investigations, how to go through the adjustment**

1 process, how to value a claim, how to negotiate;
2 any of those things?

3 A No, no.

4 Q So when you get the training, when you got
5 training, you just -- How did that happen?

6 A It's, you know, it's been a building --
7 For me, it's been a building process.

8 Q Right.

9 A You know, when you start off handling
10 minor claims, you learn that. And then as you --
11 they become more severe, you learn what those
12 values are. It's a learning process.

13 So I don't -- I don't even remember what,
14 maybe, the initial, what my initial -- what I did
15 initially or what, how --

16 Q Okay.

17 A -- I learned that initially.

18 Q All right.

19 A Obviously, my manager -- That would have
20 been involved with my manager, certainly --

21 Q Okay.

22 A -- at the time back then and moving
23 forward even.

24 Q Okay. Do they give you any kind of like,
25 you know, checklist or outline to follow, you know,

1 **so you don't miss any steps in the process?**

2 A Of investigation?

3 **Q Investigation adjustment. At any time in**
4 **the process, is there any checklist or processes**
5 **outlines; anything like that?**

6 A I'm not aware of that.

7 **Q Okay.**

8 A And I think the job is a building,
9 building block of -- Because the investigation
10 never changes.

11 **Q Right.**

12 A And never has, and not changed since
13 probably the beginning.

14 **Q Okay.**

15 A And everything we just spoke on that, so.
16 You just kind of know and know and know what you
17 know.

18 **Q And, I mean, how -- So how does that start**
19 **initially? Like, does the manager sit with**
20 **somebody for a period of time? I mean, I'm**
21 **assuming USAA doesn't just like, hey, new adjuster,**
22 **here is the phone and a computer; have at it.**

23 A I mean, I don't know so much about the
24 processes now.

25 **Q Okay.**

1 A Just because I don't really see them that
2 much --

3 **Q Right.**

4 A -- for what we do.

5 I know that there was -- I don't
6 necessarily know that it's the manager that has the
7 -- They have, whether it's training classes. They
8 have a way that they come in and learn our systems
9 and the processes. And they go through that before
10 they really hit the floor. So I don't understand,
11 because it's very different than when I first
12 started --

13 **Q Okay.**

14 A -- of how we get -- how they get there.

15 **Q All right. Is there an electronic process**
16 **or checklist that you go through in an**
17 **investigation, negotiations of a claim?**

18 A Again, not -- I'm not, no. I'm not aware
19 of any type of checklist; no, huh-uh.

20 **Q All right. Is there any sort of narrative**
21 **process that you can refer to that provides**
22 **educational and investigation or negotiations of**
23 **claims?**

24 MR. WHELAN: Object to form.

25 A I'm not sure exactly. I know what you're,

1 what you -- I guess what you're looking for what we
2 have available to us.

3 **Q Right. That's what I'm asking, just**
4 **what's available.**

5 A I mean, we have -- our computer -- in our
6 computer system we have what's called K.D.,
7 knowledge delivery --

8 **Q Okay.**

9 A -- that if we have questions, you can --
10 they're relating to anything, whether it's policy,
11 things like that, you can go to that and the
12 information is there.

13 **Q It's like a help guide or --**

14 A Correct.

15 **Q Correct.**

16 **Okay. And that's actually on your**
17 **computer, not in a hard copy?**

18 A Correct.

19 **Q All right. Is there anything else on the**
20 **computer like that that gives any guidance if you**
21 **need it, or is that kind of all encompassing?**

22 A That's all encompassing.

23 **Q Okay. Is there ever -- Have you ever seen**
24 **any kind of best practices circulation -- I will**
25 **give you some examples so you know what I'm talking**

1 about.

2 Some companies, if a particular team comes
3 up with a new best practice for the way they do
4 something, they will circulate that, you know,
5 whether it's through a memo, or once a year they
6 might recognize and implement new policies; things
7 like that.

8 Is there anything at USAA like that, that
9 you're aware of?

10 MR. WHELAN: Object to form.

11 A Not -- I would think that it -- The only
12 thing that I can think of would be the same as in
13 K.D., in the knowledge delivery.

14 Now, if there was some type of changes
15 that were coming for some type of change that was
16 company-wide, then our managers would be
17 communicating that to us, usually. But that's just
18 a verbal communication. And usually we have
19 huddles.

20 Q How often do you all -- That was kind of
21 my next question.

22 How often do you all, as a M.S.T. huddle,
23 you know, get together?

24 A We meet -- We huddle with our managers
25 usually daily.

1 **Q Okay. What types of things, topics, do**
2 **you all discuss at the huddle?**

3 A That can vary.

4 **Q Okay.**

5 A If -- It could just be what I just
6 mentioned, if there was some type of change that
7 came down. It may just be something quick about,
8 you know, what's, you know, what's going, what's
9 the week look like;, you know, things are going on,
10 like that.

11 And usually it's four days a week, not --
12 It's four a week, not five. And, yeah, just if --
13 it's a case-by-case basis, just --

14 **Q Do you all regularly discuss specific**
15 **claims at those huddles?**

16 A No.

17 **Q Okay. Do you ever discuss specific claims**
18 **at those huddles?**

19 A I guess we have. I don't know that it's
20 common practice, but I'm not going to say we
21 haven't; so, yes.

22 **Q Okay.**

23 MR. WHELAN: If you're going to
24 change topics, I need to use the restroom.

25 MR. WILLEY, IV: I'm not, but we can

1 take a break. I assume, whenever. It's
2 not a marathon. Let's break.

3 (Whereupon, a recess was had from
4 2:10 p.m. to 2:17 p.m.)

5 MR. WILLEY, IV: What was my last
6 question?

7 THE COURT REPORTER: You had asked,
8 "Okay. Do you ever discuss specific
9 claims at those huddles?"

10 Her answer: I guess we have. I
11 don't know that it's common practice, but
12 I'm not going to say we haven't; so, yes.

13 BY MR. WILLEY, IV:

14 **Q Okay. Do you ever have meetings or**
15 **huddles with other M.S.T.s, other than your own?**

16 A Have I ever?

17 **Q Right, yes.**

18 A Yes.

19 **Q How often?**

20 A I haven't had any recently, but I have in
21 the past.

22 **Q Okay. For what reasons? Why would that**
23 **happen?**

24 A To meet with -- We don't have examiners in
25 the regular units any longer, because we are --

1 examiners are separated. So it kind of -- The
2 Adjuster-I's, Adjuster-II's lose that piece, you
3 know, ability to, you know, if they have questions
4 or what have you, you know.

5 So I would -- we would, our examiners,
6 maybe would go down to and just offer kind of like
7 a mentoring, like, if you have any questions,
8 something you don't understand; opportunity. So
9 just that, you know.

10 Q How many examiners are there? Do you
11 know?

12 A Oh, I don't. In our total building?

13 Q Yeah.

14 A I mean, I know in my unit, you know --

15 Q Right.

16 A -- like I said, but -- Yeah.

17 Q Okay. When you huddle with other M.S.T.s,
18 do you all ever discuss specific claims?

19 A No, huh-uh.

20 Q You don't, okay.

21 Is there ever any kind of, like,
22 department-wide trainings where everyone gets
23 together and gets trained on a specific topic or
24 subject?

25 A There can be.

1 **Q Okay.**

2 A If there's something new that comes out.

3 **Q And when you say something new that has**
4 **come out, what's an example?**

5 A That probably, like, they're going to be
6 changing the way we handle total losses; so, you
7 know, we're going to be -- we'll be getting
8 together, most likely, with groups of people so
9 they can go over that with us. And that isn't
10 specific to examiners or, you know, that we'll all
11 be doing that. So they will do that.

12 And then we've had another total loss
13 meeting previously, and that was all of us. I'm
14 sure there's other times in the past it's been
15 other things, like, changes that we've made
16 internally that, you know, I just can't think of
17 anything right now.

18 **Q Are you a veteran?**

19 A I'm not.

20 **Q How did you come to work at USAA?**

21 A My dad was in the Navy, but --

22 **Q Okay.**

23 A And my grandfather. But, so I was aware
24 of it through that. But then a friend of mine, you
25 know, she was going to apply there, so I applied

1 too and just -- I don't know.

2 **Q Got the job?**

3 A Yeah.

4 **Q She get the job?**

5 A She got a job too.

6 **Q She still there?**

7 A No. She's a stay-at-home mom.

8 **Q Okay.**

9 A So.

10 **Q Good. That's the harder job.**

11 A Exactly.

12 **Q What did you do before you went to work at**
13 **USAA? You were in middle school or something?**

14 A Yes, I was. I was just a young child. I
15 was a pharmacy tech --

16 **Q Oh, okay.**

17 A -- with the same girl I said that we both
18 left the same place to come there.

19 **Q Okay. Interesting.**

20 **And are you from Tampa?**

21 A I'm from Land O' Lakes, which is just
22 north of here.

23 **Q Okay. Do you have, do you have any family**
24 **in South Carolina?**

25 A I do not.

1 **Q** What about know anybody in Charleston
2 County, South Carolina? Do you know anybody?

3 A Friends?

4 **Q** Friends.

5 A No.

6 **Q** No, okay.

7 With your auto claims, what percentage of
8 those claims are underinsured motorist claims?

9 A I don't -- I couldn't really even tell
10 you. I mean I can give you a guess.

11 **Q** Yeah. Just a guess. I'm not going to
12 hold you to it --

13 A No.

14 **Q** -- and say you can work them all, you
15 know.

16 A Because, obviously, it's just pretty much
17 what I get.

18 **Q** Right.

19 A It's what comes in and what the
20 investigation reveals.

21 **Q** Right.

22 A But I -- I mean, I don't know. Forty
23 percent maybe, maybe.

24 **Q** Okay. And is that pretty typical?

25 MR. WHELAN: Object to form.

1 A Yes.

2 Q Okay.

3 A Uh-huh.

4 Q All right. When a claim comes in, I'd
5 like for you to walk me through the process of what
6 you do. And when I say claim, I'm specifically
7 talking about auto claims in this instance.

8 A So when I get a new claim. When I get the
9 new claim, I -- first thing I look at is where the
10 loss occurred; where the base of the policy is; who
11 was driving the vehicles, as far as our insured's
12 vehicle. Look at the, what kind of coverages we
13 have available, all of them, everything we have.

14 Once I determine that, make contact with
15 the insured, get all my statements from anybody
16 that was -- that vehicle; get a police report, talk
17 to all the parties involved, any witnesses,
18 statements from all of that; photos of the vehicle.

19 Any -- Let me stop there and say that, you
20 know, each claim, again, has to be handled on its
21 own merits. And any investigation is different,
22 based on what -- some need more, some need less.
23 So this is just kind of a, you know, all the
24 possibilities that I may need, you know, maybe have
25 to do a scene investigation.

1 **Q What was that word?**

2 **A Scene --**

3 **Q Scene.**

4 **A -- investigation.**

5 **Q All right.**

6 **A And sometimes it's just based on what**
7 **information is given to us. Because as we learn**
8 **more and get more, maybe that means I need to do a**
9 **little bit more, or find out more things or get**
10 **more information. Just each one, each thing is**
11 **different.**

12 **Q So to back up, how do most claims come to**
13 **you? And what I'm asking is, imagine -- I'm going**
14 **to go on a little narrative for this question,**
15 **okay.**

16 **Imagine I'm coming into USAA tomorrow and**
17 **I'm going to have no access to the K.D., and I'm**
18 **not going to be able to ask anybody questions. I**
19 **need you to tell me everything I need to know in**
20 **order to find my first claim, where it is, how I**
21 **get it and what I do with it to set it up.**

22 **Does that make sense?**

23 **MR. WHELAN: Object to form.**

24 **Q Just those kind of first initial steps,**
25 **where the claim is.**

1 A I mean, it would -- If I'm answering this
2 correctly, and I hope this is what you're asking.
3 If it's -- By getting the claim -- Well, it could
4 be called in, so it's going to be there. It's on
5 the phone.

6 **Q Right.**

7 A So it's going -- I'm going to be keying
8 that whole loss report.

9 **Q So the phone rings, I have the ability on**
10 **my computer to mash a button?**

11 A Yes.

12 **Q All right.**

13 A And then you can enter all the information
14 that's provided to you by whoever is calling in,
15 calling that in --

16 **Q Okay.**

17 A -- and what they have.

18 **Q And that sets up the new claim?**

19 A Correct.

20 **Q Okay. Then what I do? Am I responsible**
21 **as the examiner for figuring out who the witnesses**
22 **are and where it occurred?**

23 A The person that calls it in, if --
24 depending on what they're able to give you, you
25 know. Sometimes depending on who it is that's

1 calling you. Sometimes it's a person involved.
2 Sometimes it's a spouse, parent, child, you know,
3 that doesn't really know a whole lot. So you get
4 as much as you can from that person, which may be
5 the witness.

6 South Carolina, for instance, you have an
7 F.R.-10, so you're going to have some information
8 if they have that.

9 **Q Okay.**

10 A But that's not going to have any witnesses
11 on there, it's just going to have the people
12 involved and maybe the other insurance companies.
13 So we'll go with -- We're dealing with South
14 Carolina. We'll say that.

15 So we'll get what we can from that. And
16 then everything is going to be on me or on the
17 person that's handling the claim to get what we
18 can, either from the person calling. I mean, I
19 will request the police report if they don't have
20 it.

21 **Q Right.**

22 A Which normally they do not, so we
23 typically request that. So, but, again, each thing
24 is different. You know, you're going to be seeing
25 what information as much you can get from the

1 person that's calling it in. And then from there
2 you move forward based on what you get.

3 **Q Right.**

4 A And then the next call would be to our
5 insureds, if that's possible, to maybe get a little
6 bit more information.

7 **Q Okay.**

8 A And we continue to investigate it that
9 way. Maybe there's an attorney calling me.
10 They're the ones that have the information. Maybe
11 there is an attorney that we can call and see if we
12 can get.

13 But, again, each claim is different. So
14 you can't say that each time it's going to
15 necessarily take you in this direction or that
16 direction, because, you know, sometimes a first
17 notice of loss is an attorney rep letter that comes
18 in with, hey, this accident happened. And that's
19 it.

20 **Q Right.**

21 A And now here we are, you know, trying --

22 **Q And they won't take your calls?**

23 A So, you know, so here we are trying to
24 then get ahold of whoever we can. So each claim
25 is, that you get is different.

1 **Q** Okay. Once you get the basic information,
2 the stuff we just talked about, the police report,
3 statements, if you need them from witnesses, any
4 photographs, et cetera, who would make the
5 determination about whether or not to do a scene
6 investigation?

7 **A** Could be the current file -- the person
8 that's handling the claim.

9 **Q** Okay.

10 **A** Maybe they review it with a manager and
11 they, you know, after that discussion they
12 determine that they may need a scene investigation
13 so it could be done.

14 **Q** What's the process for that? Like, you
15 got a wreck in South Carolina --

16 **A** Uh-huh.

17 **Q** -- I assume that they're not saying,
18 Missy, long weekend in Charleston, have fun.

19 How does that, how does somebody get
20 assigned to go do it? Who is that person?

21 **A** Oh, how do we get a scene investigation?

22 **Q** Right.

23 **A** We have outside adjusters that we can
24 hire --

25 **Q** Okay.

1 A -- to go and do those for us.

2 **Q Right.**

3 A So that's typically what we do.

4 **Q Okay.**

5 A And depending on what we need.

6 **Q And is there a list somewhere of those**
7 **that you have access to?**

8 A I believe there might be. I typically use
9 Crawford and Company, just because I've always --
10 I'm not -- There may be other ones --

11 **Q Right.**

12 A -- we can use. That's just the --

13 **Q All right. That's another question.**

14 So lay down the line -- I'm going to skip
15 around a little bit. We're going to come back to
16 this, okay.

17 But when we're deciding which defense
18 counsel to hire, assuming the case is going to go
19 into litigation, is that a decision that you make?

20 A I can, I could, potentially, but not
21 always.

22 **Q All right.**

23 A Depends on -- I mean, typically not. I
24 will say that. But I'm not going to say that I
25 haven't had a defense attorney who I haven't worked

1 with the defense attorneys and assigned something
2 myself for other reasons.

3 **Q Okay. Who typically does that assignment?**

4 A Our litigation department. Once we know
5 there's going to be -- the lawsuit is filed, it
6 usually gets transferred to them and then the -- If
7 for some reason I need to, we need to do something,
8 then they would let us know who to contact.

9 **Q Okay. So once you do the basic, call it**
10 **liability investigation, at what point are reserves**
11 **set on particular coverage?**

12 MR. WHELAN: Object to form.

13 A They should be set when the claim is
14 open -- or when the coverage, I'm sorry, is open.

15 **Q And does the examiner or adjuster set that**
16 **reserve?**

17 A Yes.

18 **Q Does anyone else have input on the amount**
19 **of that reserve, other than the examiner or**
20 **adjuster?**

21 A Typically it is just the adjuster, the
22 person that's handling, that's their
23 responsibility. If for some reason you might have
24 discussed it with your manager, maybe there was a
25 recommend -- you know, there would have been

1 guidance or discussion to increase the reserve or
2 set it higher for some reason.

3 **Q At USAA what is a reserve?**

4 MR. WHELAN: Object to form.

5 A What do we reserve it for, or are you
6 asking what it --

7 **Q What is it? What is it? Like if the jury**
8 **doesn't understand what that term means. At your**
9 **company, what does it mean?**

10 MR. WHELAN: Object to form.

11 A It's what we anticipate -- what we --

12 Based on the information at the time
13 thinking that the claim is valued at, at that given
14 time, or based on the information we've received.

15 **Q Okay. So the reserve is the claim**
16 **valuation as of the moment that it is set --**

17 MR. WHELAN: Object --

18 **Q -- is that an accurate statement?**

19 MR. WHELAN: Object to the form.

20 A Based on the information that we have.

21 **Q Right.**

22 A So we may not -- Obviously, we don't -- we
23 could only know, you know, the information that we
24 have at that time. If somebody calls in and says,
25 oh, yes, the person went to the hospital and they

1 looked okay. And, so you think, okay, well, maybe
2 it's just a treat and release. And then you find
3 out later it's a fracture. Well, obviously, that
4 wouldn't have been an accurate, but we wouldn't
5 have known that. So it's based on the information
6 we have at the time.

7 **Q Okay. So the reserve amount is the claim**
8 **valuation based on the information that the**
9 **examiner or adjuster has at the time that that**
10 **reserve is set?**

11 A Correct.

12 **Q Okay. How would somebody know what amount**
13 **to set a reserve at?**

14 A Based on your experience with settling
15 claims and based on the accurate information you've
16 been given, you know, it's an estimation or
17 guesstimate of what the claim may settle for.

18 **Q Are there any sort of guidelines or**
19 **approximations available in the K.D., or otherwise,**
20 **with respect to setting a reserve?**

21 A As far as? Do you mean like --

22 **Q Like if you have a broken leg, that might**
23 **be estimated at "X"?**

24 A No, huh-uh.

25 **Q Okay.**

1 A Because that would, you know, it's, you
2 know -- No, no.

3 **Q Okay. Just have to know.**

4 A Based on your experience. And, obviously,
5 the amount of coverage available as well.

6 **Q Right. So I guess that's my next**
7 **question.**

8 **You're never going to set a reserve above**
9 **the available coverage, right?**

10 A Correct.

11 **Q And each coverage on a policy gets its own**
12 **reserve, correct?**

13 A Yes. Let me just go back to that.

14 **Q Okay.**

15 A On U.I.M. if you have stacking, obviously,
16 it might show more.

17 **Q Fair enough.**

18 A So --

19 **Q So if you have U.I.M., B.I. and you got**
20 **two policies that's stacked --**

21 A Then it's --

22 **Q -- it could go up to the stackable limit?**

23 A Correct, uh-huh.

24 **Q But you're never going to have liability**
25 **B.I. and U.I.M., B.I. combined on the same reserve;**

1 is that right?

2 A That is correct.

3 Q Do you know why that is, why those
4 coverages are kept separate?

5 A I would only assume it's because they're
6 written separate.

7 Q Okay. Do you ever handle the liability
8 and U.I.M. claims on the same wreck?

9 A Yes.

10 Q Okay. Do you always handle, if you were
11 handling one of the claims, the other claim
12 involving the same wreck?

13 So if you're handling the liability claim
14 and there's a U.I.M. claim made, would you always
15 be assigned that U.I.M. claim?

16 A No.

17 Q Okay.

18 A It depends on the circumstances.

19 Q Right. That's my next question.

20 Tell me the circumstances under which you
21 would not be assigned both claims?

22 A If there was a bodily injury liability
23 claim being made against our named insured, or like
24 driver of our insured vehicle --

25 Q Right.

1 A And then that driver of our insured
2 vehicle was also making a U.I.M. claim.

3 **Q Okay.**

4 A At that point I wouldn't handle both of
5 those.

6 **Q Do you know why?**

7 A It's always -- this is the way it's always
8 been done from my understanding. And this is the
9 way I know it to be is that when you are
10 investigating the claim and you are investigating
11 that somebody's making a liability claim against
12 our insured driver, saying they are responsible for
13 an accident and you are looking at that, you have
14 that person, that set of eyes looking to determine
15 and protect our insured as we need to.

16 And then when our insured is then saying,
17 hey, you know, I was injured in this and I have an
18 underinsured motorist claim and I was not at fault,
19 then we need somebody to investigate that with
20 another set of eyes to determine if there was
21 something owed to the insured as the -- for a
22 coverage that they paid for.

23 **Q Okay.**

24 A So we have two sets of eyes on it, two
25 different sets, if that --

1 **Q** All right. And the person handling the
2 **U.I.M. claim, what are they protecting?**

3 MR. WHELAN: Object to form.

4 **A** Protecting the insured to make sure that
5 we, that we're paying the insured what we owe them,
6 if something is owed to them.

7 **Q** So it's not that individual's job to try
8 to keep the U.I.M. money from the insured; is that
9 fair?

10 **A** Correct.

11 **Q** And it wouldn't be that person's job to
12 try to hide a fact that is known to them in order
13 to keep the U.I.M. money from the insured, correct?

14 **A** Correct.

15 **Q** And if that person did take part in
16 keeping facts hidden from the insured which helped
17 the insured's claim, that person would not be doing
18 their job, would they?

19 **A** If they had hidden facts, no.

20 **Q** Okay. Is it your understanding that it's
21 not USAA goal to prevent their insured from
22 collecting as much of the U.I.M. coverage as
23 possible?

24 MR. WHELAN: Object to the form.

25 **A** You're asking it's not USAA goal to

1 prevent?

2 Q Right. Is it your understanding that USAA
3 does not have the goal of preventing its insured
4 from collecting as much of the U.I.M. coverage as
5 possible?

6 MR. WHELAN: Object to form.

7 A I mean, our goal is to pay what we owe,
8 investigate a claim and pay, you know, what we owe.

9 Q Okay. And what is owed would be
10 determined by the true set of facts and
11 circumstances relative to that particular wreck,
12 correct?

13 MR. WHELAN: Object to the form.

14 A Yes.

15 Q Okay. And if an adjuster at USAA
16 participated in keeping facts hidden in order to
17 not pay an insured what they are owed, that
18 individual would be violating USAA's policies and
19 ethics, correct?

20 MR. WHELAN: Object to the form.

21 A Yes. If that had happened.

22 Q In your position, and I don't want to know
23 the specifics of your salary or anything like that,
24 okay. Be clear on that.

25 Is your -- What is your pay structure? Is

1 **it a salary? Is it hourly? How are you**
2 **compensated in your position?**

3 A I'm hourly.

4 Q And is that true for all examiners, as far
5 as you know?

6 A Yes.

7 Q Okay. Same with adjusters?

8 A Yes.

9 Q All right. And is that hourly rate based
10 on your experience and years of service?

11 A I don't really know that. I mean, I know
12 that there's, in each level, there's a, I guess a
13 rate or range of what you can make.

14 Q Okay. How do you get from one level to
15 the next?

16 A To be -- You have to be promoted.

17 Q Is there a set of written criteria that
18 you have to meet in order to move from one level to
19 the next?

20 A There are some. And then there are some
21 recommendations. Again, it's been so long I
22 couldn't really tell you specifics though. But I
23 know that there are some that are required and some
24 that are recommendations.

25 Q Okay. Where are those written down? Like

1 **if you wanted to go look and see how you could get**
2 **to the next level, where would you go?**

3 A I don't really know. I know that when
4 they post the position --

5 **Q Okay.**

6 A -- you know, like, you know, hey, there's
7 an examiner posting coming. And then it would, I
8 know it would say it then --

9 **Q Okay.**

10 A -- for sure. You know, in order to post
11 you have to have been an Adjuster-I for "X" amount
12 of years and you have to maybe at least have a
13 degree or have something else and it -- you know.

14 **Q Within the examiner position, are there**
15 **different levels?**

16 A No.

17 **Q Okay. So is it your understanding that**
18 **all examiners are paid the same?**

19 A I don't know --

20 **Q Okay.**

21 A -- what anyone else makes.

22 **Q Okay. How long have you been an examiner?**

23 A Since 2012.

24 **Q Okay. And has your pay -- And, again, I**
25 **don't want to know how much or what you make or**

1 anything like that.

2 Has your pay increased during that period
3 of time?

4 A It has.

5 Q Okay. What was that increase or those
6 increases based upon?

7 MR. WHELAN: Object to form.

8 A It can involve projects. It can, you
9 know, furthering your education. And I just
10 think -- That's the best of my memory.

11 Q Okay. What have, in those seven years,
12 have you done to further your education? What are
13 some examples of that?

14 A Taking some, like, continuing education
15 courses, P.L.R.B. courses, but it's not continuing
16 education 'cause it's -- That's all I -- the word I
17 can use. Because it doesn't go toward my,
18 necessarily go toward my licensing. But courses
19 just have to do with, you know, insurance
20 adjusting.

21 Q Where have you taken those courses?

22 A I take them online at home.

23 Q Okay. And when you say involvement in
24 projects, what does that consist of?

25 A I am on a Medicare reporting team where I

1 handle Medicare checks or, you know, checking the
2 portal and getting those things handled.

3 **Q She deserves all the money for that.**
4 **Medicare is a nightmare.**

5 A Mentoring projects. There probably have
6 been other things, but I can't remember.

7 **Q All right. So one of the numbers that you**
8 **called off is you knew how many cases you have**
9 **pending?**

10 A Uh-huh.

11 **Q What other numbers do you keep tabs on --**
12 MR. WHELAN: Object to form.

13 **Q -- related to your work? I'm not --**
14 **I mean, you might know, you know, the**
15 **local --**

16 MR. WHELAN: That might be the
17 weirdest question I've heard.

18 **Q -- baseball team's record or something. I**
19 **don't want to know that. I want to know statistics**
20 **related to your work. Sorry.**

21 A Probably the only other thing I can tell
22 you, is I know average claim volume --

23 **Q Okay.**

24 A -- that I get in a week, but only myself.
25 Because I can only see my own self, so, you know,

1 that's probably about it.

2 Q What is that?

3 A Usually five to seven claims a week.

4 Q Okay. And I guess that's about how many
5 you close out every week to keep it coming?

6 A Try to.

7 Q Okay.

8 A Sometimes more, sometimes less.

9 Q Okay. Are there any tracking mechanisms,
10 in terms of negotiation or settlement of claims
11 below a reserve or within specific ranges or
12 anything like that?

13 A Maybe that someone else can see. We don't
14 see that. We can't see that.

15 Q Okay. Are there any kind of awards or
16 bonus systems, bonus, you know, programs related to
17 claims handling, specifically?

18 A No.

19 Q Okay. Are there any kind of award
20 programs or bonus programs at all for examiners or
21 adjusters?

22 A No.

23 Q Okay. Do you ever have any communication
24 with anyone related to settlement amounts? In
25 other words, the amount that you're settling a

1 particular claim or particular claims for within
2 USAA? I'm not talking about outside attorneys, or
3 the insureds. Obviously, you talk to them about
4 it.

5 But any internal conversations about that
6 that take place?

7 A In what sense, like --

8 Q Well, it's my understanding from what you
9 said that the examiner does the investigation, gets
10 the meds, sets the reserve, does the negotia --
11 handles the negotiations; is that right?

12 A Yes.

13 Q Okay. And so my question is, is there
14 ever any communication, file note, e-mail, meeting,
15 where somebody says, you know, you might have
16 settled that case for a little more than you should
17 have; or, you might have set -- you might have
18 should have set that reserve a little higher to
19 start with, so we know what we're dealing with on
20 the front-end? Anything like that take place from
21 time to time?

22 A There's no discussion, no, about
23 settlement amounts or what we settled anything for
24 after the fact.

25 Q Okay. What, if any, correspondence or

1 **conversations take place on the front-end about**
2 **those topics?**

3 A With?

4 Q **Anyone. So when you set a reserve amount,**
5 **you get a demand letter --**

6 A Uh-huh.

7 Q **-- it says I demand the moon, the sky, the**
8 **stars and the sun for good measure, what happens**
9 **next?**

10 A Demand comes in, should be sending a copy
11 to our insured, copy of the demand letter talking
12 about it. Potentially an access letter either has
13 already been sent; or, if it hasn't, for whatever
14 reason, then you would send it at that point in
15 time.

16 And that would be it. Depending on, you
17 know, where you need to go with it from there.

18 Q **Okay.**

19 A You evaluate it and you go from there.

20 Q **And what does the evaluation process look**
21 **like?**

22 A Just break out the, you know, break down
23 the demand, the medicals; put them in a file and
24 determine the value of it, and then determine if
25 you need to get authority.

1 **Q Do you use a software program in order to**
2 **value claims?**

3 A I do not, no. Within USAA?

4 **Q (Nods head.)**

5 A Yes.

6 **Q Okay.**

7 A Some people could, yes.

8 **Q Who uses the program?**

9 A Depending on the value of the claim, any
10 claim valued -- Well, there's criteria for it.
11 Under twenty-five thousand. As long as they're not
12 treat and release, they would be entered in our
13 colossus system.

14 **Q Okay. And so anything over twenty-five**
15 **thousand does not go into colossus?**

16 A Correct. Or U.I.M. claims.

17 **Q No U.I.M. claims?**

18 A No.

19 **Q No?**

20 A No, no.

21 **Q Do you know why U.I.M. claims do not?**

22 A There's some type of suit.

23 **Q Have you ever had a meeting, or how do you**
24 **know what you know about that?**

25 MR. WHELAN: Object to form.

1 A Just always told.

2 **Q Okay. Just water cooler talk?**

3 A No. Just, we just -- through -- It wasn't
4 a direct communication, like a document, but
5 through manager, verbal.

6 **Q Okay. Just at some point they said, we're**
7 **not doing U.I.M. on colossus anymore?**

8 MR. WHELAN: Object to form.

9 A Correct. And it's probably in our K.D. as
10 well.

11 **Q Okay. So those claims aside.**

12 A Uh-huh.

13 **Q U.I.M. claim comes in, demand is made, you**
14 **set a reserve, right?**

15 THE COURT REPORTER: Yes?

16 **Q Yes?**

17 A Yes.

18 **Q Without communicating with anyone,**
19 **typically?**

20 A Typically, yes.

21 **Q Okay.**

22 A But each case, again, each case on its own
23 merit, so it just depends on the specifics. But
24 once you look at all the information.

25 **Q Typically you set it as the examiner?**

1 A Correct.

2 **Q If you do need to talk to somebody, you**
3 **talk to your manager?**

4 A First.

5 **Q First?**

6 A Yes, uh-huh.

7 **Q Can you give me an example of a situation**
8 **where you would need to talk to your manager before**
9 **doing that?**

10 A Before setting the reserves?

11 **Q Right.**

12 A Maybe if there was some kind of, something
13 in question. A questionable relatedness of the
14 injury or -- Potentially.

15 **Q All right. Where does it go from the**
16 **manager? You said you talk to your manager. Do**
17 **you always get a final decision there?**

18 A Not necessarily.

19 **Q Okay.**

20 A Maybe we then might meet with the
21 director, if needed.

22 **Q Okay. And that's a meeting you would have**
23 **with the director?**

24 A With the manager.

25 **Q Okay. And then the manager would meet**

1 with the director?

2 MR. WHELAN: Object to form.

3 A The three of us.

4 Q The three, okay. That's what I'm trying
5 to get.

6 Some companies are very chain of command
7 oriented. Others are more collaborative. So
8 that's all I'm trying to get at, okay?

9 A (Nods head.)

10 Q Yes?

11 A Yes.

12 MR. WHELAN: Object to form.

13 Q All right. We set a reserve, we have to
14 respond, right?

15 A Yes.

16 Q How do we decide how to respond?

17 A To the demand?

18 Q Right.

19 A If -- Again, case by case.

20 Q Right.

21 A You know, maybe I'm doing it by myself and
22 I can write it up and either it's within my
23 authority, or it's not and I have to get authority,
24 or I maybe need some additional information, so --

25 Q Okay.

1 A -- then I just -- we make the
2 determination of how we're going to respond and
3 then we move forward, or I make that determination.
4 It just depends.

5 **Q Okay. So let's -- The different authority**
6 **levels, what is your authority level?**

7 A Forty-five thousand.

8 **Q Okay. And is that true for all examiners,**
9 **as far as you know?**

10 MR. WHELAN: Object to form.

11 A I don't know what anyone else's authority
12 is.

13 **Q Okay. Has your authority ever changed**
14 **while you've been an examiner?**

15 A Yes.

16 **Q Okay. How often?**

17 A Maybe twice, maybe three times. I can't
18 remember.

19 **Q Okay. What was it last?**

20 A Either thirty or thirty-five.

21 **Q Okay. And do you know what an**
22 **Adjuster-I's authority is?**

23 A I do not.

24 **Q Okay. If you need to offer above forty-**
25 **five thousand dollars on a case, how do you go**

1 **about that? What's the process?**

2 A After I evaluate the claim, the injury,
3 and if I feel that it's worth over forty-five
4 thousand, then I would have to send it to my
5 manager --

6 **Q Okay.**

7 A -- for her to review that. And she would
8 have to agree with that, and put the authority in
9 the file for me to make any offers.

10 **Q Okay. What is the manager able to go to?**

11 A My manager has seventy-five thousand, I
12 believe.

13 **Q Okay. Aggregate? So, in other words,**
14 **another thirty thousand on top of your forty-five?**

15 A Correct.

16 **Q Okay.**

17 A Total per exposure.

18 **Q Exposure.**

19 **So if you and your manager agree that it's**
20 **a hundred-thousand-dollar case, what would happen?**

21 A It would have to go to the director --

22 **Q Okay.**

23 A -- for the authority.

24 **Q Okay. And what is the director's**
25 **authority level?**

1 MR. WHELAN: Object to the form.

2 A I think a hundred.

3 Q Okay. And have you had claims that have
4 resolved above a hundred thousand, you personally?

5 A Have I paid claims over a hundred
6 thousand?

7 Q Yes.

8 A Yes.

9 Q So if everybody agrees, you, your manager,
10 your director, that you need to offer a hundred and
11 fifty thousand on a claim, what happens?

12 A It has to go to the executive director.

13 Q And do you know what -- That's not very
14 good. It's now a guy, it's now --

15 A Matt.

16 Q -- Matt, right. Okay.

17 A Matthew.

18 Q Do you know what Matthew's authority level
19 is?

20 A I'm not sure.

21 Q Okay. And that authority level would
22 apply to reserves and offers, correct?

23 A So that I can understand that the
24 reserve -- I can't reserve a file without his
25 authority?

1 **Q** So let me ask it better.

2 MR. WHELAN: That's a question. For
3 the record, that's a question she's
4 asking.

5 MR. WILLEY, IV: Yeah.

6 **Q** Let me ask -- That's a question. Let me
7 ask my question better, okay.

8 If you want to set a reserve above forty-
9 five thousand, you have to get approval from your
10 manager; is that correct?

11 A No. That is not correct.

12 **Q** That is not correct, okay.

13 So this process, the authority process
14 only applies to the offering of money; is that
15 accurate?

16 A Yes.

17 **Q** Okay. As an examiner, is it accurate to
18 say that you were able to set a reserve at any
19 amount within the coverage without anyone else's
20 approval?

21 A Yes.

22 **Q** Okay. However, you would not be able to
23 offer any amount above forty-five thousand without
24 getting additional authority from your manager,
25 correct?

1 A Correct.

2 **Q Okay. That's what I was trying --**

3 MR. WHELAN: All right.

4 MR. WILLEY, IV: You need a break?

5 MR. WHELAN: Yeah. Let's take a
6 break.

7 MR. WILLEY, IV: Okay.

8 (Whereupon, a recess was had from
9 3:10 p.m. to 3:14 p.m.)

10 MR. WILLEY, IV: If you don't mind
11 reading my last question.

12 THE COURT REPORTER: "Okay. However,
13 you would not be able to offer any amount
14 above forty-five thousand without getting
15 additional authority from your manager,
16 correct?"

17 Her answer is: Correct.

18 BY MR. WILLEY, IV:

19 **Q So those authority requests, do they go**
20 **through the computer system? How do they get**
21 **transmitted? You yell down the hall, post a note?**

22 A Yes. Through the computer system.

23 **Q Okay. Are there preset meetings on**
24 **authority requests? In other words, do you all get**
25 **together every Wednesday at three to discuss all**

1 your authority requests, or do you just take them
2 as they come up?

3 A Take them as they come up.

4 Q Okay. I think I already asked this. But
5 your manager and director are in close proximity to
6 where you are at work?

7 A Yes.

8 Q Okay. The executive director, you don't
9 know where he is, right?

10 A No.

11 Q Got that right.

12 Have you ever been reprimanded at work?

13 A No.

14 Q Okay. How does USAA do it? Is there like
15 a -- and I'll give you an example so you know what
16 I'm talking about.

17 Some companies have a, you know, a verbal
18 warning, then a written warning, you know, and you
19 get two written warnings and you're toast or
20 whatever.

21 Do you know what USAA's reprimand process
22 is?

23 A I think it's something like what you said,
24 but I honestly, I don't know.

25 Q Never been involved with it?

1 A No.

2 Q Okay. I figured not. You seem to nice.

3 Do you have any hard copy files that you
4 deal with, or is everything electronic?

5 A It's all electronic.

6 Q Okay. Do you keep paper for any reason?

7 A Not that I keep, no.

8 Q Okay. Do you, from time to time, take
9 notes on paper at your desk?

10 A I have. I take my voice mails down on
11 paper and throw those away and maybe scribble
12 something down here and there, but not actual
13 notes.

14 Q When you take your voice mails down, do
15 you then input them into the claims file, or do you
16 just take it down, return the call and then dispose
17 of the paper?

18 A Correct. I return the call. And then I
19 will dock in the file that I have, whatever is
20 done.

21 Q Okay. And is it USAA's policy that every
22 call on a claim is supposed to be documented?

23 A Yes.

24 Q Okay. And is it documented in the claims
25 file?

1 A Claims docs.

2 **Q Claims docs.**

3 Are the meetings that are had, for
4 example, if you met with your manager to get
5 additional authority, is that meeting documented in
6 the claims docs?

7 A Typically it is.

8 **Q Okay. Supposed to be?**

9 A That I don't know. I mean, maybe it's the
10 reason that you're meeting with them, you know,
11 that just a quick question about something. But if
12 you're conferencing a file, no. The manager docs
13 the file.

14 **Q Okay. You know when you call an insurance**
15 **company and they say on the thing, this call may be**
16 **recorded for, you know --**

17 A Qualify purposes?

18 **Q -- qualify assurance purposes. Does USAA**
19 **record calls?**

20 A They do.

21 **Q Okay. Are those recordings stored in the**
22 **claims docs?**

23 A No, no.

24 **Q Okay. As an examiner, do you have access**
25 **to those recordings?**

1 A They're just the, the randomly recorded
2 calls, not anything that we didn't record. Like,
3 if I record a statement, obviously, I have access
4 to that.

5 **Q Right, okay.**

6 A But they're randomly, no, we do not.

7 **Q Okay.**

8 A They're not --

9 **Q And, so USAA doesn't record every call for**
10 **purposes of inclusion in the claims file; is that**
11 **correct?**

12 A Correct.

13 **Q Okay.**

14 A That I'm aware of.

15 **Q That you're aware of.**

16 **When you want to record a call, for**
17 **example, record a statement to put into the claims**
18 **file, how do you do it?**

19 MR. WHELAN: You talking about a
20 statement, not a call, right? You said
21 record a call or a statement.

22 MR. WILLEY, IV: Well, a call
23 statement. I mean, a person doesn't sit
24 there typically for --

25 MR. WHELAN: Okay. You talking about

1 a recorded statement.

2 BY MR. WILLEY, IV:

3 Q I will give you an example.

4 First time you talk to your insured and
5 you say, okay, I'm going to record this call. Tell
6 me what happened. How do you record that call?
7 Like, is there a button on claims doc, or how does
8 that work?

9 A Yes. There's a button that you push when
10 you're ready to record the statement.

11 Q Okay. And then that recording gets saved
12 into the claims file?

13 A Correct.

14 (Whereupon, Plaintiff's Exhibit Number 1
15 was marked for identification.)

16 Q All right. I need an education, okay.
17 All right.

18 A I will do my best.

19 Q I know you will.

20 The first thing I'm going to mark is
21 Plaintiff's Exhibit 1, which is going to be Hood
22 USAA production 001 through 0023.

23 MR. WHELAN: Let me see that for a
24 second.

25 MR. WILLEY, IV: Yeah. That's the

1 most recent one.

2 MR. WHELAN: Okay.

3 BY MR. WILLEY, IV:

4 Q What is it?

5 A What is this?

6 Q Yes. And you can flip through it, feel
7 free to flip through it.

8 A Copy of the claims docs.

9 Q Okay. And is that printed off the
10 computer? Is that how that's generated?

11 A It looks like it.

12 Q Okay. Looking at the first page, your
13 name is on it, right?

14 A Yes.

15 Q Okay. Did you open this file; is that
16 accurate? Is that what that first entry is?

17 A I set the claim up, yes.

18 Q Okay. How did you get notice of the
19 claim?

20 A How did you get a notice of this claim?

21 Q Yes.

22 A I was already handling the initial claim
23 that was set up. I was handling the liability
24 investigation claim.

25 Q All right. At the time that you opened

1 **this claim, how long had you been handling that**
2 **claim?**

3 A I would assume, because I don't really
4 remember, since somewhere, approximately, since the
5 date of the accident in November. I don't know the
6 exact time frame, no.

7 Q **At the time that you opened this claim,**
8 **had you already conducted an investigation into the**
9 **facts surrounding the accident at issue in this**
10 **claim?**

11 A From what I can remember, I was still
12 investigating the accident. It was not completed.

13 Q **Okay. So if that original accident was**
14 **reported to you in November, this claim was open in**
15 **May, 2015 --**

16 A Uh-huh.

17 Q **-- correct?**

18 A Yes.

19 Q **Okay. So you were six months into but not**
20 **completed with your investigation of the underlying**
21 **facts; is that accurate?**

22 A From what I can remember.

23 Q **Okay.**

24 A Yes.

25 Q **All right. Who -- What was the posture of**

1 the claim that you were handling? Who was trying
2 to get compensated from who?

3 A From what I remember, Antoine Johnson was
4 presenting the claim to USAA.

5 Q Okay. Looking at this claims file, are
6 you able to tell me all of the facts that you had
7 gathered in that six-month period as it relates to
8 this wreck, prior to getting this claim?

9 MR. WHELAN: You talking about just
10 this exhibit or the whole U.I.M. file?

11 MR. WILLEY, IV: The claims file.

12 A Just from right here, just from what's
13 here?

14 MR. WHELAN: You're pointing to the
15 exhibit, but you're saying the claims
16 file.

17 MR. WILLEY, IV: Right. She said
18 that Exhibit 1 is the claims docs.

19 MR. WHELAN: Yeah. But you're saying
20 the claims file.

21 MR. WILLEY, IV: Okay.

22 A Just from this?

23 BY MR. WILLEY, IV:

24 Q From the claims docs.

25 A Okay. All right. Can I look at this?

1 **Q Yes.**

2 **A Okay. Can you repeat your question again.**
3 **I'm sorry.**

4 **Q Yeah. The claims docs that you started on**
5 **May 20, 2015 --**

6 **A Uh-huh.**

7 **Q -- it doesn't include all of the facts**
8 **that you had gathered in your six-month**
9 **investigation of this wreck, correct?**

10 **A Just seems like it's a synopsis.**

11 **Q Right. That's what I'm getting at.**

12 **So in your file, your claims docs, there**
13 **would have been more exhaustive information**
14 **relating to the facts and circumstances of the**
15 **underlying wreck than what we have here, correct?**

16 **A Correct.**

17 **Q Okay. For terminology sake, just so I can**
18 **make sure I have this right, what does I.D. mean?**
19 **Is that insured driver?**

20 **A Yes.**

21 **Q Okay. And I.V. is insured vehicle?**

22 **A Yes.**

23 **Q Okay. C.V. claimant vehicle?**

24 **A Correct.**

25 **Q Okay. On documentation number four it**

1 **says, set up claim for U.I.M. under L/R7. What is**
2 **that? What is L/R7?**

3 A Loss report number seven.

4 **Q Okay. What does that mean?**

5 A We have -- That's how you distinguish
6 between our -- the claims itself. Our member
7 numbers is pretty much our claims numbers.

8 **Q Right.**

9 A And each date of loss would be, have its
10 own loss report number.

11 **Q Okay.**

12 A But because of -- This one I don't know if
13 I mentioned -- Oh, loss report five would be the
14 one that I handled --

15 **Q Okay.**

16 A -- the liability.

17 **Q Okay.**

18 A So that's kind of -- That's what
19 distinguishes each loss report.

20 Does that make sense?

21 **Q That does.**

22 **Is there anywhere in here that I could**
23 **look to determine what loss report one, two, three,**
24 **four and six are?**

25 A No, no.

1 **Q Okay. Where would I find that**
2 **information?**

3 **A In their, their file. Just their entire**
4 **file.**

5 **Q Member file?**

6 **A Member file.**

7 **Q Okay. Does USAA have a policy or a**
8 **standard for once a claim is opened how quickly the**
9 **investigation should begin?**

10 **A As quickly as you have the information to**
11 **be able to start it. So you should be calling on**
12 **it right away, whoever you had the information for.**

13 **Q Okay. Is there a certain number of days**
14 **that a claim can be opened with no action before it**
15 **alerts a manager or alerts a supervisor?**

16 **Does that make sense?**

17 **A It does. And I'm not sure --**

18 **Q Okay.**

19 **A -- if there's anything that, if there's**
20 **any type of mechanism or anything like that that's**
21 **set up.**

22 **Q Okay. Is there anything for you, as an**
23 **examiner, where if you don't touch a file for,**
24 **hypothetically, forty-five days, you get a message**
25 **that says, you know, tickler, you haven't touched**

1 **this file for forty-five days or anything like**
2 **that?**

3 A No.

4 Q **Okay. So it's expected at USAA that,**
5 **basically, you would be actively working on all of**
6 **your files continuously from the moment that the**
7 **claim is opened?**

8 A Correct.

9 MR. WHELAN: Object to the form.

10 A Depending on what is needed.

11 Q **Right, right.**

12 A So it's not necessarily you would need it
13 every day, to touch it every day.

14 Q **Right.**

15 A Just depending.

16 Q **If you request a police report, you're not**
17 **going to touch it tomorrow, most likely, right?**

18 A Correct.

19 Q **Okay. Something Robbie doesn't know**
20 **anything about. But anyway.**

21 **The number next to your name, 49086, what**
22 **is that number?**

23 A That is my employee number.

24 Q **Okay. And if I click that, where do I go?**

25 A To the, I guess, employee profile page

1 that shows my face.

2 Q Okay.

3 A This face, that picture and then that.

4 Q And is that where you would go to click
5 like your pending list or --

6 A I don't know that you can do that.

7 Q Okay.

8 A I don't know that you can't do that.

9 Q Right.

10 A You see information on me and my team.

11 Q Okay.

12 A People that work with me and my manager.

13 Q Okay. All right. The -- there's a little
14 box up here that starts with available actions.

15 You see that?

16 A Yes.

17 Q That has a few options.

18 A Uh-huh.

19 THE COURT REPORTER: Yes?

20 A Yes.

21 Q The claims documentation option, what, if
22 I click that, what happens?

23 A You can see just the claim documentation,
24 the claim docs is what you're looking at right now.

25 Q Okay. If I click start new conversation,

1 **what does that do?**

2 A You -- Let me just say that I, you know,
3 some of this stuff you just like, you're so use to
4 this --

5 **Q I understand.**

6 A You know, you do the same thing day after
7 day, but I think that's how you add new docs --

8 **Q Okay.**

9 A -- add new claims docs. But, again, I
10 don't -- I think I just see the same thing over and
11 over every day, so I don't pay attention, actually,
12 what it says.

13 **Q Muscle memory?**

14 A Yes.

15 **Q So I understand that.**

16 **Is there a mechanism on claims docs or on**
17 **your computer at USAA to have any kind of instant**
18 **messaging chats with any other member of your team**
19 **or USAA employee?**

20 A On the computer, on our main computer?

21 **Q Yes.**

22 A Yes. We have instant messaging.

23 **Q Instant messaging.**

24 **And what is that program called?**

25 A I.M., I guess, I guess.

1 **Q Okay.**

2 **A I.M. I don't know.**

3 **Q Is it part of this claims management**
4 **software? Do you know? Or, is it separate?**

5 **A Oh, I think it's separate, but I don't**
6 **really know.**

7 **Q But you don't know.**

8 **Do you use that regularly to communicate?**

9 **A I do not. I'm bad at that.**

10 **Q I'm bad at that too.**

11 **Do you know if those messages get stored**
12 **anywhere on the claims docs or in the claims file?**

13 **A No. Not that I'm aware of, because I**
14 **don't think they're specific to the claim.**

15 **Q Got it. If you flip with me to 002,**
16 **looking at documentation number five. It says**
17 **conversion of record new to old; old unit, new**
18 **unit, et cetera.**

19 **What is that? What does that mean?**

20 **A When I was setting it up -- Initially,**
21 **when a new claim sets up, gets set up, it --**
22 **whoever is setting it up, until you assign it to**
23 **whoever you're going to assign it to, whether it's**
24 **yourself or someone else, it starts out in the**
25 **manager's name.**

1 So at the time in 2015 my unit was 7980.
2 And my manager at the time digits were 41.

3 **Q Okay.**

4 A So that's just how it, that's the way it
5 looks now.

6 **Q Okay.**

7 A That's the way it, if I set up the claim
8 now, it's going to be 7972-41. It's just my
9 manager's now.

10 So then when I transferred it to --
11 assigned it to a new person, which that person's
12 unit is 7984-13, which ended up being Diane.

13 **Q All right. So at this point, was your**
14 **manager Alisa?**

15 A No.

16 **Q Who was your manager at this point?**

17 A I think that it was Neal.

18 **Q Okay. And Neal's last name?**

19 A Schleifer. And I think that is -- I'm
20 going -- It's S-C-H -- If I had a pen. Can I have
21 a pen. Let me just write it.

22 Oh, we're going to go with that.

23 **Q Okay. S-C-H-L-E-I-F-E-R. And if it's not**
24 **exactly right --**

25 MR. WHELAN: She's holding her hands

1 up. It's a guess.

2 MR. WILLEY, IV: It's a guess.

3 MR. WHELAN: Is it a guess?

4 A It's a guess.

5 MR. WHELAN: Try not to guess, unless
6 he's asked you to guess, okay?

7 A Okay. Sorry.

8 BY MR. WILLEY, IV:

9 Q All right.

10 A But Cal was my manager at the time.

11 Q It was Neal Schleifer for who we think is
12 spelled this way?

13 A Correct.

14 Q But we're not sure?

15 A But he's still there.

16 Q Okay.

17 A He's still a manager there. I just got --
18 we got changed around a couple different units --

19 Q Got it.

20 A -- quickly.

21 Q Okay. Do you know why?

22 A My manager was initially Donna. And then
23 she retired and I got Neal. And then I went to --
24 somebody got promoted and Alisa's unit lost an
25 examiner, and then she picked me.

1 **Q Okay. Got it.**

2 **A I'm not sure.**

3 **Q Okay. That's fine. The next item is a**
4 **view conversation. Is that what shows up when you**
5 **send a letter or something out, or what is that?**

6 **A That is a automated claims communication**
7 **that goes from USAA.com.**

8 **Q Okay. Do you have to do anything special**
9 **to initiate that?**

10 **A No. It's automatic.**

11 **Q How does the system know that now is the**
12 **time to send that communication?**

13 **A Because the claim, because the claim**
14 **was --**

15 **Q Okay.**

16 **A -- open.**

17 **Q Okay. The next documentation six,**
18 **W-R-C-O-M.**

19 **Do you know what that is?**

20 **A That is the automated e-mail that's sent**
21 **that says something similar too.**

22 **Q Yes. Got it. I'm with you. Okay.**

23 **And we have the PDFs of those so that's**
24 **why I'm not wasting your time explaining it to me.**
25 **I just wanted to make sure that's what that was.**

1 Going back to documentation number four,
2 it says arbitration decision that I.D., insured
3 driver, contributed twenty percent for not
4 traveling with headlights on. As witness stated,
5 insured vehicle did not have headlights on, but
6 witness was able to see C.V. Johnson, therefore
7 C.V. Johnson should have been able to see insured
8 vehicle, I.V.

9 Do you see that?

10 A Yes.

11 Q Okay. And was that basically a summary of
12 what you used in your liability investigation of
13 the claim?

14 A I'm not exactly sure of that. It appears
15 from what I can see. But that is just a
16 summarizing what the arbitration decision was. And
17 I was just putting in that.

18 Q All right. The next portion says
19 approximate cause was C.V. Johnson failing to yield
20 right-of-way.

21 Do you see that?

22 A Yes.

23 Q That is something that you would have
24 input into claims docs?

25 A And I'm only going just from what, what it

1 appears here, that that's still part of arbitration
2 decision, that they were saying the proximate cause
3 of the accident.

4 **Q My question is, you would have input that**
5 **into the claims docs system?**

6 A This, this one we're looking at?

7 **Q Yes. That sentence.**

8 A Yes.

9 **Q Okay. And you used the arbitration**
10 **decision in your liability investigation, correct?**

11 A I'm not looking at my file, so I can't
12 necessarily say that I would do that, no.

13 **Q That's my next question.**

14 **So in order to be able to determine all of**
15 **the facts that you used in your liability**
16 **investigation, you would need to refer to your**
17 **claims file?**

18 A What I remember from this was that I
19 wasn't -- hadn't finished any investigation when it
20 got transferred.

21 **Q Right.**

22 A So I have some memory of this claim. And
23 I don't -- The investigation wasn't concluded when
24 it got transferred. So I don't think that the
25 arbitration issues would have mattered, but I

1 hadn't concluded my investigation.

2 **Q** And at this particular point in time, you
3 can't tell me all of the facts that you had in your
4 investigation in your claims file without actually
5 looking at it; is that accurate?

6 A Not all of it, no.

7 **Q** The arbitration referral, is that a proper
8 way to say it, transfer? How do you all say that?

9 A It just -- Arbitration was filed.

10 **Q** Okay.

11 A Filing.

12 **Q** All right. And do you know if USAA filed
13 that or if Geico filed that?

14 A I can't say for certain based on the time
15 frame. I would think it would be Geico.

16 **Q** All right. Documentation number eleven,
17 it says 99999 and a dash with no name.

18 Do you see that?

19 A Yes.

20 **Q** What does that indicate? Who would have
21 input that?

22 A System generated.

23 **Q** Okay.

24 A That they -- The claim information was
25 sent to I.S.O.

1 **Q And what is that?**

2 A I don't know, and I'm not -- I don't know
3 what that stands for.

4 **Q Right.**

5 A But it's a system that we send -- some
6 insurance companies send the claims information to.

7 **Q Okay. On the next page, documentation**
8 **number twelve starts with Diane Martin. It has**
9 **some additional information at twelve and thirteen**
10 **and fourteen.**

11 **Why did it move to Diane, this claim?**

12 A Because of being a U.I.M. claim, claim is
13 being made under the U.I.M. coverage. And I was
14 handling the B.I. investigation. So we had to
15 split out -- We split out claims in that situation,
16 so it was moved to her for handling of it.

17 **Q Okay. How does the decision get made who**
18 **it moves to?**

19 A It would be the next available examiner,
20 as long as they're not in your unit.

21 **Q All right. Does the computer determine**
22 **that?**

23 A The computer can determine the next
24 available examiner that's --

25 **Q Okay.**

1 A -- that's, in essence, oh, she hasn't had
2 a claim, so she's next on the --

3 **Q Okay.**

4 A -- next to get a claim.

5 **Q So it's just like a list?**

6 A It's just a, you know, it's all internal
7 system.

8 **Q Got it, all right. And, so the system**
9 **would have populated it to her without any human**
10 **inputs?**

11 A Correct.

12 **Q Did you after that point have anymore**
13 **interaction with this claim?**

14 A Going into this claim?

15 **Q Yes.**

16 A Not that I'm aware of.

17 **Q Okay. What about did you ever have any**
18 **discussions with Diane about the claim or any**
19 **meetings with her about it?**

20 A I don't remember specifically, but I --
21 she most likely either called me or -- We sat
22 across in aisle from each other. So she probably
23 when she got it turned around and asked me, hey,
24 you know. But it would be the same as her picking
25 the phone up. But because we were in close

1 proximity that she might have asked me what was
2 going on.

3 Q And do you remember when Alisa, when you
4 joined her team exactly?

5 A I do not.

6 Q Okay. Did she -- Was she Diane's manager
7 before she was yours? Do you know?

8 A Yes.

9 Q Okay. Did she switch, or did you switch
10 during the pendency of this claim?

11 A No.

12 Q Okay. If you will go to page 10 of that
13 and look at documentation number forty-five. It's
14 just a note from Alisa about suit being filed.

15 Documentation forty-five at the bottom.

16 A Uh-huh.

17 Q So at this point she was Diane's manager?

18 A Okay.

19 Q Is that accurate?

20 A Yes.

21 Q Okay. Who's Jerry Wolfe? If you look up
22 two entries.

23 A He is our physical damage specialist in
24 the field.

25 Q Once the file down here in documentation

1 **forty-five it says, suit filed, served, handled**
2 **under L/R number five and answer filed, would that**
3 **indicate a relation back to a previous loss report?**

4 A Right. Loss report five is me.

5 **Q Is you, right?**

6 MR. WHELAN: You have a question

7 or --

8 **Q Would that involve a relation back to that**
9 **previous loss report number five?**

10 A This doc?

11 **Q Yes.**

12 A It appears -- Hang on.

13 So this appears to say this file is for
14 the U.I.M. and that suit, there's suit then filed
15 and served on loss report five.

16 Is that what you're asking?

17 **Q Yes. So the suit that was filed in this**
18 **case --**

19 A Uh-huh. At this time.

20 **Q Right. That is the subject, the**
21 **underlying suit, that is now subject of this case,**
22 **was handled under your loss report when it was**
23 **answered, correct?**

24 MR. WHELAN: Object to the form.

25 A I don't -- I'm not sure.

1 **Q** Okay. The entry says suit filed, slash,
2 served; handled under L/R number five and answered
3 filed, right?

4 **A** Yes.

5 **Q** Okay. Appears majority of liability,
6 L.I.A.B., on C.D. Johnson insured with Geico.

7 Do you see that?

8 **A** Uh-huh.

9 **Q** Okay.

10 THE COURT REPORTER: Yes?

11 **A** Yes.

12 **Q** What does handle under L/R number five
13 mean to you, in your experience, reviewing claims
14 docs?

15 MR. WHELAN: Object.

16 **A** It does appear to me that this suit, that
17 it -- suit was handled under loss report number
18 five.

19 **Q** Okay.

20 **A** But I don't know if it's -- which suit,
21 because they both filed suits. So that's what I
22 don't --

23 **Q** Right.

24 **A** -- I can't speak to.

25 **Q** But we do know, based on this, is that

1 what we're talking about here is the suit where
2 Johnson is a claimant driver, right --

3 MR. WHELAN: Object to the form.

4 Q -- based on this note? Looking at
5 documentation number forty-five. It says C.D.
6 Johnson --

7 A Uh-huh.

8 Q -- right?

9 THE COURT REPORTER: Yes?

10 A Yes.

11 MR. WHELAN: What? Is the question
12 that it says C.D. Johnson?

13 A Then it would be the B.I. suit that's
14 being handled under loss report five.

15 Q Right. So based on this note, what
16 we're -- what it's referencing is the suit being
17 handled under your loss report, which involves
18 claimant driver Johnson, correct?

19 MR. WHELAN: Object to form.

20 Q That's what this note says?

21 MR. WHELAN: Asked and answered.

22 Object to the form.

23 A That it appears, correct.

24 Q Okay. So moving onto the next page, which
25 is a continuation of documentation number forty-

1 five, it says comp neg, which is comparative
2 negligence, right?

3 A Yes.

4 Q Presumably.

5 Eighty percent on Johnson and twenty
6 percent on I.D., based on arb, correct?

7 A Yes.

8 Q And I.D., again, is insured driver, which
9 would have been Therese Hood?

10 A Yes.

11 Q Okay. Then it says pending insured driver
12 records, bills for eval of U.I.M. claim, right?

13 A Yes.

14 Q Okay. So at this point, we can summarize
15 that suit's been filed, right?

16 A Yes.

17 Q And suit's being answered under the loss
18 report that you're handling with the B.I. loss
19 report, right?

20 A That's what it appears, yes.

21 Q That we have made a comparative negligence
22 note of eighty percent on Johnson and twenty
23 percent on Hood based on the arbitration, right?

24 A That's what our file for the property
25 damage, yes.

1 Q And at this point we're just waiting for
2 the records and the bills for the evaluation of the
3 U.I.M. claim?

4 MR. WHELAN: Object to form.

5 Q Correct?

6 A That's what I see here from the manager,
7 yes.

8 Q Okay. All right. The next. Received
9 suit for U.I.M., Hood verse Johnson. Due date
10 7-3-15. Suit has already been answered by adverse
11 and a countersuit has been filed against insured
12 driver.

13 The countersuit is being handled under
14 L/R6, right?

15 A Yes.

16 Q Okay. And the countersuit in the case
17 styled Hood v. Johnson, would be Johnson's
18 counterclaim against Therese Hood, right?

19 A I'm sorry? Again.

20 Q This is telling us that we received a suit
21 styled Therese Hood v. Johnson, right?

22 A Yes.

23 Q Okay. That that suit has been answered by
24 the adverse, which is Johnson --

25 A Uh-huh.

1 **Q -- right?**

2 THE COURT REPORTER: Yes?

3 A Yes.

4 **Q And Johnson has filed a countersuit**
5 **against Hood, right?**

6 A Yes.

7 **Q Okay. And that the countersuit is being**
8 **handled under loss report number six, right?**

9 A I do see that's what that says, yes.

10 **Q Okay. Are you able to determine from this**
11 **note, or you can flip through a few if you want,**
12 **but who was handling loss report number six?**

13 A I don't know, and I don't -- Is that a
14 typo?

15 **Q I don't know either.**

16 A It potentially could be.

17 **Q Okay.**

18 A Because -- That's what my thought is.

19 **Q Okay. All right. Who is Marsha, I think**
20 **Eichman?**

21 A She is one of our litigation directors, I
22 think is her title.

23 **Q Do you know how the litigation teams are**
24 **set up?**

25 A I do not.

1 **Q Saved you about five questions.**

2 MR. WHELAN: More like fifty.

3 **Q What about Peter Munroe, you know who he**
4 **is?**

5 A No. I never heard that name.

6 **Q Never?**

7 A No.

8 **Q Okay. All right. Kathy -- we're going to**
9 **talk to her. We don't need to go through that.**

10 **Do you know Kathy?**

11 A I do.

12 **Q You do. Do you speak with Kathy**
13 **regularly?**

14 A I do not.

15 **Q Is Kathy in your office?**

16 A No. She's, I believe she's a work at
17 home, maybe.

18 **Q Oh, that's nice.**

19 A I think so.

20 **Q How do you get that gig?**

21 MR. WHELAN: Object to the form.

22 **Q What, I'm not saying it's a bad thing.**

23 **How do you get to work at home?**

24 A You just ask for it, I guess.

25 **Q Okay.**

1 MR. WHELAN: She said I guess.

2 Q I guess, all right.

3 Have you ever worked on the litigation
4 team?

5 A No, I have not.

6 Q Every time that it says five nines, dash,
7 blank name, does that always mean the same thing as
8 the person making the entry? So, for example, if
9 you will look at page 16 is where I'm at. I'm
10 looking at documentation number seventy, seventy-
11 one, seventy-four where it says the input person
12 was 99999, dash, no name.

13 A Yes. That -- And I'm only going to make
14 the assumption --

15 Q Okay.

16 A -- that that's -- those are automated
17 payments.

18 Q Okay. Because in the pre-litigation, is
19 the all nines with the dash and blank, always
20 associated with an automated entry?

21 A Not -- No. 'Cause we can make -- we have
22 automated payments as well.

23 Q Okay. So in your department, you can also
24 make an automated entry and it would look exactly
25 the same, in terms of the nines?

1 A I can't say for sure.

2 Q Okay. All right.

3 MR. WILLEY, IV: I will mark 0024
4 through 0027 as Plaintiff's Exhibit Number
5 2.

6 (Whereupon, Plaintiff's Exhibit Number 2
7 was marked for identification.)

8 Q All right. It's kind of small type. If
9 you want to look at it. If you need to see
10 anything on mine, let me know, because I can blow
11 it up, okay.

12 First, looking at the top left at what I
13 would call the index. Yes.

14 What -- Are all of these things separate
15 parts of the claims file?

16 A I mean, I guess that's one way to look at
17 them. It's -- would just be it would take you some
18 place if you clicked on that, maybe. This is the
19 way our claim file looks.

20 Q Okay. So, for example, if you clicked on
21 claims plan, where would that take you?

22 A To a screen that shows -- Everything
23 that's kind of set up in the, all the -- I'm trying
24 to think -- exposure is not the right word I'm
25 thinking to use.

1 I can't, I can't explain it. I don't know
2 what else to say.

3 **Q Okay.**

4 A I see it every day and I don't -- I mean,
5 it just gives you some more information, but --

6 **Q Tell me what kind of, like what, for**
7 **example, just would be listed there?**

8 A It may -- Information that you might have
9 to, may -- Information that's pending.

10 **Q Okay.**

11 A It may show that the statements that are
12 taken or maybe they haven't been taken. If a
13 police report's been received; if the liability
14 assessment's been updated; if we've gotten the
15 appraisal done on the vehicles; if total loss is
16 still pending. And it kind of list all those
17 things out, like, kind of pending items. Maybe
18 that's --

19 **Q How do things get added to the claims**
20 **plan?**

21 A They're added -- This is called the tree
22 view.

23 **Q Are they added by you?**

24 A They could be. If you say add to the loss
25 here, sometimes they're added when the claim is set

1 up. And it's automatic.

2 Q That's what I'm getting at.

3 So when you set up a claim and you look at
4 the file for the first time and you determine, I
5 want to talk with witness A, B, C; I want to get a
6 copy of the police report; I want to get a copy of
7 the scene investigation -- I want to do a scene
8 investigation; I want to get a statement from this
9 person, you would put those things listed in the
10 claims plan?

11 A It's automatic.

12 Q Right.

13 A It's there.

14 Q Okay.

15 A And then, say the police report. You see
16 the police report is here?

17 Q Uh-huh.

18 A Once you actually receive it and you file
19 it, it's going to show completed in the claims
20 plan. It will automatically.

21 When you get that statement from, even
22 from each person, whether it's the witness, any
23 witnesses or drivers or passengers, it will
24 automatic, and you complete, once you take it and
25 you hit a complete radio button, it completes it in

1 the claims plan.

2 Q That's kind of what I was asking earlier.
3 And I should have been better with my question.
4 But is it true to say that the claims plan is
5 basically the checklist of all the things that you
6 would like to do on a claim?

7 MR. WHELAN: Object to form.

8 A Possibly.

9 Q Right.

10 A Not necessarily though.

11 Q Maybe not all inclusive, right?

12 A Yes.

13 Q Okay. But it is what it says it is, which
14 is a plan for the claim, right?

15 A Yes.

16 Q Okay. And if you click that link, it
17 would take you to a separate page that would show
18 all of those items which have been complete and
19 which were pending, correct?

20 A Yes.

21 Q Okay. And it would also show you when the
22 completed items were completed, right? Does it
23 give you a date?

24 A Maybe somewhere. I'm not sure exactly if
25 this shows in there or not.

1 Q In looking at 0024, if you look at the
2 kind of tabs on claim docs where injury evaluation
3 is in blue.

4 Do you see that?

5 A Yes.

6 Q If you were in the claims plan section,
7 would that section be blue?

8 A Yes.

9 Q Okay. So my basic question is if we got a
10 printout of the claims plan section, we would know
11 it was the claims plan section if it looked like
12 this, except 0024 instead of injury evaluation
13 being highlighted, the claims plan tab was
14 highlighted?

15 A I believe so.

16 Q Okay. This injury evaluation tab
17 section --

18 A Uh-huh.

19 Q -- who inputs this information?

20 A The file handler.

21 Q Okay. Are other individuals, like,
22 managers able to document things in there?

23 A I guess they have the ability to, but
24 normally that's not what -- Usually, it's kind of a
25 working document that we use.

1 **Q** Okay. And this document builds as you go
2 through the process; is that fair?

3 MR. WHELAN: Object to form.

4 **Q** In other words, the information that is on
5 this document that we're looking at may have been
6 entered at different times?

7 A Correct, yes.

8 **Q** All right. Do you know whether or not in
9 setting up the claim you would have entered any of
10 this information into the injury evaluation?

11 A I would not have, no.

12 **Q** Okay. And how do you know that?

13 A Because I would have just set the claim
14 up, specifically, to get it assigned and moved it
15 on.

16 **Q** When someone documents and says that a
17 U.I.M. coverage is, for example, twenty-five,
18 slash, twenty-five, what does that mean in USAA's
19 world?

20 A Well, it would mean that -- What it would
21 mean to me is twenty-five thousand per person,
22 twenty-five thousand per occurrence, which I don't
23 think that exist.

24 **Q** Right.

25 A But that's what, typically, that's what we

1 would look at it to mean.

2 Q So here under physical evidence, if you
3 look. Can you see that where it says hard impact,
4 compelling photos, USAA U.I.M five hundred, slash,
5 five hundred.

6 A Uh-huh.

7 Q To you that would mean?

8 A Five hundred thousand per person, five
9 hundred per occurrence.

10 Q Right. Which is -- The reserves on this
11 particular sheet at this moment in time, I have two
12 hundred and fifty thousand.

13 Do you see that?

14 A I do.

15 Q Okay. Do you know, does USAA have a
16 policy of paying out the undisputed U.I.M. amount?
17 I'll give you -- You need an example?

18 A Yes, please.

19 Q Okay. And then I'll reask my question.

20 Some insurance companies say that in order
21 to fairly compensate our insureds or what have you,
22 if we think thirty thousand U.I.M. is coverage is
23 owed and the insured thinks a hundred thousand in
24 U.I.M. coverage is owed, we will go ahead and pay
25 the thirty thousand that's undisputed out and

1 litigate over the seventy thousand.

2 Have you ever seen a time where USAA has
3 done that?

4 MR. WHELAN: Object to the form.

5 A Not any of my files.

6 Q Have you ever seen that in anyone else's
7 files?

8 A I can really only speak to my own.

9 Q Okay. So you're not aware of USAA ever
10 having done that?

11 A Not -- Again, I can only, really, only
12 speak to my own, anything that I've ever handled.

13 Q Right.

14 A And I've not ever done that.

15 Q Okay. Have you ever thought of that
16 before today?

17 A I have not.

18 Q Okay.

19 A Property damage, maybe.

20 Q Okay. Right. You think that's a good
21 practice --

22 MR. WHELAN: Object to the form.

23 Q -- to protect your insured?

24 A I would have to look at -- It would,
25 again, be a case-by-case basis situation. You

1 know, am I getting a release. I mean, it's a whole
2 situation.

3 Q Well, let's just talk about it generally.
4 So we talked earlier about USAA's ethics of honest,
5 integrity, loyalty, and it's kind of stand by the
6 insured idea, right?

7 A Certainly.

8 Q Okay.

9 A Well, hang on a second.

10 Q You said --

11 A Wait. Say that again.

12 Q The ethos, I think you said were on the
13 wall.

14 A Yes.

15 Q Honesty, integrity, loyalty and maybe one
16 other, right?

17 A And standing by our insured.

18 Q The idea, right?

19 A You know, I mean, if we can support them,
20 you know, and that's what -- We want to investigate
21 the claim.

22 Q Right. And you said earlier that USAA's
23 purpose of handling U.I.M. coverage is to determine
24 how much the insured should be compensated from
25 that coverage, right?

1 A If there's a claim owed and paying what we
2 owe, yes, right.

3 Q And, so my question is, just to you
4 generally, there's no dispute about a particular
5 amount being owed? In other words, USAA agrees
6 it's owed and the insured agrees its owed, don't
7 you think it would be appropriate for USAA to go
8 ahead and pay that undisputed amount to their
9 insured?

10 A Again, I can't speak to every single case
11 because there's so many factors that come in. You
12 know, am I getting a release for that, because I'm
13 going to need that. And I don't believe that I
14 would be getting a release, if there's other
15 factors that are going to come into play. So I, I
16 just don't know.

17 Q Let's talk about the release factor. The
18 release, its purposes is to protect the rest of the
19 coverage that USAA is not paying, right?

20 MR. WHELAN: Object to the form.

21 Q Would you agree with that? That's what a
22 release does?

23 A Correct.

24 Q It says, we will pay you "X"; you will
25 sign this and we will never pay you another dollar,

1 right?

2 MR. WHELAN: Object to form.

3 A Yes.

4 Q Basically. So, no, you wouldn't get a
5 release under that circumstance, but rather than
6 being able to hold the disputed amount hostage and
7 basically negotiate against your insured, the
8 company would be paying the insured what everybody
9 agrees the insured is owed and only disputing the
10 disputed amount, doesn't that seem more fair than
11 holding the undisputed amount to try to get the
12 insured to take less on the disputed amount in
13 exchange for a release?

14 MR. WHELAN: Object to the form.

15 Q Just as a person, I mean?

16 A That's just not my decision to make.

17 Q I understand that.

18 A So I, you know, I can't speak to that.
19 It's just not for, it's not for me to make that
20 decision.

21 Q And I'm just asking you based on your
22 claims handling experience. I'm not asking you to
23 make a decision for USAA or to tell them what they
24 should do. I'm just saying, from a common sense
25 perspective, if our purpose is to stand by our

1 insureds, pay what we believe is owed, doesn't that
2 make more sense?

3 MR. WHELAN: Object to form.

4 A Not necessarily. That's all I can -- I
5 just don't feel like -- I feel like it's a case-by-
6 case basis, so I can't say that that, that that --

7 Q All right. So in this case at this
8 particular point in time where this injury
9 evaluation is printed, the reserves were set at two
10 hundred and fifty thousand, right?

11 A Yes.

12 Q That's the internal evaluation of the
13 case, right, the reserve?

14 A I don't know why it was set at that.

15 Q Right. But it is set at that?

16 A It is set at that, correct.

17 Q Okay. And if you go to the next page, we
18 see that the total specials allowed are two hundred
19 and seven thousand two hundred and two dollars.

20 Do you see that?

21 A Yes.

22 Q Okay. I'm going to have a short
23 conversation about medicals claim verse medicals
24 allowed.

25 Medicals allowed is the amount that USAA

1 agrees is actually compensable?

2 MR. WHELAN: Object to the form.

3 Q Is that accurate?

4 A That they feel is owed or they feel is
5 related?

6 Q Right. So, for example, sometimes people
7 claim -- They get in a car wreck, they go to the
8 hospital, they get treated and then they get a
9 pregnancy test on the way out. Pregnancy test is
10 on the bill. That may be part of medicals claim,
11 but it wouldn't necessarily go on medicals allowed,
12 right?

13 A Possibly.

14 Q Right. So in this case, the total
15 specials that were allowed, including the medicals
16 at this point in time were two hundred and seven
17 thousand two hundred two dollars, right?

18 A Yes.

19 Q Okay. And we got the reserve set at two
20 hundred and fifty thousand.

21 So do you see any reason, given your
22 experience in claims handling that it would not
23 have been appropriate to compensate Ms. Hood for
24 the two hundred and fifty thousand, and just argue
25 over the remainder?

1 MR. WHELAN: Object to form.

2 A Because we hadn't settled the claim.

3 Q So you don't think it would be appropriate
4 to compensate the undisputed amount without her
5 signing a release, releasing her right to collect
6 additional money, right?

7 MR. WHELAN: Object to form.

8 A Based on the information that I have here
9 and that we didn't have a settlement.

10 Q Okay. All right.

11 On authorization notes which is about
12 halfway down on page 0025 --

13 A Uh-huh.

14 Q -- it says claims authority conference
15 conducted today and authority granted for two
16 hundred and fifty thousand regarding U.I.M. claim
17 for Therese Hood.

18 Do you see that?

19 A I do.

20 Q Okay. How would I determine what day that
21 claim authority conference was held on? Is there
22 somewhere else in the claims docs I could look to
23 find that?

24 A I don't know if it would be somewhere
25 else. I'm not sure.

1 **Q** Where else might it be if that information
2 were going to be somewhere else, on what sections
3 would be possible?

4 **A** I'm not -- You know, I mean, I have ones
5 that look like this. My files look like this where
6 my manager docs, and it doesn't show a date either.

7 **Q** Okay.

8 **A** It just shows that I made an offer after
9 that, so.

10 **Q** All right. If I -- And I'm not trying to
11 pin you down to one section or another, I'm just
12 saying, if I came to your desk and said, Missy, I
13 need to know when this client authority conference
14 was held, where would you kind of go to see if you
15 could find it?

16 **A** I don't -- Again, this is, I think a
17 litigation file.

18 **Q** Okay.

19 **A** And I don't know if they have -- do
20 something any different than what I do. So I don't
21 know.

22 **Q** All right. So in your file it doesn't
23 look like that?

24 **A** It does look like this, but I don't -- it
25 did. The conference, fact that there was a

1 conference, I don't have a conference. My manager
2 just looks at it.

3 **Q All right.**

4 A And there's no conference.

5 **Q Okay. All right.**

6 A So it wouldn't have been a conference.

7 **Q This next section, do you have this**
8 **section called Negotiation Points and Strategy in**
9 **your --**

10 A Yes.

11 **Q Who inputs that information?**

12 A The file handler.

13 **Q Okay. Anyone else?**

14 A And when I say file handler, that would be
15 the person in litigation as well. But I don't know
16 if -- I'm not saying a manager can't put
17 information in there. I don't, you know -- I can
18 only speak to what my manager, doesn't normally doc
19 anything in there.

20 **Q Okay. What's the purpose of that section?**

21 MR. WHELAN: Object to the form.

22 A Everybody has a different kind of use for
23 it, but when you look at this, it's kind of a lot
24 of information in there, and it kind of helps you
25 break down -- makes it a little more concise for

1 you.

2 Q Is it specifically to give you -- to
3 remind you of facts or things to negotiate on when
4 you're trying to resolve a case?

5 MR. WHELAN: Object to form.

6 A I mean, it can. Again, everybody -- I've
7 seen it used for different purposes for different
8 people.

9 Q Right. I mean, it's under the subject of
10 strategy. And the ultimate goal is to get the case
11 resolved, right? That's the goal of every claim,
12 get it resolved?

13 A For everyone involved, yes.

14 Q Right. And you have a goal, you have
15 objectives, you may have a strategy, whatever. The
16 strategy is to get the case resolved, as far as
17 little payment as possible, right?

18 MR. WHELAN: Object to form.

19 A No.

20 Q All right. You said the reserve, for
21 example, in this case, two hundred and fifty
22 thousand, right?

23 MR. WHELAN: You said you set the
24 reserve?

25 MR. WILLEY, IV: USAA.

1 **Q** The reserve is set at two hundred and
2 fifty thousand, okay.

3 Would you expect that opening offer to be
4 two hundred and fifty thousand?

5 **A** I don't know what to expect, because I
6 don't know what was going on in this claim.

7 **Q** Typically when you're handling claims, is
8 your first offer the full amount of the reserve
9 that's set on that claim?

10 **A** Not -- For myself, not typically, but that
11 doesn't mean it hasn't happened.

12 **Q** Right. And would you expect that for
13 other claims handlers their first offers are very
14 rarely the full amount of the reserve set for their
15 claims?

16 MR. WHELAN: Object to form.

17 **A** It just -- I can't speak to what anyone
18 else might do. Each case -- It's a case-by-case
19 basis.

20 **Q** Isn't part of the training that you get at
21 USAA about how to negotiate claims with attorneys
22 and claimants? Isn't part of the training USAA
23 gives claims examiners and adjusters about
24 negotiating claims with attorneys and claimants?

25 **A** Yes. At some point I had some training.

1 **Q** All right. And isn't the purpose of
2 trying to resolve the claim to resolve it at as low
3 of a payment as possible?

4 **A** Is that the purpose?

5 **Q** That's the purpose of trying to negotiate
6 a claim, right, to resolve it at the lowest number
7 possible where both sides accept the settlement?

8 **A** No. It's just to pay what we owe and to
9 come to a mutual agreement, whatever that number
10 may be. There isn't --

11 **Q** Okay. Right. But USAA has determined
12 that the reserve on a claim, for example, here it's
13 set at two hundred and fifty thousand. I think
14 we've agreed that it would be very rare, I will
15 submit to you in this case they did not, USAA ever
16 offer two hundred and fifty thousand as its first
17 offer, right?

18 MR. WHELAN: Object to the form, if
19 that's a question.

20 **A** Again, I don't know what went on with this
21 and how it was negotiated, how -- what offer was
22 initially made and what was the, you know, what the
23 specifics were when everything transpired. I can't
24 speak to that.

25 **Q** And I'm not -- Right. And I'm not asking

1 you for specifics on what happened with the
2 negotiations.

3 What I'm saying, what I'm asking you is,
4 isn't it true if we went and looked at USAA's
5 files, negotiation files, you would expect that it
6 would be the rare file where USAA's first offer to
7 resolve a case was at the full amount of the
8 reserve that was set?

9 A Again, I don't -- Possibly. I just don't
10 know. I don't have enough information.

11 Q Okay.

12 A I can only speak to my own.

13 Q All right. And you agree that that would
14 be rare for your files, to find a file where the
15 first offer that you made to a claimant or a
16 claimant's attorney was the full amount of the
17 reserve authority you had on that file?

18 A In fact, it would be rare. But I'm not
19 saying it couldn't happen.

20 Q Right. And isn't part of the negotiation
21 process, to attempt to get that claimant attorney,
22 or claimant, to agree to accept as low a number as
23 possible, but to accept? It has to be mutually
24 accepted. But to accept as low a number as
25 possible to resolve the claim?

1 A No.

2 **Q Okay. It's never your goal when you go**
3 **into a claim negotiation to pay the full amount of**
4 **the reserve, is it?**

5 A Is it my goal to pay what we owe and to
6 settle it amicably with the party?

7 **Q Right.**

8 A So, I mean, that's the way I think about
9 it.

10 **Q Right.**

11 A That's what I do.

12 **Q Right. And I understand that, and I don't**
13 **disagree with what you're saying. It has to be**
14 **amicable settlement where both sides agree,**
15 **correct?**

16 A Yes.

17 **Q Okay. And it is the company's objective**
18 **to make that agreement number as low behind the**
19 **reserve as possible, right?**

20 A I'm not aware of that, no, I don't.

21 **Q No one has ever said to you, or you've**
22 **never seen a report or you've never been in a**
23 **meeting where they discussed claims paid as a**
24 **percentage of reserves?**

25 A No.

1 **Q** Okay. You've never been in a meeting or
2 seen a document or had any information distributed
3 to you about your team's performance in terms of
4 total payment of claims over a assessed value or
5 anything like that?

6 **A** No, to be honest.

7 **Q** Okay. Do you believe that the claims
8 examiner's job to pay the claimant as much money as
9 possible?

10 **A** I believe that it's my job to pay what we
11 owe on a claim.

12 **Q** Right. And the payment of the owed amount
13 is based upon the valuation of the claim, right?

14 **A** Yes.

15 **Q** And the internal valuation of the claim is
16 what you use to set the reserve, right?

17 MR. WHELAN: Object.

18 **A** I'm sorry?

19 **Q** The internal valuation of the claim is
20 what is used to set the reserve amount, correct?

21 **A** Typically the high value of the claim is
22 what the reserve is set at.

23 **Q** Right. Based upon the internal valuation
24 of the claim, right?

25 **A** Correct.

1 **Q** Okay. What I'm getting at is the claimant
2 has no input on the reserve on a typical claim,
3 right?

4 **A** Correct.

5 THE COURT REPORTER: Can we take a
6 break?

7 MR. WILLEY, IV: Sure.

8 (Whereupon, a recess was had from
9 4:37 p.m. to 4:44 p.m.)

10 BY MR. WILLEY, IV:

11 **Q** So looking back at Plaintiff's Exhibit 2,
12 I'm going to go to the last page of that, which is
13 0027.

14 We're going to be done with this one.

15 Look again at the index on the left-hand
16 side. I call it the index.

17 **A** We'll go with that.

18 **Q** Okay. At the bottom of the loss event
19 overview where it says Cary Tanrath, witness;
20 Missy Howard, X443XX handling B.I. claim;
21 Jack Daniel, those three. What would you expect to
22 be there?

23 **A** Should there -- Are you asking should
24 there be anything different or should there --

25 **Q** Like if you click that --

1 A Oh.

2 **Q -- where would it take you, would you**
3 **expect?**

4 A It would just take you to a screen that
5 looks similar to this.

6 **Q Okay.**

7 A When I say similar, it would just have a
8 place for somebody's name, address and phone
9 number.

10 **Q Okay.**

11 A So that's the -- So like Jack Daniel, his
12 information is probably there.

13 **Q Okay.**

14 A His contact information, maybe --

15 **Q Yeah.**

16 A -- e-mail address and things like that, is
17 what I'm assuming, if that's the screen.

18 **Q Yeah.**

19 A Because these are under add to loss.
20 There -- that becomes a drop down.

21 **Q Got it.**

22 A And it can -- there's a -- You can add
23 something that says other party.

24 **Q Okay.**

25 A Because, typically, what this is, when you

1 add, when it's add to loss, it's going to be
2 claimant vehicle, witnesses --

3 **Q Got it.**

4 A -- personal property, different things
5 that might be associated with this. And there's
6 one that's other party.

7 **Q Okay.**

8 A And then that's how I got added, or that's
9 how my name got added and Jack Daniel --

10 **Q Okay.**

11 A -- if you have to add another party.

12 **Q And, so if you went there, would it, would**
13 **you expect to see like a summary if you all talked**
14 **on the phone sort of thing?**

15 A No.

16 **Q Okay.**

17 A It's really just information.

18 **Q Got it, okay.**

19 A Like if you were to go to detail under
20 where we are now --

21 **Q Uh-huh.**

22 A -- it would list Therese Hood's name,
23 address and phone number --

24 **Q Okay.**

25 A -- and maybe e-mail.

1 **Q All right.**

2 **A And that's what it would look like.**

3 **Q Well, I hope to be able to see all that**
4 **one day, but we'll figure that out.**

5 **Let me ask you about Plaintiff's --**

6 **MR. WHELAN: Jack Daniel's e-mail**
7 **address?**

8 **MR. WILLEY, IV: No.**
9 **What this tab showed.**

10 **MR. WHELAN: She just told you.**

11 **Q Let me show you Plaintiff's Exhibit 3.**
12 **(Whereupon, Plaintiff's Exhibit Number 3**
13 **was marked for identification.)**

14 **Q Which is Hood USAA 0028 through 0044.**
15 **Just take a minute and familiarize yourself.**

16 **Do you know what this document is?**

17 **A Not just by looking at it, no.**

18 **Q Okay. It doesn't look like anything that**
19 **you're familiar with, as far as USAA's forms and**
20 **all like that?**

21 **A Wait a second. It looks like all the**
22 **information that's from our screens, but I don't**
23 **know where it's coming from.**

24 **Q Okay. Fair enough.**

25 **A Yeah. I don't -- I'm not sure.**

1 **Q Who is Ronald Vestal? Do you know him?**

2 **A I did know him.**

3 **Q How is he?**

4 **A He passed away.**

5 **Q What was his role?**

6 **A He was, maybe a litigation director --**

7 **Q Okay.**

8 **A -- possibly. I'm not sure his exact**
9 **title. But he passed away a couple years ago,**
10 **maybe a year or two ago.**

11 **Q Okay. All right. Sorry to hear that.**

12 **Have you ever seen the, what I'm going to**
13 **mark as Exhibit 4, which is Hood USAA 0045.**

14 **(Whereupon, Plaintiff's Exhibit Number 4**
15 **was marked for identification.)**

16 **A I'm sorry. What was the question?**

17 **Q Have you ever seen that?**

18 **A Have I seen this screen before?**

19 **Q Yes.**

20 **A On other files, yes.**

21 **Q And what is that?**

22 **A It's the reserve history. When the**
23 **reserves were changed or opened and closed or,**
24 **and/or changed.**

25 **Q And that's what I was going to ask you.**

1 So there's -- You see where it stays a
2 hundred thousand for a while, but there's several
3 entries for that, like, 5-21, 6-22, 6-22, 6-22?

4 A Yes.

5 Q Why -- How does --

6 When you say open, does that open and
7 close -- I'm trying to figure out why there would
8 be multiple entries for the same amount.

9 A I'm not exactly sure --

10 Q Okay.

11 A -- about everything.

12 Q Okay.

13 A Okay. I can tell you that when there's a
14 change, you're going to get like a change -- This
15 is the file handler code, like --

16 Q Yeah.

17 A So like -- or not -- The employee number,
18 I apologize. So Diane is 46902.

19 Q Right.

20 A Okay. So as soon as the file changes
21 over, when it went M0085, it's always going to --
22 Then it will make an update.

23 Q Right.

24 A And then when there's an increase, it will
25 make an update.

1 **Q Right.**

2 **A The other things, and this is what I'm not**
3 **sure on. This is just going to be what I --**

4 **Q Just the best of your knowledge.**

5 **MR. WILLEY, IV: You can't tell her**
6 **not to answer. She's allowed to answer.**

7 **A It's just that it -- We have reserve**
8 **remainders that we can look at that we get.**

9 **Q Uh-huh.**

10 **A I don't know if that's what that is or**
11 **not.**

12 **Q Okay. How would you be able to determine**
13 **what that is? Is there any way in the claims file?**

14 **A Not that I know.**

15 **Q Other than on the claim docs, Exhibit 1,**
16 **would there be anywhere you could look to determine**
17 **why a reserve was changed? Would that be notated**
18 **anywhere else, other than as a documentation on**
19 **Exhibit 1?**

20 **A Not that I'm aware of.**

21 **Q Okay.**

22 **MR. WILLEY, IV: All right. I will**
23 **mark 0046 through 0384 as 5.**

24 **(Whereupon, Plaintiff's Exhibit Number 5**
25 **was marked for identification.)**

1 MR. WHELAN: These are all the pages
2 from 0046 through?

3 MR. WILLEY, IV: Yes. The full,
4 unless somebody stole one on the plane.

5 BY MR. WILLEY, IV:

6 Q Okay. You don't need to flip through
7 that.

8 If you will go with me to 0077.

9 All right. What is this?

10 A Recorded statement transcript.

11 Q Okay. And you took this recorded
12 statement, correct?

13 A I did.

14 Q Okay. You said earlier when you take a
15 recorded statement you, obviously, tell the person
16 you go up top and you hit the button to record,
17 right?

18 A Yes.

19 Q Okay. And then you have the opportunity
20 to record statement, obviously. And you also take
21 notes in the claims doc of the file?

22 A Yes.

23 Q Okay. And sometimes might those notes be
24 useful, for example, for negotiation points or
25 liability issues related to the incident?

1 MR. WHELAN: Object to the form.

2 A Regarding what happened, yes.

3 Q Okay. This recorded statement is part of
4 L/R7, okay, which is the one part, I will say, at
5 least of the U.I.M. claim file, okay. That's where
6 this is, or at least it's been represented to me.

7 This recorded statement would have been
8 taken by you under L/R5, correct?

9 A Correct.

10 Q Okay. And L/R5 is where you would have
11 notated anything that you took down during that
12 call, correct?

13 In other words, you're not going to have
14 any notations in Plaintiff's Exhibit 1 that you
15 made about this call, right?

16 A I wouldn't have docked anything in loss
17 report seven, but, I mean, this recorded statement
18 is, is the facts of --

19 Q What happened?

20 A -- what happened.

21 Q Right. And if you go to 86, which is the
22 last page of that recorded statement.

23 This recorded statement was transcribed on
24 what day? December --

25 A December 11, 2014.

1 Q Okay. And according to the first page,
2 you took the recorded statement on November 13,
3 2014.

4 Does that sound like a typical gap, in
5 terms of getting a transcription back on a
6 statement you took?

7 A I don't transcribe every statement I get.

8 Q Okay. If you do transcribe a statement,
9 does it generally take about a month; is that a
10 fair estimate?

11 A I wouldn't think so.

12 Q Okay. Is it generally faster?

13 A Yes.

14 Q Okay. And at the time that this statement
15 was taken and transcribed L/R7 was not open yet,
16 correct, the U.I.M. claim file?

17 A Correct.

18 Q As you sit here today, do you know why you
19 asked to have this particular statement
20 transcribed?

21 A I could only think of one reason.

22 Q What's the one reason you can think of?

23 A That -- and I don't know for sure for
24 sure.

25 Q Right.

1 A Is that if this Mr. Johnson got an
2 attorney and the attorney requested a copy of the
3 statement.

4 Q But you don't know for sure that was the
5 reason?

6 A No.

7 Q Okay. Would you generally have documented
8 that reason in your communication requesting the
9 transcription?

10 A Let me go back on that.

11 Q Okay.

12 A Is that the -- our sub department,
13 subrogation department could have requested it for
14 arbitration.

15 Q Is another possible way?

16 A Yes.

17 Q But you don't know in this case, as we sit
18 here today, whether it was one of those, the other
19 or either, right?

20 A No.

21 Q Okay. You need to look at the date that
22 you requested the transcription to determine that,
23 right?

24 A Yes.

25 Q Do you know how a recorded statement from

1 **L/R5 would get into the claims file for L/R7?**

2 A No.

3 **Q Okay. Is that typical?**

4 MR. WHELAN: I'm sorry. One second.

5 Yeah. I just wanted to see that last
6 question.

7 Okay. I'm sorry.

8 A I, and I don't know for sure. I could
9 have copied it over when I created the U.I.M. file.

10 BY MR. WILLEY, IV:

11 **Q Okay. Would that be reflected on the**
12 **claims doc for L/R7 if you had input a document**
13 **into the file?**

14 A I don't know that it would show in here or
15 not, that it wouldn't.

16 **Q Okay. But you just flipped through that.**
17 **You don't see it in there, do you?**

18 A No, huh-uh.

19 **Q Is it possible that somebody handling that**
20 **file went into your pending B.I. claim and**
21 **transferred it subsequent?**

22 A They could have asked me or could have
23 called another person if I wasn't in the office and
24 had someone else, you know, transfer.

25 **Q Right. So they could have gained access**

1 to, they being the people handling the U.I.M.
2 claim, could have gained access to your B.I. file
3 and transferred documents, that's possible,
4 correct?

5 MR. WHELAN: Object to the form.

6 A They would have -- They wouldn't have gone
7 into it.

8 Q Right. An intermediary could have gone
9 into it and transferred information, correct?

10 MR. WHELAN: Object to form.

11 A Possibly.

12 Q In fact, somebody had to go into the file
13 at some point and move your recorded statement from
14 that file L/R5 to L/R7 in order for it to be in
15 there --

16 A A copy of it.

17 Q -- right?

18 A Yes.

19 Q If you go to 88. This is a recorded
20 statement that Diane Martin took, correct?

21 A Yes.

22 Q Okay. And Diane Martin testified earlier
23 was the individual that the system randomly
24 selected to assign the U.I.M. file to after you
25 opened it, right?

1 A Correct.

2 Q Okay. If you will go to page 94. The
3 date this statement was transcribed is January 29,
4 2015, correct?

5 A Yes.

6 Q And that would have been prior to May 20,
7 2015 when you actually opened the U.I.M. file,
8 right?

9 A Yes.

10 Q Do you have any idea why Diane Martin
11 would have been taking this recorded statement five
12 months before the U.I.M. file was assigned to her?

13 A It appears, because it says here that --
14 Hang on a second. Something about Mysti, I think
15 that's what Mysti was interested in.

16 So she must have been taking it on my --
17 taking the statement for me.

18 Q Where did you see that, Miss?

19 A Hang on.

20 Q Spell the word miss at.

21 A On the top of page 94. It says --

22 Q Oh.

23 A -- okay, that's probably what Mysti was
24 interested in. It says Mysti.

25 Q Okay. Right.

1 A But I thought I saw that somewhere else
2 too, something here references my name.

3 Oh, right here. Mr. Smith, is there
4 anything else you would like to add to the
5 statement.

6 **Q I see the middle of 93.**

7 A "I think for Mysti's sake, uhm, one of the
8 issues is gonna be were the headlights on".

9 **Q Right.**

10 A So she must have -- maybe I was out and
11 she just happen to be the one that answered the
12 phone the day they called.

13 **Q And, so this transcription was done in**
14 **January of 2015, which means that the statement**
15 **would have been taken prior to January 29, 2015,**
16 **right?**

17 A Yes.

18 **Q And there's not a date on the first page**
19 **of it, at least.**

20 A Oh.

21 **Q So Diane's involvement at that point, she**
22 **took a recorded statement for the B.I. file, which**
23 **was L/R5 five months, at least five months before**
24 **the U.I.M. file was opened and assigned to her; is**
25 **that a fair statement?**

1 A Yes.

2 Q So she would have known, obviously, when
3 she got assigned the U.I.M. file that this
4 statement existed, right?

5 A I don't know that she would have wouldn't
6 have remembered.

7 Q Okay. Fair enough.

8 A I can't speak on that.

9 Q All right. I'm going to blow your mind
10 again. Let's go to 96. It gets even better.

11 Who took this recorded statement?

12 A All right. I think it's me.

13 Q You think it's you?

14 A I believe it's me.

15 Q Okay. Are you sure? Not a hundred
16 percent but --

17 A Ninety-nine.

18 Q Ninety-nine, okay.

19 Where could we find out for sure? If we
20 looked in L/R5, we'd be able to see the number
21 associated, the employee number associated with
22 that recorded statement, right?

23 A Yes.

24 Q That would tell us who took it, right?

25 A Yes.

1 Q Okay. Did you handle the B.I. claim all
2 the way through?

3 A No.

4 Q Once it went into litigation, you handed
5 off that claim; is that right?

6 A Correct, yes.

7 Q There are some e-mails between you and
8 defense counsel that was hired to defend the B.I.
9 claim.

10 Do you recall any conversations with a man
11 by the name of Chris Nickels?

12 A I know Chris Nickels, but don't remember
13 any communication with Chris.

14 Q How do you know him?

15 A Just through other files or, you know,
16 calling him to see if I can get information or
17 assistance.

18 Q When not handling litigation claims, when
19 would you ever need to contact him?

20 Does that question make sense?

21 A If I need maybe a minor court approval.

22 Q All right. Betsy Kushner (Phonetically),
23 do you know her?

24 A Yes.

25 Q She was the senior litigation manager?

1 A I know she works in our office.

2 Q Okay. Would it be typical for her to ask
3 you to speak with an attorney hired to defend a
4 B.I. claim?

5 A I can't say that she would or wouldn't. I
6 just don't know.

7 Q Okay.

8 A I don't remember.

9 Q If she did --

10 MR. WILLEY, IV: I don't have a copy
11 for you, but I will show you the e-mail.

12 MR. WHELAN: You have the whole
13 e-mail? I just, I got some notes when I
14 --

15 MR. WILLEY, IV: Oh, that's okay.
16 No, the notes are fine.

17 MR. WHELAN: I think you should show
18 her the whole e-mail.

19 BY MR. WILLEY, IV:

20 Q Yeah. You can take a look at it. It goes
21 in reverse, okay. So this one is -- Hold on a
22 second. Go all the way back. How about that.

23 Guys, I spoke with the plaintiff's office
24 already. Alex Myrtle (Phonetically) is handling
25 attorney on the Kucks over there. It's kind of

1 **immaterial at that point.**

2 MR. WHELAN: Well, it's still not all
3 the way back. It's responding to
4 something.

5 MR. WILLEY, IV: That's where she
6 gets pulled in.

7 MR. WHELAN: Good gracious. Eight
8 pages.

9 MR. WILLEY, IV: Yeah.

10 BY MR. WILLEY, IV:

11 **Q So you get pulled in up here with Betsy.**
12 **Let's see. I lost my spot. So --**

13 MR. WHELAN: Let's me just take a
14 look at that.

15 MR. WILLEY, IV: You have all this.
16 It's all plaintiff's production.

17 BY MR. WILLEY, IV:

18 **Q All right. So plaintiff's production 2284**
19 **is kind of where it starts. And you get brought in**
20 **on what is actually plaintiff's production 2282,**
21 **which is an e-mail from Betsy which says, good**
22 **morning, attached please find lawsuits which have**
23 **now been filed on behalf of William and Mary Kuck.**
24 **And that is sent to you, Alisa and Chris Nickels**
25 **from Betsy Kushner.**

1 Do you -- And your e-mail back was, thank
2 you; do you know if they have been served;
3 Missy Howard; April 10, 2016, eight-eighteen a.m.

4 You typically get to work that early?

5 A Yeah.

6 Q You're an early one?

7 A Yeah.

8 Q Okay. Do you have any independent
9 recollection of this e-mail thread?

10 A No.

11 Q Okay. Later Betsy says, Chris, and,
12 Melody, do you have confirmation of service upon
13 the insured of these two suits for William and
14 Mary Kuck. And Chris says, it's possible that
15 their personal lawyer, Kevin Smith, accepted
16 service. We will reach out to him and find out.

17 Then there's a conversation about the
18 plaintiff's lawyers in this case, okay.
19 Chris Nickels replies and says, with you on the
20 e-mail, Betsy Kushner, Melody Reeves
21 (Phonetically), recommend extreme caution, perhaps
22 a quick T.C., telephone call, I assume that means
23 next week. Then the call was set up, okay. Please
24 coordinate with Missy.

25 There is an e-mail from you indicating

1 what times work for you and then the e-mail from
2 Melody Reeves who is Chris Nickels paralegal
3 setting the time, okay. Chris will call you.

4 Do you remember that phone call?

5 A I do not.

6 Q Okay. And --

7 MR. WHELAN: Object to form.

8 Q Would that phone call have been documented
9 in L/R5, L/R6 or L/R4, 3, 2, 1?

10 Do you know where that would have been
11 documented?

12 A I would think -- I mean, L/R5, but I don't
13 remember.

14 Q Okay.

15 A I don't remember it.

16 Q All right. Would you expect that it would
17 have been documented somewhere by you?

18 A If there was a phone call, yes.

19 Q Okay. How long does, if you know, maybe
20 you don't know, USAA keep its claims files after a
21 claim is closed?

22 A Oh, seven years, ten years.

23 Q Okay.

24 A But I'm really not sure.

25 Q I understand. There's an e-mail which is

1 Hood, plaintiff production 2378 dated May 21, 2015.
2 So we're now at the point where you've opened the
3 U.I.M. file and it's been transferred to Diane,
4 right?

5 A Yes.

6 Q This is an e-mail from Diane to
7 Chris Nickels copying you, okay.

8 MR. WHELAN: Let me see it.

9 MR. WILLEY, IV: You have all these?

10 MR. WHELAN: Well, Roy, you're
11 supposed to bring copies of the exhibits
12 to the deposition. I mean, there's three
13 thousand pages.

14 MR. WILLEY, IV: Four thousand.

15 MR. WHELAN: Four thousand pages.

16 MR. WILLEY, IV: You don't have them
17 on your computer?

18 MR. WHELAN: I do not.

19 MR. WILLEY, IV: Well, read just that
20 e-mail.

21 MR. WHELAN: Okay.

22 MR. WILLEY, IV: Okay. All right.

23 BY MR. WILLEY, IV:

24 Q This is, just show you, Hood plaintiff
25 production 2378. And the second highlighted line

1 just says, this claim went to arb and that decision
2 was eighty percent on claimant Johnson and twenty
3 percent on USAA Hood for no headlights. Missy is
4 handling the B.I. at a twenty percent liability
5 based on that outcome.

6 Do you see that?

7 A Yes.

8 Q Okay. And is that in fact an accurate
9 reflection of how you handled the B.I. claim on
10 eighty percent Johnson, twenty percent Hood
11 comparative?

12 A I can't accurately say that. I know that
13 that's what that says, but I didn't type that. So
14 I don't know.

15 Q Okay. And in order to accurately be able
16 to say that, would you have to look at your claims
17 file?

18 A I didn't handle the B.I. claim, so I
19 didn't settle it.

20 Q Right. But at that point in time she says
21 you're handling the claim. I know it didn't
22 settle.

23 A I mean, I never even got a demand. I was
24 still --

25 Q Right. You did an investigation?

1 MR. WHELAN: You got the
2 interruption?

3 THE COURT REPORTER: Yes.

4 Q You did an investigation, right, on
5 liability?

6 A I was in the process -- You know, I, from
7 what I remember, was that I always wanted to get
8 Kuck's statement to assist with finalizing my
9 liability decision.

10 Q Right.

11 A And that was, that was -- And I don't know
12 that I ever got that prior to it getting
13 transferred.

14 Q Okay. And that information would be in
15 L/R5, your claims file, right?

16 A Correct.

17 Q Okay. And what your investigation showed
18 and how you were handling the claim up until that
19 point would also be in your claims file, correct?

20 A Yes.

21 Q Okay. And if the statement was in fact
22 still being waited on, you still wanted that, you
23 would expect to see that as an uncompleted item in
24 your claims plan, right?

25 A Yes.

1 **Q Okay. You have any questions for me?**

2 MR. WHELAN: Object to the form.

3 **A No.**

4 MR. WILLEY, IV: Okay. Thank you for
5 your time. That's all I have.

6 MR. WHELAN: All right.

7 CROSS-EXAMINATION

8 BY MR. WHELAN:

9 **Q All right. Ms. Howard, are reserves a**
10 **reflection of -- he's also said they're a**
11 **reflection of exposure, as opposed to value?**

12 **A Yes.**

13 **Q Okay. And looking at when you opened up**
14 **this U.I.M. file, you would have -- there would be**
15 **nothing in it, correct, on May the 20th; is that**
16 **right?**

17 **A Correct.**

18 **Q Okay. And, so in your file you would have**
19 **had factual information, such as the police report**
20 **and the statements that you took, right?**

21 **A That is correct.**

22 **Q Would you have take -- Would it be your**
23 **practice to take that information and put it into**
24 **the U.I.M. file when you opened it?**

25 **A Yes. That is what I do.**

1 Q Okay. So let me ask you this.
2 Now, on Exhibit 3, is that over there?
3 Thank you.

4 Looking at page 2 of Exhibit 3.
5 Mr. Willey was asking you about what he called the
6 index on the document with the blue tabs. And he
7 was asking you about where it had a link for
8 Cary Tanrath.

9 You remember that?

10 A Yes.

11 Q These witnesses. And he said it would
12 have their address, basically?

13 A Yes.

14 Q Looking at page, the second page of
15 Exhibit 3 under Cary Tanrath, is that, that
16 essentially the information that you would get when
17 you click on that link?

18 A That is correct, yes.

19 Q All right. And then same thing with
20 respect to Jack Daniel down below?

21 A Yes.

22 Q All right. Then see where it says
23 Missy Howard XX44366? Again, that's the same thing
24 on that blue tab?

25 A Yes.

1 **Q** Okay. But you have not seen this info --
2 In your day-to-day job, you don't see the
3 information presented as it appears in Exhibit 3
4 that we have here today; is that fair?

5 **A** Yes.

6 **Q** It's in a different format?

7 **A** Right.

8 MR. WHELAN: All right. I think
9 that's all I have for you. Thank you.

10 MR. WILLEY, IV: It's not early, but
11 it's not late.

12 THE COURT REPORTER: You need this
13 transcribed, Mr. Willey?

14 MR. WILLEY, IV: Yes.

15 THE COURT REPORTER: You need a copy,
16 Mr. Whelan?

17 MR. WHELAN: Oh, yes, please, please.

18 (Whereupon, the deposition was concluded
19 at 5:30 p.m.)
20
21
22
23
24
25

ERRATA SHEET
DO NOT WRITE ON TRANSCRIPT - ENTER CHANGES HERE

IN RE: Therese Hood v. USAA

CASE NO. 2018-CP-10-0666

PAGE NO.	LINE NO.	CHANGE	REASON

Under penalties of perjury, I declare that I have
read my deposition and that the facts stated in it
are true and correct subject to any changes in form
or substance entered here.

1 CERTIFICATE OF OATH

2
3 STATE OF FLORIDA

4 COUNTY OF HILLSBOROUGH

5
6 I, ROBERTA TURNER, Registered Professional
7 Reporter and Notary Public, State of Florida, duly
8 commissioned, qualified and authorized to
9 administer oaths and to take and certify
10 depositions, do hereby certify that the above-named
11 GAIL (MISSY) HOWARD was by me, before the giving of
12 her deposition, first duly sworn to testify as to
13 the truth, the whole truth and nothing but the
14 truth.

15 WITNESS my hand and official seal this
16 3rd day of April, 2019.

17
18
19 
20 ROBERTA TURNER, RPR, FPR, CLR, CCR (GA)
21 Registered Professional Reporter
22 NOTARY PUBLIC - STATE OF FLORIDA
23 My Commission No. FF 235676
24 Expires: 09-28-19
25



1 REPORTER'S DEPOSITION CERTIFICATE
2 STATE OF FLORIDA
3 COUNTY OF ORANGE
4

5 I, ROBERTA TURNER, Registered Professional
6 Reporter, hereby certify that I was authorized to
7 and did stenographically report the deposition of
8 GAIL (MISSY) HOWARD; that a review of the
9 transcript was not requested; and that said
10 deposition was later reduced to computer
11 transcription under my personal supervision, and
12 pages 4 through 157 is a true and complete record
13 of my stenographic notes.

14 I further certify that the deposition was
15 taken at the time and place specified herein above
16 and that I am not a relative or employee or
17 attorney or counsel of any of the parties, nor am I
18 a relative or employee of any of the attorneys,
19 counsel connected with the action, nor am I
20 financially interested in the action.

21 Dated this 3rd day of April, 2019.

22
23 
24 ROBERTA TURNER, RPR, FPR, CLR, CCR (GA)
25 Registered Professional Reporter
NOTARY PUBLIC - STATE OF FLORIDA
WITNESS NOTIFICATION LETTER

1 TURNER REPORTING, INC.
2 581 N. PARK AVENUE, SUITE 355
3 APOPKA, FLORIDA 32704
4 (407) 497-6070

5 APRIL 3, 2019

6 GAIL (MISSY) HOWARD
7 C/O ROBERT W. WHELAN, ESQ.
8 Nelson, Mullins, Riley & Scarborough, LLP
9 Liberty Center, 6th Floor
10 151 Meeting Street, Suite 3500
11 Charleston, South Carolina 29401

12 RE: Therese Hood v. USAA
13 CASE NO. 2018-CP-10-0666

14 The transcript of the above-referenced proceeding
15 has been prepared and a copy is enclosed here for
16 your review.

17 Any corrections you wish to make to the transcript
18 should be made on the errata sheet. Please do not
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24 
25 _____
26 Roberta Turner, RPR, FPR, CLR, CCR, (GA),

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28 Robert W. Whelan, Esq.

29 TURNER REPORTING, INC.
30 407-497-6070

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IN THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON IN THE
COURT OF COMMON PLEAS FOR THE
NINTH JUDICIAL CIRCUIT

CASE NO: 2018-CP-10-0666

THERESE HOOD,
Plaintiff,
vs.

UNITED SERVICES AUTOMOBILE
ASSOCIATION (USAA),
Defendant.

DEPOSITION OF:

KATHY MOATS

Examination of a Witness, beginning
at 9:00 A.M. and concluding at 1:00 P.M.
on Friday, March 22, 2019, taken by the
Plaintiff at Nelson, Mullins; 100 N. Tampa
Street, Suite 3500; Tampa, Florida, before
Roberta Turner, RPR, FPR, CLR, CCR (GA),
Certified Court Reporter.

1 APPEARANCES:

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7 On behalf of the Plaintiff;

8 ROBERT W. WHELAN, ESQ.
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14 On behalf of the Defendant.
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I N D E X

WITNESS

KATHY MOATS

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PLAINTIFF'S EXHIBITS MARKED

NO. 1 Hood Claims Documents Bates 0001-0023	4
NO. 2 Hood Claims Loss Summary Bates 0024-0027	4
NO. 3 Hood Documentation Bates 0028-0044	4
NO. 4 Exposure History	4
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1 (Whereupon, Plaintiff's Exhibit Numbers 1
2 through 5 were marked for identification.)

3 THE WITNESS: I do.

4 KATHY MOATS

5 called as a witness having been first duly
6 sworn, was examined and deposed as follows:

7 DIRECT EXAMINATION

8 BY MR. WILLEY, IV:

9 Q All right. Kathy, we've met before.

10 How do you say your last name?

11 A Moats.

12 Q Moats, okay. Would it be okay if I call
13 you Kathy?

14 A Absolutely.

15 Q And you can call me Roy.

16 MR. WHELAN: Call him Mr. Willey.

17 Go ahead.

18 Q During the course of the deposition, if
19 you need a break at any time, just let me know,
20 okay. This is not an endurance contest. I am not
21 here to try to wear you down or anything like that.
22 So we will take breaks as often as you need breaks.

23 And that goes for everybody else. So
24 Robbie already knows if he needs a break, if
25 Roberta needs a break, if the guy on the wall needs

1 a break, if anybody needs a break, just let me know
2 and we'll take a break, okay.

3 You understand that?

4 A Yes, sir.

5 Q Okay. Have you had your deposition taken
6 before?

7 A Never.

8 Q Okay. So, obviously, Ms. Roberta is here
9 and she's creating a written record of everything
10 that we say. And, so it's important, unlike in a
11 normal conversation where you might nod or I might
12 nod and we would both know what was being
13 communicated, that we actually give verbal, audible
14 responses so that she can take it down onto the
15 record, okay?

16 A Yes, sir.

17 Q All right. You understand you're under
18 oath just like if we were in a court of law?

19 A Yes, I do.

20 Q Okay. And if you have any questions
21 during the deposition, the rule says that you have
22 to ask me. You're not allowed to ask Mr. Whelan.
23 And that includes if we take a break, you're not
24 allowed to discuss your testimony with him, okay?

25 A Yes, sir.

1 Q All right. Along those same lines, if I
2 ask a question and he objects, which sometimes he
3 likes to do, all that he's doing is just saying
4 that he thinks I asked a question in a bad way.
5 And that could just be a compound question. And I
6 will give you an example of that.

7 If I say, would you agree with me that the
8 sky is blue and the grass is green, okay. Answer
9 to both of those would be yes, of course. But I
10 really asked you two questions in one question.
11 And, so there he may object to that. You still
12 answer, but he's just preserving that objection for
13 the record.

14 You understand that?

15 A Yes.

16 Q Okay. If at any time during the course of
17 the deposition you don't understand my question, I
18 do sometimes have a tendency to be wordy and ask
19 long questions, so if you don't understand my
20 question or a part of my question, will you just
21 let me know that so that I can clarify it for you?

22 A Yes, I will.

23 Q Okay. And we're going to assume for
24 purposes of today that if you do answer my question
25 that you understood the question; is that fair?

1 A Yes.

2 **Q Okay. All right. So let's get started**
3 **with --**

4 **MR. WILLEY, IV: Anything else on**
5 **background that you want me to tell her,**
6 **Robbie?**

7 MR. WHELAN: Tell her whatever you'd
8 like.

9 MR. WILLEY, IV: Okay.

10 BY MR. WILLEY, IV:

11 **Q I think that covers it all.**
12 **Do you have any questions or concerns?**

13 A No, sir.

14 **Q Okay. All right. How long have you been**
15 **at USAA?**

16 A Twenty-four years on January 23rd of 2019.

17 **Q Okay. And what is your current position?**

18 A My official title is litigation manager.
19 However, I'm a field litigation manager.

20 **Q Okay. How long have you been a litigation**
21 **manager?**

22 A I believe six to seven years. I don't
23 know exactly.

24 **Q Okay. So since about 2013-ish?**

25 A Ish, yeah.

1 **Q Okay. What were you before you were a**
2 **litigation manager?**

3 **A I was a claims examiner.**

4 **Q How long were you a claims examiner?**

5 **A Six to eight years, maybe.**

6 **Q Okay. And before you were a claims**
7 **examiner, what was your position?**

8 **A A claims adjuster.**

9 **Q Okay. And were you in that position for**
10 **the balance, or did you do something else?**

11 **A No. I was not always in claims. I was a**
12 **claims examiner for three years -- I mean, claims**
13 **adjuster for three years.**

14 **Q Okay.**

15 **A I was a claims rep for three years. And**
16 **then the first three years, I was a customer**
17 **service rep.**

18 **Q Okay. Have all of your moves been**
19 **promotions?**

20 **A Yes, sir.**

21 **Q When you were a claims examiner, last six,**
22 **eight years ago, was your claims director that you**
23 **were under, is he or she still at the company?**

24 **A One of them is, yes.**

25 **Q Okay. Who was that person?**

1 A John Ellison.

2 Q As a litigation manager who, if anyone,
3 reports to you?

4 A No one reports to me.

5 Q Okay. Who do you report to?

6 A I report to Danielle Smith.

7 Q Okay. And how long have you been
8 reporting to Danielle Smith?

9 A She just came back from maternity leave at
10 the end of February; so, a month.

11 Q Okay. Did you -- Was she your report
12 before she went on maternity leave?

13 A No, she was not.

14 Q Okay. All right. Who was your report
15 before she came back from maternity leave?

16 A We had an interim manager named
17 Sara Sepulveda.

18 Q Okay. And how long was Sara there?

19 A From October until Danielle returned in
20 February.

21 Q Do you know how to spell Sara?

22 A S-A-R-A. Sepulveda.

23 Q Yes.

24 A S-E-P-U-L-V-E-D-A.

25 Q All right. Did you meet with Robbie

1 **before this deposition?**

2 A I did.

3 **Q Okay. Did you meet with him before today?**

4 A I did.

5 **Q Okay. How many times have you all met?**

6 A Twice this week.

7 **Q Okay. When?**

8 A Tuesday and Wednesday afternoons.

9 **Q Okay. How long were those meetings?**

10 A Tuesday was maybe three to four hours.

11 Wednesday was probably about the same.

12 **Q Okay. Was anyone else present at those**
13 **meetings?**

14 A No.

15 **Q Did -- was anyone participating via video**
16 **teleconference or telephone in those meetings?**

17 A No.

18 **Q In the room it was just you and**
19 **Mr. Whelan?**

20 A That is correct.

21 **Q Okay. Did Mr. Whelan show you any**
22 **documents during those meetings?**

23 A Yes, sir, he did.

24 **Q What documents did he show you?**

25 A He showed me numerous letters; the report

1 from Mr. Poplin. I'm sure there were more, but I
2 can't remember exactly.

3 Q Were the letters that he showed you
4 letters from the claims file in this case?

5 A Yes.

6 Q Did you see any documents that weren't a
7 part of the claims file in this case?

8 A Not to my knowledge.

9 Q You met with Mr. Whelan again this
10 morning?

11 A Briefly for maybe fifteen minutes.

12 Q Did you talk with Mr. Whelan last night?

13 A I did.

14 Q Okay. How long was that conversation?

15 A Five or ten minutes, maybe.

16 Q What's your understanding about what this
17 case is about?

18 A Just that Ms. Hood has filed a claim
19 against USAA for bad faith.

20 Q What's your understanding of what the
21 basis of that claim is?

22 A I don't, I don't really understand what
23 it's about. I mean --

24 Q All right. Did you have the opportunity
25 to ever review the complaint in this case?

1 A I was aware there was a complaint. I do
2 not remember if I ever read it.

3 Q Okay.

4 A I may have, but I do not remember.

5 Q All right. Before Sara's Sep --

6 A Sepulveda.

7 Q Sepulveda, okay.

8 Before she was your direct report, who was
9 your direct report?

10 A Katina Tomei, T-O-M-E-I.

11 Q Okay. And how long was Katina Tomei your
12 --

13 A I'm going to say from about July or August
14 of '15, I believe --

15 Q Okay.

16 A -- to -- No. That would have been '16 to
17 October of '18.

18 Q Okay. When did you become involved in the
19 underlying claim that's subject to this lawsuit?

20 A I believe it was June of '15 when the suit
21 was served.

22 Q All right. Who was your direct report at
23 that time?

24 A Ron Vestal, V-E-S-T-A-L.

25 Q Okay.

1 A Mr. Vestal is no longer with the company.
2 He's deceased.

3 Q I understand that. I'm sorry to hear
4 that.

5 What is that position called?

6 A Director of litigation operations.

7 Q Okay. How many of those positions are at
8 the company?

9 A I have no idea.

10 Q Are their multiple?

11 A Yes.

12 Q Okay. Who does the director of litigation
13 operations for your team report to?

14 A Ann Marie Simonson (Phonetically).

15 Q And how long has that been the case?

16 A I believe Ann Marie has been in that
17 position three years, give or take.

18 Q All right.

19 A I'm not sure.

20 Q Who was in that position prior to
21 Ann Marie?

22 A Dan Dominick.

23 Q How long was --

24 A Oh, I'm, I'm sorry. I gave you incorrect
25 information.

1 **Q That's okay.**

2 **A My manager reports to Jamie Cooper.**

3 **Q Okay.**

4 **A Jamie Cooper reports to**

5 **Ann Marie Simonson. I apologize.**

6 **Q And what is Jamie Cooper's title?**

7 **A Honestly, I could not tell you.**

8 **Q Okay. Do you know what**

9 **Ann Marie Simonson's title is?**

10 **A No.**

11 **Q Is Jamie a guy?**

12 **A Jamie is a girl.**

13 **Q A girl.**

14 **A Woman.**

15 **Q How long has Jamie been in that position?**

16 **A Two to three years, possibly.**

17 **Q Who was in that position prior to Jamie?**

18 **A Dan Dominick was in that position.**

19 **Q How long was Dan Dominick in that**

20 **position?**

21 **A I have no idea.**

22 **Q Okay. For a while, multiple years?**

23 **A I believe so, yes.**

24 **Q How long has -- And you don't know what**
25 **that position is called as you sit here, right?**

1 A No.

2 **Q That's fine. How long has that position**
3 **reported to Ann Marie Simonson?**

4 A I believe Ann Marie's been in that
5 position three years --

6 **Q Okay.**

7 A -- or more.

8 **Q All right. Who was in that position**
9 **before Ann Marie?**

10 A Tom Strausberger.

11 **Q Okay. How long was Mr. Strausberger in**
12 **that position?**

13 A I have no knowledge. I don't know. A
14 long time.

15 **Q What do you call your team?**

16 A Just our team.

17 **Q Okay.**

18 A There's no particular name.

19 **Q For example, yesterday Ms. Howard told me**
20 **they call their team a Member Services Team.**

21 A Well, we're a litigation team.

22 **Q A litigation team?**

23 A Yeah.

24 **Q Okay. I just want to make sure we're all**
25 **using the same terminology.**

1 A Okay. No. Yes. We would be a litigation
2 team.

3 Q Okay. Do you know how many litigation
4 teams are in the company?

5 A No, I do not.

6 Q Are there multiple litigation teams in the
7 building where you work?

8 A Yes, there are.

9 Q Okay. And how are the litigation cases
10 assigned to a team?

11 A Based on the states that we handle.

12 Q Okay. What states is your team
13 responsible for?

14 A Currently my team handles Florida and
15 Georgia.

16 Q Okay. Does any other team handle Florida
17 or Georgia?

18 A Not to my knowledge.

19 Q At some point did your team handle South
20 Carolina?

21 A Yes, sir, we did.

22 Q Okay. And for how long did your team
23 handle South Carolina?

24 A I do not remember. I don't believe it was
25 very long.

1 **Q Okay. Do you know how your team came to**
2 **be assigned South Carolina?**

3 A I'm assuming a decision from upper
4 management.

5 **Q Okay. Do you know why your team no longer**
6 **handles South Carolina?**

7 A I'm not on -- in that capacity, so I don't
8 know why.

9 **Q Okay. Do you know who makes those**
10 **decisions?**

11 A No, I do not.

12 **Q Okay. Do multiple litigation teams report**
13 **to Jamie Cooper?**

14 A Yes, they do.

15 **Q Okay. Do you know how many?**

16 A No, sir.

17 **Q Okay. Do you know who Ann Marie reports**
18 **to?**

19 A I know who she is, but I apologize, I
20 cannot think of her name right now.

21 **Q Okay. Do you know what her title is?**

22 A I'm not positive, no.

23 **Q Okay. What's your best guess on what her**
24 **title is?**

25 A Executive vice president; something of

1 that nature.

2 Q Okay. Is that individual in your office?

3 A No, sir.

4 Q Is Ann Marie in your office?

5 A No.

6 Q Is Jamie in your office?

7 A No, sir.

8 Q Okay. Your director is in your office,
9 correct?

10 A She's in Tampa.

11 Q Okay. But not in the same building?

12 A Correct. I don't work in either building.

13 Q Right. Because you're in the field?

14 A And I work at home, yes.

15 Q Right, okay.

16 Do you have specific responsibility for
17 either Florida or Georgia?

18 A My specific responsibility is in Florida.

19 Q Okay. At the time of this underlying
20 suit, what states or state were you specifically
21 responsible for?

22 A Specifically for Florida.

23 Q Okay.

24 A But I did do some South Carolina.

25 Q Okay. Did other litigation managers

1 **handle South Carolina cases?**

2 A Yes, sir.

3 **Q Okay. Do you know who?**

4 A I would only be guessing; no, sir.

5 **Q Okay. How did you find out that you would**
6 **no longer be handling South Carolina cases?**

7 A I can't say specifically. I'm sure it was
8 a directive that came down from somewhere; probably
9 my manager told me.

10 **Q With you working at home and being in the**
11 **field, do you have to ever come into the office for**
12 **in-person meetings?**

13 A I do on occasion.

14 **Q Okay. Do you receive your directives from**
15 **management at those meetings, or do you typically**
16 **receive them another way?**

17 A We can receive them via e-mail. We can
18 receive them via huddles, or in person.

19 **Q Do you know how you received the directive**
20 **that you weren't going to be handling South**
21 **Carolina cases?**

22 A No. I don't remember.

23 **Q Do you remember when that was?**

24 A No. I don't remember.

25 **Q When about was it? Was it a year ago, two**

1 **years ago?**

2 A Most likely in the two-year range.

3 Q Two-year range.

4 Were you assigned any South Carolina cases
5 **after the case that underlies this matter resolved?**

6 A I don't know.

7 Q If you were to look for that information,
8 **where would you go to find it?**

9 A I have no idea. I'm sure there's a way,
10 but I have no idea.

11 Q On your computer, do you have access to a
12 **list of your pending cases?**

13 A My current pending, yes.

14 Q Are you able to go and see past pending
15 **cases?**

16 A I am, yes.

17 Q Okay. Are those cases -- indicate when
18 **they were assigned to you?**

19 A I would assume if I went in the file, yes,
20 I could see when it was assigned to me or when I
21 took the case.

22 Q All right. What was the reason that you
23 **were given for no longer being assigned South**
24 **Carolina cases?**

25 A I don't remember.

1 **Q Who gave you that information?**

2 A I don't remember.

3 **Q Okay. Would it have been your director?**

4 A I would assume it was my director, but I
5 do not remember for sure.

6 **Q Okay. And in the two-year range your**
7 **director would have been Katina?**

8 A You mean when I was handling South
9 Carolina claims?

10 **Q When you found out that you weren't going**
11 **to be handling South Carolina claims any longer.**

12 A I can't honestly say if it was Katina or
13 Ron.

14 **Q But it was -- You think it was either**
15 **Katina or Ron?**

16 A It came from my director, it would have
17 been one of them. But I cannot honestly say if it
18 came directly from them.

19 **Q Okay. Do you handle litigation claims**
20 **that are liability claims and U.I.M. claims, or do**
21 **you only handle one specific type?**

22 A I handle all claims.

23 **Q Okay. Do you know how the claim that is**
24 **the subject of this case was assigned to you?**

25 A At that time, I do not remember how it was

1 assigned to me.

2 Q Okay. Where would you look to find that
3 information?

4 A I have no idea.

5 Q Okay. If you looked in your past pending
6 cases and pulled up this claim, would you be able
7 to determine how it was assigned to you?

8 A I can't say.

9 Q Okay. Typically in a claims file, does it
10 indicate transfer assignment of a case?

11 A The file, the claims file would show that
12 it was transferred from an adjuster directly to me.

13 Q All right. And sometimes, or more often
14 than not, are there notes in there at the time of
15 transfer that give you information about the case
16 situation?

17 A There are notes in the claims file, but
18 not from a manager.

19 Q When you sit down to work for the day
20 and -- You work from home, correct?

21 A Correct.

22 Q Okay. So is all of your claim information
23 on a computer?

24 A That is correct.

25 Q Okay. And what program is that

1 **information stored on?**

2 A We have a claims file and a litigation
3 file.

4 **Q Okay. And are those files kept in**
5 **separate software systems?**

6 A Yes.

7 **Q What is the claims file system called?**

8 A I don't know that there's a name for it.

9 **Q Okay.**

10 A It's just our claims file.

11 **Q That's how you all refer to it?**

12 A Uh-huh; yes, sir.

13 **Q Okay. How do you refer to the litigation**
14 **file?**

15 A As our litigation file or ALIS file,
16 A-L-I-S.

17 **Q Okay. Other than the software that has**
18 **the claims file and the software containing the**
19 **ALIS file, are there any other software programs**
20 **that you utilize in your work?**

21 A Not that have the information in those
22 files, no.

23 THE COURT REPORTER: I'm sorry. Can
24 we take a quick break?

25 MR. WILLEY, IV: Yes.

1 (Whereupon, a recess was had from
2 9:25 a.m. to 9:27 a.m.)

3 THE COURT REPORTER: "Okay. Other
4 than the software that has the claims file
5 and the software containing the ALIS file,
6 are there any other software programs that
7 you utilize in your work?"

8 Her answer: Not that have the
9 information in those files, no.

10 BY MR. WILLEY, IV:

11 **Q What is the difference between the**
12 **information stored in the claims file and the**
13 **information stored in the ALIS file?**

14 A The claims file is the information that is
15 formed by the adjuster or examiner, whoever is in
16 charge of that file initially.

17 **Q Okay. Do you ever -- You input data into**
18 **the claims file as well, correct?**

19 A I do. Not as often, but I do, yes.

20 **Q What types of information would you input**
21 **into the claims file?**

22 A There's some information I initially put
23 in there to send the file out to our attorneys.

24 **Q Okay.**

25 A When I make contact with my insured

1 directly, initially, that goes in that file. And
2 there is a form in there that I will sometimes fill
3 out with accident and injury information.

4 **Q Okay. What type of information do you put**
5 **into the ALIS file?**

6 A A summation of the claim itself and then
7 pertinent docs about what's transpiring within the
8 claims.

9 **Q Okay. Is that where you log updates about**
10 **the litigation?**

11 A Yes.

12 **Q Okay. Is that where you would keep track**
13 **of offers made and demands received?**

14 A If I -- Yes. If I have that information,
15 yes.

16 **Q Okay. Is that where you would track**
17 **information about decisions related to the handling**
18 **of the litigation?**

19 A Yes.

20 **Q Do you handle U.I.M. claims differently**
21 **than you handle liability litigation claims?**

22 A Only to the respect that I don't make
23 direct contact with my insured in a U.I.M. claim.
24 I would do that all through the attorney, where on
25 the other, on the B.I., I may occasionally talk

1 directly to my insured or communicate with them.

2 **Q But as far as the actual defense of the**
3 **suit, the litigation process, do you handle those**
4 **types of claims any differently?**

5 A No.

6 **Q Okay. You said that you were specifically**
7 **a field litigation manager. Will you color in for**
8 **me what that means.**

9 A My main job is to -- I'm the USAA
10 representative that goes to mediations with our
11 attorneys, our defense attorneys. I'm the person
12 that takes the money from USAA. And that is the
13 majority of my job is doing that.

14 **Q Mediations?**

15 A Mediations. And that's basically across
16 Central Florida, anywhere else they send me, but
17 basically Central Florida.

18 **Q And was that basically your job in 2015**
19 **and '16, '17?**

20 A Yes, it was.

21 **Q The only distinction then being you had**
22 **claims in South Carolina?**

23 A Correct.

24 **Q Okay. Do you also typically attend trials**
25 **for USAA?**

1 A I will if I have the time, yes.

2 Q Okay. Is there another individual who has
3 that as their primary job, or for all litigation
4 managers is it a time-based analysis on whether to
5 attend a trial?

6 A It would be a time-based analysis, yes.

7 Q So there's no USAA policy that says if one
8 of your cases goes to trial, you must attend the
9 trial?

10 A That is correct.

11 Q Okay. During trials that you were unable
12 to attend, how do you get information about what is
13 happening at the trial?

14 A USAA will either hire an outside adjuster,
15 or we have contractors that we will hire to attend
16 the trials.

17 Q Okay. So USAA will send either one of its
18 own employees or a third-party to monitor the trial
19 and report back, if a trial is occurring?

20 A That is correct.

21 Q Okay. And in those situations you're not
22 relying on defense counsel for the sole updates
23 about what's going on in trial, correct?

24 A Correct.

25 Q Okay. With respect to monitoring

1 litigation as it goes through the process, does
2 USAA handle -- Strike that -- hire third-party
3 adjusters or contractors to monitor its litigation
4 cases.

5 A I'm not sure that I understand what you're
6 asking me.

7 Q Well, what I'm asking is have you ever
8 seen a circumstance where --

9 MR. WHELAN: Objection.

10 Q -- in lieu of in-house litigation manager,
11 USAA would hire a third-party adjuster to handle a
12 specific litigation claim?

13 A We have contractors that are ex-USAA
14 employees, usually retirees, that if we need help,
15 they will come back and they will, on occasion.

16 Q All right. In this underlying claim, were
17 you the sole litigation manager responsible for it?

18 A Yes, I was.

19 Q Okay. There was no other litigation
20 manager that was ever responsible for this claim;
21 is that right?

22 A That is correct.

23 Q Okay. When I say this claim, let's
24 clarify that.

25 Were you responsible for the B.I. claim

1 **litigation file.**

2 A No.

3 **Q Okay. Who was responsible for that file?**

4 A I believe that file was handled by
5 Dina Hester.

6 **Q And Dina's in Tampa?**

7 A Yes. She works at home, yes.

8 **Q So when we're talking about this claim,**
9 **you were responsible only for the U.I.M. suit; is**
10 **that accurate?**

11 A Yes.

12 **Q Were you responsible for any other**
13 **coverages arising out of this automobile wreck?**

14 A No. I believe everything else, collision
15 that kind of thing, was all taken care of before.

16 **Q Okay. Do you think insurance companies**
17 **should be able to take two different factual**
18 **positions on the same automobile wreck?**

19 MR. WHELAN: Object to form.

20 A I believe that each claim is handled
21 individually, separately, and the investigation is
22 done based on what we need done in our -- my
23 particular file, U.I.M. file.

24 **Q I understand that. What I'm asking you is**
25 **a little more general.**

1 What I'm asking you is do you think an
2 insurance company should be able to take two
3 different factual positions with respect to the
4 same automobile wreck?

5 MR. WHELAN: Object to the form.

6 A Yes. If it is needed, yes.

7 Q And when you say if it's needed, what do
8 you mean?

9 A If I'm investigating a claim, I ought
10 to have -- I have the right to determine what
11 information I need to gather to support my claim.
12 We don't generally share information between B.I.
13 claims and U.I.M. claims. So I would not
14 necessarily know what was in that other file.

15 Q Okay. Would you agree with me that civil
16 litigation should be a search for the truth?

17 MR. WHELAN: Object to the form.

18 A It should be based on the truth.

19 Q And would you agree with me that there's
20 one automobile wreck, that there can only be one
21 set of true facts relating to how that automobile
22 wreck occurred?

23 A I believe that, ultimately, it will come
24 down to one set of facts based on the
25 investigations.

1 **Q** All right. Would you agree with me that
2 if there's two claims arising out of the same
3 wreck, the same insurance company USAA is handling,
4 and there being handled based on a different
5 factual position, one of those positions would be
6 incorrect?

7 MR. WHELAN: Object to the form.

8 **A** I do not know what's going on in the B.I.
9 file when I'm handling a U.I.M. file. I'm handling
10 a U.I.M. file based on what I need, what
11 information I need to gather to determine how I
12 want to proceed with that U.I.M. file.

13 I don't contact the B.I. adjuster and ask
14 them what have you done on this.

15 **Q** But you do, sometimes when you're handling
16 a U.I.M. file, get information from the B.I. file,
17 correct?

18 **A** It could happen.

19 **Q** I mean, it happened in this case.

20 **A** I do not believe I got that information
21 from the B.I. file.

22 **Q** What information?

23 **A** The information on the headlights. I got
24 that information from -- through you, through
25 Jack Daniel.

1 **Q You understand Mr. Poplin was hired by**
2 **Chris Nickels, Attorney Chris Nickels?**

3 **A I understand that now.**

4 **Q And that Chris Nickels was the liability**
5 **defense lawyer for USAA; you understand that?**

6 **A I understand that now.**

7 **Q Okay. And, so do you know that USAA**
8 **actually wrote the check to hire Mr. Poplin?**

9 **A I don't know that.**

10 **Q Is it typical when you're handling a**
11 **litigation file and an expert retainer is approved,**
12 **that USAA writes the check to retain that person?**

13 **A Yes.**

14 **Q And you got Mr. Poplin's report during the**
15 **handling of this U.I.M. claim, correct?**

16 **A That is correct.**

17 **Q And at the time you got that report, you**
18 **knew that Mr. Poplin had been hired by USAA, right?**

19 **MR. WHELAN: Object to the form.**

20 **A I did not have any knowledge that USAA had**
21 **hired Mr. Poplin. The letter was addressed to**
22 **Chris Nickels, whom I know was handling the B.I.**
23 **claim.**

24 **Q Okay. So based on reading the letter and**
25 **the report, you were -- were you able to summarize**

1 that Mr. Nickels had hired Mr. Poplin?

2 A Assumption, yes.

3 Q Yes. And you knew at the time that
4 Mr. Nickels was handling the defense of the B.I.
5 claim for USAA?

6 A I believe I did, yes.

7 Q And, so at that time you got the report,
8 you knew then that an expert hired by USAA --

9 MR. WHELAN: Object to form.

10 Q -- had determined that Ms. Hood's
11 headlights were on, based on the report, right?

12 A Based on the report, I knew that there was
13 a report that said she had her high beams on, yes;
14 based on the report.

15 Q When you're handling litigation files, are
16 you able, based on USAA's policies and procedures,
17 to make an offer without a demand having been made?

18 A Yes.

19 Q Okay. And are you allowed to make that
20 offer up to the amount of the reserve set on the
21 claim?

22 A I am not allowed in all cases to do that.

23 Q Tell me in what cases you wouldn't be
24 allowed to do that. Like, what's the distinction,
25 if that's an easier way to put it?

1 A If I have a B.I. policy, a ten. And I
2 know that somebody had a serious injury, I don't
3 need anybody's permission to tender my ten thousand
4 dollars.

5 **Q Okay. As a litigation manager, do you**
6 **have a certain amount of authority that you can**
7 **reserve or offer without permission from the**
8 **director?**

9 A Yes.

10 **Q Okay. And what is that amount?**

11 A Up to sixty thousand dollars.

12 **Q Okay. What is the authority amount of the**
13 **director?**

14 A One hundred thousand.

15 **Q What is the authority amount of a person**
16 **who is in Jamie's position?**

17 A It has changed since then. Do you want
18 what it was or what --

19 **Q Yeah, what it was.**

20 A -- it is?

21 Back then, I believe it was up to one
22 fifty.

23 **Q What is it now?**

24 A In her capacity, it's up to one fifty, but
25 she also has another level.

1 **Q Okay. Because of her individual standing?**

2 A The next level actually includes Jamie and
3 another person.

4 **Q Okay.**

5 A At this time. Back then it was different.

6 **Q Okay. Who was that other person?**

7 A At this time Jaime Cooper and
8 Michelle Copeland --

9 **Q Okay.**

10 A -- have the next layer of authority.
11 Back then it was Ray LaSalle
12 (Phonetically).

13 **Q Okay. And what was the then, since that's**
14 **the relevant time period, the authority that Ray**
15 **could add to that?**

16 A One fifty to three hundred.

17 **Q Okay. And if you need more than three**
18 **hundred, that would be Ann Marie; is that right?**

19 A No. That was -- Ray was included in that
20 too, but that was a culmination of people.

21 **Q Okay.**

22 A Could change at any given meeting.

23 **Q Okay. If you needed more than three**
24 **hundred in authority, then where -- who would you**
25 **go to? Who is the next level?**

1 A Well, it would again be Ray LaSalle, but
2 it would be Ray LaSalle and -- there was usually
3 one or two other parties present at the time of
4 discussion.

5 Q All right. And what was that next level
6 of authority?

7 A That anything over three hundred.

8 Q Okay. And that on up?

9 A On up.

10 Q Okay. All right. That authority is to
11 adjust the reserve, correct?

12 A No. We can put a reserve in above our
13 authority.

14 Q Okay.

15 A We just can't offer the authority.

16 Q Okay. So in order to, in this case, for
17 example, if the reserve is set at a hundred
18 thousand, you get the case, you want to offer the
19 full hundred thousand, you have to speak with your
20 director and get their permission to do that,
21 correct?

22 A Yes, sir.

23 Q Okay. When you are preparing for a
24 mediation, do you have that meeting ahead of time
25 to determine what the authority at the mediation

1 will be?

2 A Yes, we do. And I don't handle just my
3 claims, I handle everyone's claims.

4 Q I understand.

5 A So depending on who the litigation manager
6 is, yes.

7 Q Okay.

8 A They would have the meeting before the
9 mediation.

10 Q Okay. So I'm just sticking with your
11 claims.

12 If it's your claim and you want to be
13 able, you think you need to be able to offer the
14 two hundred and fifty thousand at the mediation,
15 you would meet with your director and the other two
16 individuals ahead of time; is that right?

17 A Yes, sir.

18 Q Okay. So when you get to mediation, do
19 you have all the authority that you're going to
20 have for that mediation?

21 A Yes.

22 Q Okay. How far in advance, typically, do
23 you have those meetings? How does that process
24 work? Because I understand you're handling a lot
25 of mediations, so.

1 A It could be, on average, anywhere from the
2 day before to two or three weeks out.

3 **Q Okay. In a given week or month, whichever**
4 **is easier, you tell me. How many mediations are**
5 **you handling?**

6 A As a whole right now, anywhere from twenty
7 to twenty-five.

8 **Q A month?**

9 A Uh-huh.

10 THE COURT REPORTER: Yes?

11 A Yes. Sorry.

12 **Q And was that also true in 2016, '17?**

13 A I do not believe I was handling that many
14 cases back then. I will say on average somewhere
15 on the fifteen to twenty range.

16 **Q Per month?**

17 A Per month.

18 **Q Okay. And those are in-person mediations?**

19 A In-person mediations.

20 **Q So you're on the road a lot; fair to say?**

21 A It's fair to say.

22 **Q Okay. With your position, do you have**
23 **fewer claims assigned to you than other litigation**
24 **managers?**

25 A Yes, I do.

1 **Q** Okay. How many claims are personally
2 assigned to you on average? I know you're pending
3 fluctuates, but --

4 **A** On average right now, I'd say in the
5 ninety range.

6 **Q** Okay. And was that many true in 2016 or
7 '17 --

8 **A** No.

9 **Q** -- or did you --

10 **A** I believe back then I would say -- I'm
11 going to guess in the sixty to eighty range;
12 somewhere back then.

13 **Q** Okay.

14 THE COURT REPORTER: You guys are
15 starting to cut each other off.

16 MR. WHELAN: She can only type one
17 person at a time.

18 MR. WILLEY, IV: And I'm bad at that.

19 THE COURT REPORTER: What I have is
20 your question: Okay. And was that many
21 true in 2016 or '17 --

22 She answered: No.

23 And then you said: -- or did you --
24 and then she started.

25 BY MR. WILLEY, IV:

1 **Q So let's just clean that up.**

2 **So in 2016 and '17, you were handling on**
3 **average sixty to eighty pending files of your own?**

4 **A That is correct.**

5 **Q Okay. And you were actually doing fewer**
6 **mediations then as well, correct?**

7 **A That is correct.**

8 **Q Were you handling larger cases?**

9 **A Then, yes.**

10 **Q Okay. What was the average case size or**
11 **value? How do you, how do you gauge it?**

12 **A Back then I handled pretty much anything**
13 **that was assigned to me; didn't have a value on it.**
14 **It could be a soft tissue, it could be a serious**
15 **injury case.**

16 **Q Okay. How is that different from now?**

17 **A Now I handle, I typically handle cases**
18 **that have little to no value to them --**

19 **Q Okay.**

20 **A -- that aren't complex and don't require a**
21 **lot of time.**

22 **Q Because you don't have a lot of time,**
23 **right?**

24 **A Because I don't have a lot of time.**

25 **MR. WHELAN: Object to the form.**

1 **Q How do you determine what authority you're**
2 **going to try to get on a case?**

3 A Based on my evaluation of the liability
4 and the damages and my experience. As a person
5 that attends mediations, I see a lot of -- I'm
6 probably as comfortable with value as anyone could
7 be, I guess.

8 **Q So you like to have an understanding of**
9 **the full file?**

10 A Absolutely. You have to.

11 MR. WHELAN: You're stepping on his
12 answers just a little bit.

13 A Oh, okay.

14 MR. WHELAN: Slow down.

15 A Okay.

16 BY MR. WILLEY, IV:

17 **Q Have you ever gone to a mediation and**
18 **offered your full authority on the first offer?**

19 A Yes.

20 **Q What percentage of your mediations would**
21 **you say that occurs in?**

22 A Percentage-wise I don't know, but I can
23 tell you it's very few.

24 **Q Okay. And I know this is common sense to**
25 **us. But, you typically start with an offer much**

1 **below your actual authority on the case?**

2 A No.

3 Q **Okay.**

4 A I may start with an offer below my
5 authority, but not necessarily much below.

6 Q **Okay. Fair. You typically start with an**
7 **offer that allows you to have room to negotiate,**
8 **right?**

9 A Yes, sir.

10 Q **Okay. What percentage of your mediations**
11 **would you estimate resolve for the full amount of**
12 **the authority that you have on that particular**
13 **case?**

14 A I couldn't give a percentage. I have no
15 idea.

16 Q **Okay. Is it -- How do you characterize**
17 **it, most, about half, fewer than half, barely none?**

18 A I would be purely speculating and guessing
19 if I told you. I do not know.

20 Q **Okay. You have a pretty good memory of**
21 **the mediations you've handled this month?**

22 A I have a handle on them.

23 Q **Okay. Of the mediations that you've**
24 **handled this month, how many resolved for the full**
25 **authority that you --**

1 A You're still asking me something I don't
2 know.

3 **Q Okay.**

4 A I -- It's not something I keep track of.

5 **Q What do you keep track of --**

6 MR. WHELAN: Object to the form.

7 **Q -- in terms of the resolution of cases**
8 **you're handling?**

9 A If I'm asked for a report by my manager, I
10 would tell her how many mediations I attended, how
11 many I settled, how many impasse. I do not give
12 her a monetary value of any kind.

13 **Q Ever?**

14 A She doesn't ask.

15 **Q She never asks?**

16 A Not to me, no.

17 **Q Who would she ask if she asked? You said**
18 **not to you.**

19 MR. WHELAN: Object to the form.

20 Calls for speculation.

21 A She would not ask anyone. She might go
22 into my file, but she would not ask anyone.

23 **Q Right. Okay. Does your manager have**
24 **access to your ALIS files?**

25 A Yes.

1 **Q Do other litigation managers have access**
2 **to your ALIS files?**

3 **A Yes.**

4 **Q Okay. Do all litigation managers have**
5 **access to your ALIS files?**

6 **A Yes.**

7 **Q Okay. And, so at any time you are able to**
8 **go in and look at another litigation manager's ALIS**
9 **files; is that fair?**

10 **A I could.**

11 **Q Okay. And that's true whether or not**
12 **you're involved in that particular claim, correct?**

13 **A That is correct.**

14 **Q Okay. Who makes the decision about who to**
15 **hire as defense counsel?**

16 **A It's my decision who to hire, but we have**
17 **specific attorneys in those areas that we hire.**

18 **Q South Carolina, for example, there would**
19 **be a list of attorneys that you would be able to**
20 **choose from?**

21 **A I don't remember specifically what it was**
22 **back then; but, yes, there would be a list. It**
23 **could be one, it could be more.**

24 **Q All right. Where would you go to see that**
25 **list?**

1 A We have a list of defense counsel. And I
2 haven't been in it forever. There's a list of
3 defense counsel in our system.

4 **Q Okay. And I know you probably have them**
5 **committed to memory, right?**

6 A Florida is the state I have handled all my
7 career.

8 **Q Right.**

9 A It's the only state I've consistently
10 handled.

11 **Q When, so when you say those lists are in**
12 **the system, all I'm trying to figure out is where**
13 **in the system?**

14 A We have a system that has a list of our
15 defense counsel names, address, phone numbers, what
16 territory they have, and that kind of thing, that
17 we can refer to. But I do not refer to it.

18 **Q Okay.**

19 A I wouldn't even know where to find it
20 right now.

21 **Q Okay. What's it called? How do you call**
22 **it?**

23 A I honestly don't remember.

24 **Q Okay.**

25 A I honestly do not remember.

1 **Q** If a junior litigation manager came to you
2 and said, hey, I need to hire defense counsel in
3 this state, what would you say to them?

4 A In this state?

5 **Q** No. In --

6 A Any state?

7 **Q** -- a different state.

8 **Right.**

9 A I would probably have to refer them to my
10 manager --

11 **Q** Okay.

12 A -- to give them the information where to
13 go.

14 **Q** Okay. Prior to this case, had you worked
15 with Carlock, Copeland and Stair Law Firm?

16 A To my recollection, no. This was a first
17 time I worked with them.

18 **Q** How did you, in this case, decide to
19 retain them, or did you decide?

20 A I can't absolutely tell you that. I don't
21 know how I chose them. I'm assuming they were on
22 our list to choose, and that's how I chose them.

23 **Q** Have you worked with them since this case?

24 A No. This was the one and only case I had
25 with them.

1 **Q How would you characterize the experience?**

2 MR. WHELAN: Object to the form.

3 **A Good. I mean --**

4 **Q What I'm asking, did you feel like you got**
5 **information or did not get information related to**
6 **the claim that you would typically get from other**
7 **defense counsel you've worked with?**

8 **A Actually, my comment would be that I got**
9 **very good information from Jack. I got extremely**
10 **good thorough reports from Jack.**

11 **Q Okay. Did you feel like, that you were**
12 **always up to date on what was happening with the**
13 **litigation?**

14 **A Yes, I did.**

15 **Q Okay. And did his information that he**
16 **provided you provide you with all the information**
17 **you needed in order to make an informed decision**
18 **about the claim?**

19 MR. WHELAN: Object to form.

20 **A I think all was very broad. I mean, I**
21 **believe it gave me everything I needed. Was it all**
22 **the information, I don't know.**

23 **Q Okay. Knowing what you know now, having**
24 **sat through the trial, is there any information**
25 **that you felt like you didn't get that you would**

1 **have liked to have received in order to evaluate**
2 **the claim from Jack?**

3 A To the best of my ability, I believe that
4 Jack had given me everything that he needed and
5 everything that we needed to go to trial.

6 Q **There's reports that Jack would send you**
7 **from time to time, and at the end of those reports**
8 **I think always, but at least mostly he would make a**
9 **recommendation about valuation of the claim.**

10 Do you recall that?

11 A I recall seeing that on some of the
12 reports, yes.

13 Q **Did you base your valuation on his**
14 **analysis, or did you base your evaluation of the**
15 **claim on your own analysis?**

16 A I relied on my defense attorney for his
17 analysis. I based it on the information that I had
18 either developed or he had developed in the case.

19 I do have the authority to disagree with
20 him, if I choose to. But in this case, I relied on
21 him.

22 Q **Okay. And did you ever, yourself, alter**
23 **the reserve in the case?**

24 A I believe that I did. I would have to
25 look at the file to be sure.

1 Q All right. Would that information be
2 contained in the claims file or the ALIS file?

3 A The claims file.

4 Q Okay. And I'm going to show you
5 Plaintiff's Exhibit 4.

6 Is that where you would go to look for
7 that information?

8 A Yes. I would click on the claims file and
9 it would -- this would pop up.

10 Q Okay. And your employee number is 42569,
11 right?

12 A Yes, sir.

13 Q Okay. So if you had -- Well, let me just
14 give you a chance to look at that.

15 A Yes, sir.

16 Q Okay. Do you see anywhere on there where
17 you actually changed the reserve amount during your
18 handling of the claim?

19 A No.

20 Q Okay. In fact, there's only one change of
21 the reserve amount; is that accurate?

22 A That is accurate, yes.

23 Q And that change is when it went from one
24 hundred thousand to two hundred fifty thousand?

25 A Yes.

1 **Q And what date was that changed on?**

2 **A 8-24-16.**

3 **Q Okay. And do you know whose employee**
4 **number that is?**

5 **A My assumption would be that that was**
6 **Ron Vestal.**

7 **Q Okay. And I believe that's correct.**
8 **Would it be typical for Ron to change**
9 **reserves on claims that you were handling?**

10 **A No. It was not typical.**

11 **Q Okay. Do you know why it happened in this**
12 **case?**

13 **A No, I do not.**

14 **Q Would Ron have access to your claims file**
15 **and your ALIS file?**

16 **A Yes, he does.**

17 **Q Okay. Would Ron have consulted with you**
18 **prior to changing the reserve?**

19 **A Yes, he would have.**

20 **Q Okay. Do you remember him consulting with**
21 **you in this instance?**

22 **A I do not remember that in particular, but**
23 **I do know Ron Vestal and I had multiple, multiple**
24 **conversations over this file.**

25 **Q Okay. Was it typical for you to have**

1 multiple conversations with Ron about specific
2 files?

3 A I would say the more complex files, yes.

4 Q Okay. On a given month, how many files
5 with exposure in the million-dollar range were you
6 handling back then?

7 A I would say none.

8 Q Okay. Very rare?

9 A Very rare.

10 Q Okay. Would it be fair to say that during
11 the time you were handling this claim, this was
12 probably the only claim you had with exposure at
13 that level?

14 MR. WHELAN: Object to the form.

15 A I can't answer that definitively.

16 Q Do you recall any other claims you were
17 handling with that type of exposure at this level?

18 MR. WHELAN: Object to form.

19 A I don't recall at all.

20 Q All right. Do you recall why the reserve
21 was changed from a hundred thousand to two hundred
22 and fifty thousand?

23 A I don't recall why, but my assumption
24 would be that I got information from Jack Daniel --

25 Q Okay.

1 A -- that warranted an increase in reserve.
2 That's generally what happens.

3 **Q Where would you look for that information,**
4 **the claims file or the ALIS file?**

5 A It could be in either.

6 **Q Okay. Do you know what date the Poplin**
7 **report was uploaded to your file?**

8 A No, I do not.

9 **Q Okay. Where would you look to find that**
10 **information?**

11 A Depending on which file it's in, it would
12 tell me the date it was uploaded and the time.

13 **Q Where would that information be found in**
14 **the claims file?**

15 A In the claims file it would be under what
16 we call e-docs.

17 **Q Okay.**

18 A And the ALIS file it would be under the
19 documents.

20 **Q Okay. And do both of those give you a**
21 **list of all documents that have been uploaded to**
22 **the file?**

23 A Date and time, yes.

24 **Q Do they tell you who uploaded them?**

25 A Yes.

1 **Q Okay. Are you able to see who accessed a**
2 **particular claims file or ALIS file?**

3 A The claims file, yes. I can look under a
4 tree view and find out who accessed it.

5 **Q Okay. Tell me that is again, a tree view?**

6 A Yes. There's a -- we call, I believe we
7 call portal.

8 **Q Okay.**

9 A And portal will give us a list of who's
10 been in that file, date and time.

11 **Q Okay.**

12 A And the ALIS file, unless they documented
13 something in the file, I would have no idea how you
14 would know.

15 **Q Okay. When a claim is transferred from**
16 **the examiner to the litigation manager, does that**
17 **claims file carry over, or is a new claims file**
18 **typically created?**

19 A It would carry over, depending.

20 **Q Right. So --**

21 A In this case there was a B.I. file and a
22 U.I.M. file, so two separate files had be to
23 created.

24 **Q Right. U.I.M. --**

25 A But when I got the U.I.M. file, that file

1 that was used in claims is what I got.

2 Q And, so in this case, when the file was
3 transferred to you, you were able to see and access
4 all of the information that Missy Howard had as
5 part of her investigation?

6 A I was able to, yes.

7 MR. WHELAN: Tell you what, let's
8 take a break.

9 MR. WILLEY, IV: Okay. Perfect.

10 (Whereupon, a recess was had from
11 10:13 a.m. to 10:19 a.m.)

12 BY MR. WILLEY, IV:

13 Q All right. I'm going to hand you what's
14 marked Plaintiff's Exhibit 1. And feel free --
15 This is the first part of it. Flip through it. I
16 think I have it at where the file was transferred
17 to you, but look a few pages back and whatever you
18 need to do just to make sure that --

19 A Okay.

20 Q Okay.

21 A Yes, sir.

22 Q So what day did you get this file?

23 A It appears this was transferred to my
24 digits on June 30th.

25 Q Okay. And the documentation number fifty

1 is the one I'm looking at.

2 A Yes, sir.

3 Q That's the first one with your name on it?

4 A Yes.

5 Q Okay. What does that documentation tell
6 us?

7 A That tells me that we transferred the
8 claims file into leap file, which was
9 electronically sent to Jack Daniel.

10 Q Okay. Leap file is just how you would
11 share large documents --

12 A Right.

13 Q -- with outside people?

14 A Correct.

15 Q Okay. And the ALIS number, is that the
16 ALIS number that would have been associated with
17 this file the entire time?

18 A Yes. It would have been.

19 Q Okay. There's also on here, it says,
20 subject, confidential e-doc, D.V.D. burn request.
21 What would that be?

22 A I have no idea.

23 Q Okay.

24 A I'm assuming that a D.V.D. was made.

25 Q Okay.

1 A When I do this, that's the end of what I
2 do. I don't know how they -- I know that they tell
3 me it goes into a share drive, but I have no
4 knowledge of where it goes or how it goes.

5 **Q Okay.**

6 A I assumed it was electronic. It may not
7 have been.

8 **Q All right. I'm going to show you part of**
9 **Plaintiff's Exhibit 5, which is Hood USAA 127,**
10 **okay.**

11 **Here is the second page, and 128.**

12 A Okay.

13 **Q What is this?**

14 A This was the e-mail that I sent to Jack
15 giving him the assignment.

16 **Q Okay. And this e-mail was sent on June**
17 **30th?**

18 A Yes, sir.

19 **Q The same day that you got the case, right?**

20 A Yes.

21 **Q Okay. It says on here phase, backslash,**
22 **simple.**

23 A That's how we -- That's the billing
24 assignment that I sent with the case.

25 **Q Okay. Tell me about that.**

1 A That will be, initially, I -- that's like
2 the initial phase of the case. And this has
3 changed over time too. So at some point in time it
4 went to complex, I'm sure.

5 **Q Okay.**

6 A Or should have gone.

7 **Q So, initially, when you got the case, you**
8 **saw that it was a car wreck case and designated it**
9 **as phase simple?**

10 A Yes, I did.

11 **Q Other than phase simple, what are the**
12 **designations that USAA was using at that time?**

13 A I don't believe there was any, or even at
14 this point in time that there is any particular
15 designation. That's just in terms of billing.

16 **Q In terms of billing, okay.**

17 A Yeah.

18 **Q And that's what I'm asking you.**

19 **So you've told us that there was a simple**
20 **designation and a complex designation, correct?**

21 A Right.

22 **Q Are there any -- Were there any others**
23 **that you would use?**

24 A To my recognition -- I mean, recollection,
25 I don't know.

1 Q Okay. In any event, those would have been
2 the two most common?

3 A Yes.

4 Q And was it your responsibility to
5 determine whether it was at a simple or complex
6 designation?

7 A Yes.

8 Q And are those designations paid at
9 different rates? In other words, defense counsel
10 gets paid a different rate depending on that
11 designation?

12 A It does affect their pay and how they're
13 paid. I --

14 Q Okay. You have in here a summary of what
15 happened, correct? Yes?

16 A I'm sorry. What did you ask?

17 Q You have in here a description of what
18 happened, right?

19 A Yes.

20 Q Okay. Where would you have got that
21 information?

22 A In the claims file.

23 Q Okay. The last sentence of paragraph two
24 says, Johnson and Kuck both have injury claims
25 against Hood, which are being handled by

1 Chris Nickels at Clawson and Staubs. P. and C.
2 placed the plaintiff twenty percent liable for the
3 accident.

4 You see that?

5 A Yes.

6 Q Okay. Would that information about who
7 was handling the B.I. claims have been in the
8 U.I.M. claims file?

9 A I would be guessing. I don't know.

10 Q Okay. What does, what does P. and C.
11 mean?

12 A Property and casualty.

13 Q So at this point when you assign this
14 case, did you understand that -- Was it your
15 understanding that Ms. Hood's comparative fault was
16 twenty percent for the accident? Is that what --

17 A That is where her claim is valued at, yes.

18 Q And that's what you were communicating to
19 Mr. Daniel?

20 A Yes.

21 Q Okay. And that would have been based on
22 the arbitration that took place, in addition to the
23 information that Ms. Howard collected in her
24 investigation?

25 MR. WHELAN: Object to the form.

1 A First off, I don't know that there was an
2 arbitration filed on this. And second, twenty
3 percent would be Missy's, based on Missy's
4 investigation of it, I assume.

5 **Q All right.**

6 A But I don't have any knowledge how she got
7 there.

8 **Q I understand. It says, Hood has U.I.M.**
9 **coverage five hundred, five hundred per person per**
10 **accident U.I.M. coverage.**

11 **You see that?**

12 A Yes.

13 **Q Okay. Do you now know that to be**
14 **incorrect?**

15 A I now know that she has stacking coverage,
16 yes.

17 **Q Did you get that information directly from**
18 **the claims file that was transferred to you?**

19 A I would be guessing, but I would say yes.

20 **Q Okay. The claims file, if you look back**
21 **at the claims file, what time was that transferred**
22 **to you?**

23 A One-thirty-five p.m.

24 **Q Okay. And this e-mail was at?**

25 A Two-twenty-six p.m.

1 **Q** Okay. So is it fair to say you did not
2 have a lot of time to actually go through all the
3 documents and verify everything yourself at the
4 time you sent the transfer?

5 **A** No. That's not fair to say many.

6 **Q** Okay.

7 **A** I mean --

8 **Q** Would you have had the opportunity to look
9 at the policy, insurance policy, yourself, and come
10 up with that conclusion, or do you think you relied
11 on what was already in the file?

12 MR. WHELAN: Object to the form.

13 **A** At the time we did not have a lot of
14 information on, on the injury, other than she had a
15 fractured ankle.

16 **Q** Right.

17 **A** I would have assumed that the value of the
18 claim was under the five hundred thousand and may
19 not necessarily have looked for the stacking at
20 that time. That is not normally what I do, but
21 that's what I would guess that I did at this time.

22 **Q** Okay. And at this particular time when
23 the claim was transferred to you, the reserve would
24 have been set at a hundred thousand, right?

25 **A** Yes, it was.

1 **Q** **Okay. And that would have been set**
2 **without having received any medical records or**
3 **bills, right?**

4 **A** **Yes.**

5 **Q** **Okay. And you did not change that reserve**
6 **when the file was transferred to you, correct?**

7 **A** **That is correct.**

8 **Q** **In fact you never changed the reserve?**

9 **A** **Correct.**

10 **Q** **Without medical records and bills, what**
11 **process or information allowed you to reach a**
12 **reserve of a hundred thousand on the claim?**

13 **A** **The fact that she had a fractured ankle**
14 **and rib fractures. And that was our knowledge.**

15 **Q** **And, so those two pieces of information,**
16 **fractured ankle, rib fracture, would give you a**
17 **reserve valuation of a hundred thousand?**

18 **A** **It did for Missy. I don't know how she**
19 **came up with that figure.**

20 **Q** **Right.**

21 **A** **I can't answer to that.**

22 **Q** **Right. But you never changed the reserve?**

23 **A** **No, I did not.**

24 **Q** **So when you were handling the claim until**
25 **it was changed by Ron, that was your figure as**

1 well, right?

2 A Yes.

3 Q Okay. Did you use any other information,
4 not having any of the medical records or bills,
5 allegedly, to arrive at that valuation?

6 A Are you talking about the one hundred
7 or --

8 Q The one hundred thousand.

9 A I didn't --

10 Q Okay.

11 A -- set the value at one hundred thousand,
12 so I don't know what information Missy used.

13 Q Okay.

14 A Or why she came up with that figure.

15 Q Okay. Based on the information that you
16 had from her file when it was transferred to you,
17 did you feel like that was a fair valuation of the
18 claim?

19 A I don't recall.

20 Q Okay.

21 A I mean, you're asking me to make
22 speculation.

23 Q No. What I'm trying to get at is what you
24 did.

25 If you thought it was unfair or if you

1 thought it should have been different, you would
2 have changed it?

3 A I would have changed it.

4 Q Right. And you did not change it?

5 A Correct.

6 Q And I think based on the documents that
7 we've seen so far, you're pretty thorough and
8 you're fair?

9 A Yes.

10 Q And you generally turn things around
11 pretty timely?

12 A Yes.

13 Q I mean, this transfer was sent within an
14 hour of your having received it, right?

15 A Yes.

16 Q Okay. So if at some point you thought
17 this evaluation of a hundred thousand should have
18 been different, you would have changed it?

19 A Yes.

20 Q Okay. And other than those two pieces of
21 information, rib fracture and ankle fracture and
22 twenty percent comparative, would you have based
23 the valuation on anything else? Did you have
24 access to anything else at that time?

25 A To my knowledge, when I got the claim, all

1 I had was what the claim file handler had
2 developed.

3 **Q Okay.**

4 A At that point in time is when my
5 investigation starts. So, initially, there would
6 be no reason to increase the reserve until I got
7 more information.

8 **Q Right.**

9 A I don't just arbitrarily increase
10 reserves --

11 **Q Right.**

12 A -- without added information.

13 **Q Right. You ever decrease reserves?**

14 A I have. It's very rare, very rare.

15 **Q Okay. The last paragraph to Jack, next to**
16 **last paragraph, excuse me.**

17 It says, I'm not familiar with South
18 Carolina law. When I read the suit, it appears to
19 me that it is a bodily injury suit against Johnson.
20 It does not name USAA. However, the assignment is
21 for the U.I.M. claim.

22 Prior to this case, had you handled any
23 South Carolina U.I.M. claims?

24 A I have no idea.

25 **Q Okay. Would it be typical for you to say**

1 that you weren't familiar with South Carolina law
2 if you were?

3 A Yes. I am not familiar with South
4 Carolina law.

5 Q All right. And is it fair to say you
6 handled, relatively, few South Carolina cases in
7 your twenty-four-year career?

8 A On the litigation side, yes. I do not
9 remember --

10 Q Right.

11 A -- if at all I handled them. I'm sure I
12 did on the claims side.

13 Q Claims side, fair.

14 A But on the litigation side few.

15 Q Okay. Do you have any recollection of
16 handling South Carolina cases prior to this one?

17 A I don't have any recollection, no.

18 Q There were some attachments there, which
19 included the suit transmittal, suit papers and
20 police report.

21 Would it be typical to attach those three
22 documents when you're sending a case?

23 A Right. Because they don't necessarily get
24 the file right away, the claims file.

25 Q Okay. And 131 through 133, what is this

1 document?

2 A This is the new suit transmittal that I
3 sent to Jack, that first attachment there.

4 Q All right. What's the purpose of this
5 form?

6 A At that time it was just to give the
7 attorney a synopsis of the file.

8 Q Okay. Do you have to fill this out on
9 every transmittal?

10 A This form isn't even used anymore.

11 Q At that time, did you have to fill it out
12 on every transmittal?

13 A It was a requirement back at that time,
14 yes.

15 Q The initial case analysis, which is an
16 attachment to this says --

17 A An initial case analysis?

18 Q Yeah. If you look at the top of 131, you
19 see where it says attachments C.L.R. injury
20 valuation, police report, suit papers.

21 A Oh, that. These attachments, yeah.

22 Q Okay. I'm going to hand you the rest,
23 Plaintiff's Exhibit 5, and ask you if those
24 attachments are in there.

25 And I will represent to you that the

1 police report and the suit papers are in there.

2 What I'm interested in is the C.L.R. injury
3 evaluation, mandatory reporting requirements and
4 initial case analysis and P.T.R. from that.

5 A I do not see, but it doesn't surprise me.

6 Q Okay. Why does it not surprise you?

7 A Because back when we were using the new
8 suit transmittal forms, we were -- part of the
9 requirements was that we sent those three
10 documents.

11 Q Got it.

12 A But Jack, having been -- done a lot of
13 claims for USAA, was probably already familiar with
14 those documents and would have no reason to capture
15 them.

16 Q All right. How would you typically
17 communicate with Jack?

18 A The majority of what I do then and now is
19 via e-mail.

20 Q Okay.

21 A But on complex cases like this, I would
22 have phone calls with him too.

23 Q Right. What e-mail system do you use?

24 A Currently it's Outlook.

25 Q Okay.

1 A I don't know if it was Outlook back then.
2 I'm assuming it was, just a different version.

3 **Q All right. When you have calls with**
4 **defense counsel, do you record those calls?**

5 A I don't.

6 **Q Right.**

7 A The company may or may not. I believe our
8 system tells you that it may be recorded.

9 **Q Okay.**

10 A I believe I was using a cell phone at the
11 time.

12 **Q Right.**

13 A So it would not have been recorded.

14 **Q And that's, I think that's right because**
15 **at 131 instead of an extension, you gave your cell**
16 **phone --**

17 A Cell phone number.

18 **Q -- number. I won't call you, okay?**

19 A I don't think that's my number now anyway.

20 **Q Okay.**

21 A I think it has actually changed since
22 then.

23 **Q But my --**

24 A It has.

25 **Q Okay. My question was, how would you**

1 document what you talked with Jack on the phone
2 about? Where would you document that?

3 A I would assume that I would document it in
4 ALIS.

5 I would also assume that I may not
6 document every phone call I made with him.

7 Q Okay. But to the extent you documented
8 phone calls with him, they would be in the ALIS
9 file?

10 A Yes.

11 Q Okay. You've mentioned he sent a number
12 of reports, which I have. I don't have them all.
13 I'm working on that.

14 But when you got one of his reports, how
15 would you respond to him? Would you typically call
16 him, or would you typically send him an e-mail
17 about it? I'm not saying every time, but just
18 typically.

19 A My typical mode of operation is e-mail, so
20 I have to assume that I would e-mail.

21 Q Okay. Mine too.

22 One last thing, actually, about this. 132
23 there's a section called facts.

24 A Yes.

25 Q Where would you have got those facts?

1 A I -- typically for me, I look at the
2 police report. That's my mode of --

3 **Q Okay.**

4 A Typically.

5 **Q So --**

6 A I can't, honest defin -- answer this
7 definitively. They're different places in the file
8 that I could have gotten it, plus a police report.

9 **Q Okay. All right. The next thing is 134.**
10 **It's just a letter from Jack dated July 1st, right?**

11 A Yes.

12 **Q Okay. And is that just acknowledging his**
13 **receipt of the file?**

14 A Yes. Just so that I know he'll take care
15 of a case -- the answer.

16 **Q The next thing that I have, which is 135**
17 **through 143 is called Initial Case Analysis and**
18 **Litigation Defense Budget.**

19 **Okay. Who would have prepared this**
20 **document?**

21 A Jack Daniel.

22 **Q Okay. And the report submission date on**
23 **this document is October 21, 2015?**

24 A That's what it says, yes.

25 **Q Okay. So that would have been almost four**

1 months -- three and a half months after you
2 transmitted the file to him, correct?

3 A Yes.

4 Q Would you expect that you would have had
5 any other communication with him during that
6 four-month period about the case?

7 A If there were relevant information he
8 developed, he may have contacted me either via
9 e-mail or phone number. I don't know that he did.

10 Q Okay.

11 A The attachments that you were referring to
12 a while ago, one of them was their expectations and
13 when this report is due.

14 Q Okay.

15 A And the initial case analysis, that would
16 have been the template for this.

17 Q Okay. If you had received e-mails, I
18 think from him or correspondence, do those e-mails
19 automatically get uploaded in the ALIS file?

20 A No.

21 Q Okay. Do they automatically get uploaded
22 in the claim file?

23 A No.

24 Q So your, your Outlook e-mail is separate
25 from both of those software programs?

1 A Yes.

2 Q Okay. Would you sometimes put e-mails
3 that you received into the ALIS file?

4 A We are not required to do so, but it is my
5 method to put most of those in there. I don't put
6 them all, but yes.

7 Q Okay.

8 A I do put a lot of them in there.

9 Q All right. Do you know where Jack would
10 get the information that he put in the initial case
11 analysis?

12 A He would get it from the claims file, and
13 any information that he had developed during that
14 four-month period.

15 Q Okay. On page 137 at the very top it
16 says, she believe she suffered permanent impairment
17 to her right ankle and that damages exceed ten
18 thousand dollars.

19 Would that, typically, if you had set a
20 reserve at a hundred thousand, would that be a fact
21 that would support having set that reserve at that
22 level?

23 MR. WHELAN: Object to form.

24 A That's just his statement about what she
25 believes.

1 **Q Okay.**

2 **A I don't --**

3 **Q There's -- Page 138 under analysis**
4 **liability it says, there does not appear to be a**
5 **dispute that defendant collided into the right side**
6 **of plaintiff's vehicle.**

7 **That squares with the investigation that**
8 **Missy did, right?**

9 **MR. WHELAN: Object to form.**

10 **A I -- to my knowledge, that's what**
11 **happened. I don't know if that's what Missy**
12 **concluded.**

13 **Q Okay.**

14 **A I wasn't in her file, I wasn't in her**
15 **investigation.**

16 **Q At the end of paragraph two there, there's**
17 **a conversation about, it says, our argument for**
18 **comparative fault is that plaintiff had a duty to**
19 **travel with her headlights on in the evening and**
20 **the accident would have been avoidable had she done**
21 **so.**

22 **When you look at U.I.M. claims, do you**
23 **view it as being adverse to the insured?**

24 **A No.**

25 **Q Okay. Tell me how you view it, what's**

1 **your responsibility to the insured is.**

2 A My responsibility is to do a full and
3 complete investigation of the liability and the
4 damages and to make a fair and reasonable
5 evaluation of the claim, and to pay our insured a
6 fair and reasonable valuation based on my
7 investigation.

8 **Q Okay. And when you're doing that**
9 **investigation, generally, do you look at liability**
10 **and damages? Is it kind of two areas of that?**

11 A Yes. Causation.

12 **Q Venue plays a role, right?**

13 A Venue plays a role.

14 **Q So when he says our argument for**
15 **comparative fault, it seems as though he is trying**
16 **to make an argument against USAA's insured,**
17 **basically, alleging she was at fault, doesn't it?**

18 MR. WHELAN: Object to form.

19 A No. I don't see it that way.

20 **Q How do you see it?**

21 A I see it -- In any investigation that I
22 do, I have to look at all the facts, negative or
23 positive to our insured --

24 **Q Right.**

25 A -- because it does affect the value of a

1 claim.

2 **Q Right.**

3 A So I have to investigate the negative,
4 even if it is our insured. That's the only right
5 thing to do.

6 **Q Okay. Why do you, why -- I mean, what**
7 **tells you that you have to investigate the**
8 **negative?**

9 A Because that's what doing an investigation
10 is. It's to look at the entire picture.

11 **Q Right.**

12 A Not just focus on what's going to be
13 positive for my insured to increase the value of
14 her claim. I have to look at everything.

15 **Q Right. In order to try to find the truth**
16 **about that claim and what happened; is that fair?**

17 A In order to find what I believe is the
18 correct information about what happened in that
19 claim, yes.

20 **Q Okay. The next sentence says, however,**
21 **despite a good argument against liability, Jasper**
22 **County is a dangerous venue and plaintiff verdicts**
23 **in Jasper are usually well in excess of medical**
24 **bills.**

25 **Is that something that you would give**

1 weight to in your evaluation of a claim, the venue?

2 A Yes. It would be.

3 Q Okay. Page 139 talks about the analysis,
4 initial theory of defense. The second paragraph
5 says, after receipt of plaintiff's initial damages
6 information and medical records, we will be able to
7 assess whether we have a strong causation and/or
8 damages argument. If we cannot obtain good
9 testimony from any of the treating physicians, we
10 may want to discuss obtaining an expert to
11 challenge damages and potentially coordinating that
12 with liability counsel, Geico.

13 Do you see that?

14 A Uh-huh.

15 THE COURT REPORTER: Yes?

16 A Yes.

17 Q How do you read that?

18 MR. WHELAN: Object to form.

19 A Honestly, I -- Geico was the bodily injury
20 coverage that we have -- ultimately paid Ms. Hood.

21 They took -- They were first in line for
22 defense. We were second in line.

23 So my assumption, I mean -- In other
24 words, Jack let them -- They did what they needed
25 to do in the investigation and Jack followed behind

1 and coordinated with them.

2 **Q Right. It says, if we cannot obtain good**
3 **testimony from any of the treating physicians.**

4 **You take that to mean that he's hoping to**
5 **get testimony that discounts her injuries?**

6 **A I don't know what he means by that.**

7 **Q Okay. It's not something you would**
8 **consider in looking at a claim?**

9 **MR. WHELAN: Object to form.**

10 **A I mean, we look at testimony, regardless**
11 **who it's given from --**

12 **Q Right.**

13 **A -- and determine whether it's good or**
14 **bad --**

15 **Q Right.**

16 **A -- for us and for you.**

17 **Q Right.**

18 **A But I don't, you know, I don't know what**
19 **he meant by that.**

20 **Q Us being the insurance company --**

21 **A Yes.**

22 **Q -- the U.I.M. claim?**

23 **And then it says, we may want to discuss**
24 **obtaining an expert to challenge damages. So if**
25 **you take that to mean if we don't get good**

1 testimony from the treating physician that helps us
2 lower the value of the claim, we might want to go
3 get an expert to try to help us on that?

4 MR. WHELAN: Object to form.

5 A There again, I don't know what -- I can't
6 read into what Jack believes. But it's common for
7 us to get a C.M.E. done on any injured party,
8 especially if it's going to trial.

9 Q Especially if the treating physicians say
10 everything is related, right?

11 A I don't know why he said that.

12 MR. WHELAN: Object to form.

13 Q Okay.

14 A I can't answer to that.

15 Q All right. So do you know in this case
16 how much coverage Geico had?

17 A I believe it was twenty-five thousand per
18 person, fifteen thousand per accident.

19 Q Okay. So available to Ms. Hood from Geico
20 would have been twenty-five thousand, right?

21 A Yes.

22 Q Okay. We know that Jack's statement or
23 belief based on the medical bills, what he put in
24 his report, is that they're in excess of ten
25 thousand, right?

1 A Yes, sir.

2 Q Okay. We don't have any other information
3 on the medical bills at this time, as far as we
4 know, right?

5 A As far as I can see, yes.

6 Q We know that based on the investigation
7 done by Missy and what we have in our file, that
8 we've got a comparative analysis of eighty percent
9 on Johnson and twenty percent on Hood, right?

10 MR. WHELAN: Object to form.

11 A That's what the claims file said.

12 Q USAA's claims file?

13 A Yes.

14 Q Okay. And we know that, based on Jack's
15 analysis, Jasper County is potentially a dangerous
16 venue, right?

17 A Yes, sir.

18 Q Okay. There's also mention in here that
19 we should take into account the fact that Ms. Hood,
20 our insured, is not from Jasper County, the
21 defendant is. And, so that may weigh against him?

22 A Yes, sir.

23 Q Okay. So we take that into account?

24 A Yes.

25 Q All right. We take all that into account

1 in determining a U.I.M. valuation, right? Right?

2 A Yes, sir.

3 Q And in his initial -- If you go to the
4 next page 140, his initial valuation says, we would
5 not recommend paying a value above four to twelve
6 thousand to resolve the U.I.M. claim.

7 Do you see that?

8 A I see that.

9 Q Okay. So based on twenty-five thousand in
10 primary coverage, he's giving the total value of
11 the claim somewhere between twenty-nine thousand
12 and thirty-seven thousand, right?

13 A That's what his report says.

14 Q Do you have any reason to believe that he
15 thought differently than what he put in his report?

16 A I can't answer to what he thought.

17 Q Do you generally expect reports and
18 valuations you get from defense counsel to be their
19 best estimate?

20 A Generally, yes.

21 Q Let me ask you this. Do you ever think
22 that defense counsel is either overvaluing or
23 undervaluing a case in order to be able to keep the
24 case in litigation so they can keep working the
25 file?

1 A No. I do not believe my defense attorneys
2 do that.

3 Q Okay. You don't believe Jack would do
4 that?

5 A And I don't believe Jack would do that.

6 Q All right. So we've got a valuation from
7 Jack between twenty-nine and thirty-seven thousand.
8 So now I want to look at the litigation defense
9 budget, which is on page 142, starting on 142.

10 Okay. What was his total estimate of
11 defense costs?

12 A Between thirteen thousand and fifty
13 dollars and twenty-two thousand five hundred and
14 forty-seven dollars.

15 Q All right. And, so at the outset of the
16 case, he's estimating that we're going to spend,
17 USAA is going to spend somewhere between nine and
18 fifteen thousand more dollars defending the case
19 than the case is worth; is that right?

20 MR. WHELAN: Object to form.

21 A His value in his report indicates, yes,
22 we're going to spend more money than the value of
23 the case.

24 Q Okay. Do you ever, at that time, say,
25 might be a good time to make an offer, see if we

1 can get the case resolved, at what he at least
2 thinks is a fair value?

3 A That is not typically how we do things.

4 Q Okay. But you are able to make an offer
5 without a demand, right?

6 A I am able to.

7 Q Right. And, so when a reserve is set,
8 that reserve does not take into account defense
9 costs, correct?

10 A Correct.

11 Q All right. So in this instance, we have a
12 reserve of a hundred thousand dollars, which is our
13 internal valuation of the claim, right?

14 A Yes, sir.

15 Q And we have defense counsel who is telling
16 us that his valuation of the claim is somewhere
17 between four and twelve thousand, right?

18 A Yes, sir.

19 Q And defense counsel is telling us that
20 we're going to spend between thirteen and twenty-
21 two five to pay him to defend that claim, right?

22 A That's his estimation of expense costs,
23 yes.

24 Q In your experience, is the estimation of
25 expense costs usually lower or higher than the

1 **amount actually spent?**

2 A It depends on the case.

3 **Q Okay. Would there have been anything at**
4 **this point in time stopping you from making an**
5 **offer to your insured for an amount that USAA felt**
6 **was reasonable?**

7 A I think that it would have been too early
8 in the case to do that.

9 **Q Okay. And tell me why that is.**

10 A Because we had not gathered -- Litigation
11 is much different than claims, in that, we have
12 access to more information than claims may have, or
13 may ultimately do.

14 **Q Okay.**

15 A So my assumption and my recollection would
16 be that we wanted to gather all the information
17 that we could, including the damages and the
18 medical bills, as well as any testimony before we
19 made any offers.

20 **Q Okay. But there's nothing in your**
21 **processes or policies that would stop you from**
22 **making an offer; is that right?**

23 A No. If I felt it was a good time to do
24 it, I would ask and do it.

25 **Q Okay. All right. The next thing that I'm**

1 going to show you is dated March 29, 2016, which as
2 far as I know, is the next report that you received
3 from Jack, okay.

4 And the documents I've been provided,
5 that's the next one. That's Bates labeled Hood
6 USAA 148 through Hood USAA 155. Of course it's
7 addressed to you, correct?

8 A Yes, sir.

9 Q Okay. And you've seen this before?

10 A Yes, sir.

11 Q All right. And this actually indicates
12 that you received it via e-mail, right?

13 A Yes.

14 Q And I think if you look at the report,
15 it's traditionally Jack would send them to you via
16 e-mail, right?

17 A Yes.

18 Q So if you had a response to that report,
19 would it have been typical in your practice just to
20 reply to that e-mail with the report and ask any
21 questions you had or --

22 A That would be typical for me to respond
23 via e-mail, but I would not always respond when I
24 got these reports.

25 Q Of course. Because you have to read them,

1 and some may not require a response, right?

2 A Correct.

3 Q Okay. This document, if you will go to
4 page 149, which is the second page.

5 We now know -- We've got plaintiff's
6 discovery responses here, okay.

7 A Yes, sir.

8 Q And we now know that the plaintiff's
9 medical bills are two hundred and seven thousand
10 two hundred and two dollars and sixteen cents,
11 right?

12 A Yes, sir.

13 Q All right. And that's based on actual
14 verifiable data that we received via discovery,
15 this is no longer just Jack's statement, right?

16 A To my knowledge, that would be
17 information, yes.

18 Q Okay.

19 A Gathered from discovery.

20 Q In the first paragraph where it says,
21 scheduled discovery and other potential claims, he
22 also informs us that Geico wants to tender its
23 limits to Plaintiff Johnson, and its also going to
24 tender, but it's, basically, trying to work out a
25 pro rata, okay.

1 **You see that?**

2 **A Yes, sir.**

3 **Q All right. Does USAA have any policy**
4 **about when a U.I.M. claim should be paid? In other**
5 **words, is it okay at USAA to pay a U.I.M. claim**
6 **while the liability coverage is still pending?**

7 **A It's possible if we can come to an**
8 **agreement with plaintiff's counsel, yes.**

9 **Q There's nothing at USAA that says in a**
10 **policy or procedure the liability has to tender**
11 **before we'll pay the first dollar, right?**

12 **A That is correct.**

13 **Q And that's been my experience as well. So**
14 **the -- In this case, the fact that Geico was going**
15 **to tender didn't mean that was the first time we**
16 **could offer money, right?**

17 **MR. WHELAN: Object to form.**

18 **A It doesn't mean that we can't offer money,**
19 **yes. We can offer money early.**

20 **Q The rest of this document talks about**
21 **statements that have been taken, a letter that**
22 **plaintiff sent to other parties, recorded**
23 **statement, eyewitness, medical records, related**
24 **treatment, discovery to be scheduled and updated**
25 **exposure range.**

1 And that's on the last page, which is 155.
2 And at that time, Mr. Daniel indicates that,
3 assuming our liability argument remains slightly
4 stronger than plaintiff's, a reasonable to
5 settlement range in this case is one hundred and
6 seventy thousand to two hundred and seventy-five
7 thousand. We would not recommend offering more
8 than three hundred thousand until more facts have
9 developed.

10 Do you see that?

11 A Yes, I see that.

12 Q Okay. So we now have a case where the
13 medical bills have gone from a ten-thousand-dollar
14 estimate to two hundred and seven thousand dollars.

15 MR. WHELAN: Object to the form.

16 Q Right? Between these two reports?

17 A That's what it appears.

18 Q And we have, essentially, the same venue,
19 right?

20 A Yes.

21 Q Okay. And we have the same, the same
22 facts related to how the accident actually
23 occurred, right?

24 A We --

25 MR. WHELAN: Object to form.

1 A We have some facts about how the accident
2 occurred, yes.

3 Q Right. And the valuation of the claim is
4 now, if you add in the liability amount, between a
5 hundred and ninety-five thousand and three hundred
6 thousand, right, the total valuation?

7 A The total value.

8 Q And when you received this, you did not
9 change the reserve on the claim, right?

10 A No, I did not.

11 Q Do you have any explanation for why?

12 A No. I do not have an explanation. I
13 don't recall why.

14 Q Do you know if you asked Jack why we now
15 have a valuation on the claim in the same venue
16 with the same facts at -- between below medical
17 bills, actually, and 1.5 times medical bills, when
18 on his initial report we were at three times the
19 estimated medical bills and above?

20 MR. WHELAN: Object to form.

21 A I'm sorry. You have to ask that again.

22 Q All right. So you remember on his last
23 evaluation we looked at, he estimated the medical
24 bills at ten thousand based on, I think you said a
25 statement, right?

1 A Yes.

2 MR. WHELAN: Object to form.

3 Q Okay. And he valued the total claim at
4 that time between twenty-nine thousand dollars,
5 right, and thirty-seven thousand dollars?

6 A Okay. Yes.

7 Q Correct?

8 So at that time he was valuing the claim
9 at somewhere between three and four times the
10 estimated medical bills, right?

11 A Yes.

12 Q Okay. Now with this report, we have
13 actual discovery responses which include the actual
14 medical bills, correct?

15 A Yes, sir.

16 Q Okay. And he has told us in this report
17 that those medical bills reflect she has incurred
18 two hundred and seven thousand two hundred and two
19 dollars and sixteen cents in medical bill costs due
20 to her injuries from the accident, right?

21 A Yes.

22 Q All right. His valuation, based on
23 everything else remaining the same except the
24 medical bills, has gone to a total valuation of a
25 hundred and ninety-five thousand to three hundred

1 thousand, right?

2 A Yes.

3 Q And that would represent a valuation of
4 approximately 1.5 -- or, excuse me, less than the
5 medical bills to 1.5 times the medical bills,
6 right?

7 A Yes.

8 Q All right. Do you know if you had any
9 discussion with him about why that was the case?

10 A I do not recall a discussion with him
11 about that.

12 Q All right. But in any event, upon
13 receiving this information that the medical
14 specials were more than two times the reserves set,
15 you did not change the reserve at that time?

16 A I did not change the reserve.

17 Q Okay. And there were no conversations at
18 that time at USAA about additional authority, as
19 far as you know?

20 A As far as I know, I don't know.

21 Q Okay. And based on his last valuation,
22 which was, again, same venue, same facts, more
23 medical bills, we went -- if we went with these
24 medical bills, which were the actual medical bills,
25 we would get a valuation somewhere between six

1 **hundred and eight hundred thousand; would you agree**
2 **with that?**

3 MR. WHELAN: Object to form.

4 A I understand what you're saying. And
5 based on your evaluation, yes.

6 **Q Okay. And, in fact, that would be based**
7 **on Jack's initial evaluation, right?**

8 MR. WHELAN: Object to form.

9 A You're assuming what Jack based his
10 initial evaluation on. I don't know what Jack
11 based his initial evaluation on.

12 **Q But in any event, you didn't take it into**
13 **account because you didn't change the reserve,**
14 **right?**

15 A There's nothing that says I have to change
16 the reserve at that time. There's nothing wrong
17 with not changing a reserve at that time.

18 **Q Okay. I don't disagree with that. But if**
19 **you thought the reserve needed to be changed at any**
20 **given time on a file you were handling, you would**
21 **timely go ahead and --**

22 A Normally I would --

23 **Q -- change it?**

24 A -- timely go ahead and change it, yes.

25 **Q All right.**

1 A That would be my normal procedure.

2 Q Okay. Take that. That was March 29,
3 2016.

4 Okay. The next report we're going to look
5 at is from May 12, 2016. It's a doozy. 156
6 through 166, okay.

7 All right. And this was also sent to you
8 via e-mail, right?

9 A Yes.

10 Q Okay. And this contains additional
11 information about some depositions that have
12 occurred?

13 A Yes, sir.

14 Q Okay. It also indicates on 161 that
15 there's a new witness, which may be or may not be
16 favorable to Ms. Hood. It talks, again, about this
17 letter. 163 it goes into injuries. And, again,
18 has the same medical bill total of two hundred and
19 seven thousand two hundred and two dollars and
20 sixteen cents.

21 And then it goes into a section on
22 dizziness and balance problems. And then on 165 it
23 actually gets into a liability analysis, the
24 current facts, okay.

25 And here he values the case ninety-five

1 **thousand to two hundred forty-five thousand.**

2 **That's at the bottom of 165, actually.**

3 **Do you see that?**

4 A Yes.

5 **Q All right. Do you, I mean, do you know**
6 **why the value changed?**

7 A Yes. Because it was our belief throughout
8 this claim that she was traveling without her
9 headlights when she should have had her headlights
10 on. And we believe that she was traveling in
11 excess of the posted speed limit. And this report
12 is after he has taken the deposition of these
13 witnesses under oath.

14 **Q Okay. And -- Go ahead. I'm sorry.**

15 A No. I would just say that I believe that
16 it strongly supported our case, which is why he
17 reduced the value range, settlement value range.

18 **Q Our case being USAA?**

19 A USAA.

20 **Q Right. And those facts about the**
21 **headlights were known and considered at the time**
22 **that the file was transferred to you, right?**

23 MR. WHELAN: Object to the form.

24 A We knew that there was an issue with the
25 headlights.

1 **Q Right?**

2 **A Yes.**

3 **Q And, in fact, the twenty percent**
4 **comparative applied to Ms. Hood and USAA's internal**
5 **investigation, was as a result of that headlight,**
6 **no headlight allegation, right?**

7 **A I did not do Missy's evaluation, but**
8 **that's what I would assume.**

9 **Q All right. And, so that fact has not**
10 **changed? We just have more evidence to support**
11 **what USAA believed the whole time, right?**

12 **A Right. We have --**

13 **MR. WHELAN: Object to form.**

14 **A We have confirmed verification through**
15 **depositions.**

16 **Q Okay. Anything else from that letter you**
17 **think is important?**

18 **A No, sir.**

19 **MR. WHELAN: Object to the form.**

20 You gave her a ten-page letter. You
21 didn't ask her to read it.

22 Is the question -- Do you really want
23 to know if there's anything in that
24 ten-page letter she thinks is important?

25 **BY MR. WILLEY, IV:**

1 **Q** Anything else important to your testimony
2 in the letter that we just talked about?

3 MR. WHELAN: Does she have --

4 I mean, I object to that question.
5 Please don't make her read that entire
6 letter --

7 MR. WILLEY, IV: Well, she did read
8 it.

9 MR. WHELAN: -- and tell you whether
10 there's anything --

11 She --

12 A I flipped through it.

13 MR. WHELAN: You know good and well
14 she did not sit here and read that
15 ten-page letter.

16 MR. WILLEY, IV: Right.

17 MR. WHELAN: She's sitting right in
18 front of you.

19 MR. WILLEY, IV: All right. I will
20 ask it differently.

21 BY MR. WILLEY, IV:

22 **Q** Any topics -- we read through all the
23 topics in there --

24 A Let me look at it again.

25 **Q** Okay. -- that were important?

1 MR. WHELAN: That were important?

2 Okay. Object to the form.

3 You just wasted, you just wasted time
4 with a question like that, in my opinion.

5 A Let me preface it by saying that
6 everything that I look at is important in my
7 evaluation of the case. And at the time that I
8 read that letter, I'm sure that I took that letter
9 and its contents into my evaluation of the case.

10 **Q All right. And some things you read you**
11 **give more weight to and less weight to, right?**

12 MR. WHELAN: Object to form.

13 A I give the same weight to everything. How
14 it affects my case negatively or positively may be
15 different.

16 **Q Right.**

17 A But I give the same weight to it all.

18 **Q And in this case, there was no difference**
19 **in what USAA knew at the time, or thought at least**
20 **at the time the case was transferred to you about**
21 **the headlights and what that report from Jack --**

22 A Well --

23 **Q -- said?**

24 A -- I think there is a difference.

25 MR. WHELAN: Object to form.

1 A When we, when we think something versus
2 getting the actual testimony that proves it, I
3 think there is a difference there.

4 **Q Okay.**

5 A And that's, obviously, what we got. We
6 got evidence to prove our theory.

7 **Q Okay. And, so that would have supported a**
8 **lower evaluation?**

9 A Yes. Because it would have made our, the
10 comparative negligence different.

11 **Q And, again, at that time you didn't make**
12 **any change to the reserve, right?**

13 A No, I did not.

14 **Q Ran next is a copy of the deck page, okay,**
15 **167.**

16 **Any idea why that's next?**

17 A Because you're going to talk about the
18 stacking.

19 **Q Oh, okay. Let me rephrase that. So it's**
20 **next in the documents in the claims file as they've**
21 **been produced to me.**

22 A Oh.

23 **Q So do you think that it was uploaded at**
24 **that point or would it have been uploaded before?**

25 A My normal procedure when I get a new claim

1 in --

2 **Q Right.**

3 A -- is to add the policy on my tree view so
4 that I have access to that policy without having to
5 dig for it. I'm assuming that that's where that
6 came from. But without looking at tree view, I
7 don't know.

8 **Q And we could look at the e-docs to**
9 **determine when it was added?**

10 A You know, I'm assuming, yes, yes. That
11 would be possible.

12 **Q Okay.**

13 A And it could have been Missy that did it.
14 I don't know that. I don't know who would have
15 uploaded that without looking at the actual
16 document that was filed.

17 **Q Okay. Next document I'm going show you is**
18 **Hood USAA 180 through 184, okay.**

19 **What's the date on that document?**

20 A August 22, 2016.

21 **Q Okay. What is it?**

22 A Its an update on the file.

23 **Q Okay. First page says Mr. Smith stressed**
24 **his belief that plaintiff's liability position has**
25 **become stronger because of his recent efforts in**

1 developing her case. In particular, he contends
2 Defendant Johnson cell phone records showed he was
3 talking on the phone at the time of the accident.

4 Do you see that section?

5 A I do.

6 Q Did you give any weight at that time, or
7 at any time to the notion that Mr. Johnson was on
8 his phone at the time of the accident?

9 A I would have given it consideration, but
10 it does not definitively prove that he was on the
11 phone at that time, at the time of the accident.
12 That could have been him making a phone call
13 immediately following the accident.

14 Q If -- Strike that.

15 The next section says, in his recent
16 discussion Mr. Smith said he has hired Wood Poplin,
17 P.E. We are familiar with Mr. Poplin, as he is a
18 frequently used accident reconstruction expert.

19 You see that?

20 A I see that.

21 Q The next document that I have is 185
22 through 190 and beyond, which is Mr. Poplin's
23 report.

24 Do you recall how you received
25 Mr. Poplin's report?

1 A I do not recall how I received it.

2 Q Okay. This -- And it says in here on 181,
3 which is the next page that, Mr. Smith said he does
4 not have a final opinion or report from
5 Woody Poplin, but he expects to receive one and
6 will be forwarding it to us.

7 Even though plaintiff's counsel has yet to
8 formally name this expert, we're going to send
9 Mr. Poplin a subpoena rather than await production
10 of his file.

11 You see that?

12 A I don't see it. Where --

13 Q Right here.

14 A Okay.

15 Q Mr. Smith says he does not have a final
16 opinion or report.

17 Do you see that?

18 A Yes.

19 Q All right. So fair to say that this
20 report did not come as an attachment with
21 Mr. Daniel's letter?

22 A Fair to say.

23 Q Okay. And the e-docs will tell us when
24 and who put this report in the file, right?

25 A Yes.

1 Q Okay. When you go through -- to 182,
2 there's a section that -- I'm down on the last full
3 paragraph --

4 A Okay.

5 Q -- third sentence. We have not conducted
6 a detail coverage analysis, but it appears
7 plaintiff may have one million in U.I.M. coverage
8 available for this claim.

9 You see that?

10 A Yes, I see that.

11 Q Okay. As best you know, was that the
12 first time that you became aware there might be a
13 million in coverage?

14 A I do not recall.

15 Q Okay. The next page 183. It says,
16 previously we provided a fairly wide settlement
17 range suggesting that an offer from ninety-five
18 thousand to two hundred and forty-five thousand
19 might be reasonable.

20 You see that?

21 A Yes.

22 Q Okay. And, so, essentially, with this
23 information about the cell phone potential, about
24 the Poplin report and an increase in coverage,
25 Mr. Daniel's valuation has not changed, right?

1 A Correct.

2 Q Okay. Do you know if you had anymore
3 conversations with Mr. Daniel in the days
4 immediately following this report?

5 A I do not recall.

6 Q Okay. If you read the next to last
7 sentence in that same paragraph under case
8 assessment where it says, it might be worth
9 offering.

10 Do you see that?

11 A Yes.

12 Q It might be worth offering some amount on
13 the higher end of the prior recommended range to
14 eliminate the risk of a bad verdict, but the
15 current facts do not warrant an offer that exceeds
16 two hundred forty-five thousand.

17 Did I read that correctly?

18 A Yes, sir.

19 Q All right. So is Mr. Daniel's position at
20 this time that USAA should not offer more than two
21 hundred and forty-five thousand, right?

22 A That's what it says.

23 Q Okay. The next sentence says, in fact,
24 any number above two hundred seventy-five thousand
25 could signal that we are afraid of this case, even

1 when the facts could make this venue favorable to
2 the defense.

3 How do you take, afraid of this case? I
4 mean, what does that mean?

5 MR. WHELAN: Object to form.

6 A I have no idea what Jack Daniel meant when
7 he said that.

8 Q And that's -- It was a bad question,
9 because that's not what I'm asking you.

10 How do you take it when you read it?

11 MR. WHELAN: Object to form.

12 A There, again, I don't know what
13 Jack Daniel's felt about this case and why he said
14 that particular statement.

15 Q Okay.

16 A Personally I was never afraid of the case.

17 Q Right. And, I mean, USAA should never be
18 afraid of a case when it's about compensating its
19 insured fairly, right?

20 MR. WHELAN: Object to form.

21 A I should be concerned and aware of a case,
22 but I should not be afraid of a case.

23 Q Right.

24 A I should do my investigation to the best
25 of my ability to determine a fair and reasonable

1 value in which I will pay my insured, or offer my
2 insured.

3 Q Right. And, I mean, USAA it doesn't
4 matter how much is paid, as long as it's fair and
5 reasonable, right?

6 A Yes.

7 Q Okay. So did you give Mr. Daniel's
8 statement about being afraid of the case and
9 signaling fear any weight in your evaluation?

10 A There, again, I give all information that
11 I'm given the same weight. How I ultimately
12 determine whether or not it affects my case is a
13 different story.

14 I do not remember ever reading that.

15 Q Okay.

16 A I'm sure I did, but I --

17 Q Okay. The last page 184 next to last
18 sentence, the parties have rescheduled mediation in
19 this case for October 28, 2016.

20 Do you see that?

21 A Yes, I do.

22 Q All right. Did you attend the mediation
23 in this case?

24 A I did not.

25 Q Okay. Who attended the mediation in this

1 **case?**

2 A I believe it was an outside adjuster hired
3 by Carlock, Copeland, I believe. I wasn't there.
4 I wasn't --

5 **Q Where would you look to find that**
6 **information?**

7 A I may have documented it in my file. I
8 may have relied solely on Jack Daniel to get that
9 person.

10 **Q Why did you not attend the mediation?**

11 A Ron Vestal did not allow me to attend it.
12 I wanted to attend, but he did not want me to
13 attend.

14 **Q What was his reasoning for that?**

15 A He felt like Jack Daniel could do the job
16 without the use of an outside adjuster, which is
17 not uncommon. We use outside adjusters all the
18 time.

19 **Q Why did you, I mean, want to attend?**

20 A Because it was a significant case. And
21 part of my job is, as attending mediations is to
22 evaluate what is in front of me and make an
23 opinion -- or, that's not the correct thing. To
24 use it to assess my case.

25 **Q All right.**

1 A And another part of my investigation. And
2 I would like to have attended to have met Ms. Hood
3 and you and work with Jack.

4 **Q Did you typically have mediations in this**
5 **period of time that you wanted to attend that you**
6 **weren't permitted to attend?**

7 A Yeah. We weren't always, we weren't
8 always allowed to fly --

9 **Q Okay.**

10 A -- to the expense.

11 **Q And that's what I was getting at. It was**
12 **your understanding that it was a cost benefit**
13 **analysis on whether to send you?**

14 A Basically, yes. Because an outside
15 adjuster can do the same thing I do.

16 **Q They can drive a Honda over and you gotta**
17 **fly, right?**

18 A Right.

19 **Q Okay.**

20 THE COURT REPORTER: Before you go to
21 your next exhibit, can we take a break?

22 MR. WILLEY, IV: We sure can.

23 (Whereupon, a recess was had from
24 11:34 a.m. to 11:42 a.m.)

25 BY MR. WILLEY, IV:

1 **Q How is Diane Martin mixed up in all this?**

2 MR. WHELAN: Object to the form.

3 **A I have no idea.**

4 **Q Okay. She didn't play any role in your**
5 **handling the litigation file?**

6 **A No.**

7 **Q Did you ever communicate with her about**
8 **the litigation file?**

9 **A No. I know Diane Martin, but I did not**
10 **communicate with her.**

11 **Q Okay.**

12 **A And I know Missy, but I don't recall ever**
13 **talking to her about it either.**

14 **Q Okay. Let me show you Plaintiff's Exhibit**
15 **4.**

16 **What date was that, the reserve changed?**

17 **A 8-24-16.**

18 **Q Okay. And how was it changed?**

19 **A Ron Vestal changed it.**

20 **Q All right. And what was it changed from**
21 **and to?**

22 **A One hundred to two fifty.**

23 **Q Okay. And that's thousand, one hundred**
24 **thousand two --**

25 **A One hundred thousand --**

1 Q -- hundred fifty?

2 A -- to two hundred fifty thousand.

3 Q All right. And that would have been two
4 days after Jack's letter?

5 A Yes.

6 Q Okay. Do you recall when you first saw
7 Mr. Poplin's report?

8 A No.

9 Q Okay. Does the software system, as far as
10 you know, allow us to see who opened a specific
11 document when?

12 A We have a sophisticated software system,
13 but I can't -- I mean, every document, every e-doc
14 that I put in has a history.

15 Q Okay.

16 A So it would tell you when I opened it and
17 when I filed it.

18 Q Okay. Got it.

19 A Does that mean that, necessarily, it came
20 in at that same date and time --

21 Q Not necessarily?

22 A -- not necessarily.

23 Q Right. And you'd be able to see on that
24 history, for example, if we went and looked at
25 Poplin's report, that e-doc history would tell us

1 **when you opened it?**

2 A When I put it in there.

3 **Q Right. Assuming you put it in?**

4 A Assuming I put it in.

5 **Q Okay. But if you didn't put it in, if**
6 **somebody else put it in, it would still allow us to**
7 **see the first time you opened it, right?**

8 MR. WHELAN: Object to form.

9 A Well, you use the word first time. It
10 would tell you when I put that, or whoever put that
11 doc in there, put it in there.

12 **Q Right.**

13 A But that doesn't necessarily mean that's
14 the first time I opened it.

15 **Q All right. I thought I understood what**
16 **you're saying, but --**

17 A In other words, an e-mail comes to me --

18 **Q Right.**

19 A -- and it's got an attachment --

20 **Q Okay.**

21 A -- I read my e-mail. My habit is to
22 always read my e-mails when they come in. I have
23 e-mail on my phone.

24 **Q Right.**

25 A I read my e-mails when they come in.

1 **Q Right.**

2 **A And I generally look at that document.**

3 **Q Right.**

4 **A But I may not -- Maybe I'm in a mediation.**
5 **I may not immediately put that into the doc, into**
6 **the file.**

7 **Q Okay. But for purposes of once the**
8 **document gets in there, the e-doc history for that**
9 **document would tell us each time it was opened**
10 **within the claims file?**

11 **A Oh, I don't know that.**

12 **Q You don't know that?**

13 **A I don't know that.**

14 **Q It may just tell us when it was uploaded**
15 **and by whom?**

16 **A Right. That's all that I'm aware of that**
17 **it will tell you.**

18 **Q All right. But at some point, obviously,**
19 **you reviewed Mr. Poplin's report?**

20 **A Yes, sir. At some point I did.**

21 **Q Do you remember, specifically, when that**
22 **was?**

23 **A No, I do not.**

24 **Q Okay. And I think you already said this,**
25 **but you don't recall ever having to meet with Ron**

1 or anyone else on the team about changing the
2 reserve, right?

3 A If I said that, that's incorrect. I --
4 Normally, I would be the person to change that
5 reserve.

6 Q Right.

7 A If Ron changed that reserve, it was
8 probably more than likely, and I cannot say
9 definitively, more than likely while we were having
10 a conversation about the file.

11 Q Okay. Do you recall that conversation?

12 A No, I do not.

13 Q Okay. To the extent that you documented
14 that conversation, it would be documented in the
15 ALIS file?

16 A We did not doc every conversation we have.

17 Q I know that. And that's why I prefaced it
18 with, to the extent that you would have documented
19 it, that's where it would have been documented,
20 right?

21 A Yes. It would have been in the ALIS file,
22 if I documented it, yes.

23 Q Okay. I'm going to just show you the
24 first, second page of Mr. Poplin's report, okay,
25 which is 186.

1 In that report, is this the letter you
2 were referring to when you said it was addressed to
3 Mr. Nickels?

4 A Yes.

5 Q Okay. And, so you were able to ascertain
6 from that, that this report was prepared for
7 Mr. Nickels, correct?

8 A Correct.

9 Q Would you have given the fact that this
10 report was prepared for USAA, any weight in your
11 consideration of it?

12 MR. WHELAN: Object to form.

13 A As I told you before, I give everything
14 that is presented to me in my file the same
15 consideration and the same weight. What I do with
16 it is a different thing.

17 Q Okay. What I'm getting at is, if you
18 received a report from an expert retained by the
19 claimant's attorney and you received a report for
20 an expert retained by your company, do you consider
21 those reports differently?

22 A No. I wouldn't consider -- I would have
23 to consider them based on what information was in
24 the file.

25 Q Okay.

1 A Regardless of where it came from.

2 Q Right. And I guess what I'm asking you
3 is, in your experience on sort of a credibility
4 analysis, you know, do you generally find that the
5 claimant's attorney's expert support their theory
6 of the case and the insurance company's expert
7 support their theory of the case?

8 MR. WHELAN: Object to form.

9 Q Is that generally a true statement?

10 A It can tend to look that way, yes.

11 Q Okay. And, so what I'm asking is in this
12 instance the fact that the report was prepared for
13 USAA.

14 MR. WHELAN: Object to form.

15 A I didn't care who the report was prepared
16 for. What I cared about was the content of the
17 report.

18 Q Okay. And what was the content?

19 A The content of the report said that she,
20 her high beam headlight was illuminated at the time
21 of the accident.

22 Q Okay. And you had no other expert report
23 or scientific study of any kind that indicated that
24 her lights were off, right, at that time?

25 A No report, no.

1 **Q Okay.**

2 A Not to my knowledge, no.

3 **Q Okay. No opinion from anybody else?**

4 A Well, I had the opinion of four or five
5 witnesses who all said she did not have her
6 headlights on.

7 **Q Well, that's not quite what they said,**
8 **right?**

9 MR. WHELAN: Object to form.

10 **Q They didn't all say she didn't have her**
11 **headlights on.**

12 A Okay. If you want to get into
13 particulars, I believe one said she may have had
14 running lights on.

15 **Q Right.**

16 A And I believe the other said that they did
17 not believe she had headlights on.

18 **Q I think, I think that Mr. Johnson's**
19 **testimony was that he just didn't see her, right?**

20 A He believe because he didn't -- she did
21 not have her headlights on.

22 **Q But that was -- He speculated, because --**
23 **she didn't have her headlights on, right?**

24 MR. WHELAN: Object to form.

25 **Q He didn't see her headlights?**

1 A I don't know. I mean, I --

2 **Q It was --**

3 A Whatever he testified to, I'm sure is --

4 **Q Okay. It was never documented in your**
5 **file that he said I saw her headlights and they**
6 **were off, right?**

7 MR. WHELAN: Object to form.

8 A I don't know.

9 **Q Okay. And it was never documented in the**
10 **file that the person driving behind her said, I saw**
11 **her headlights at the time of impact and they were**
12 **off, right?**

13 MR. WHELAN: Object to form.

14 A The person that was behind Ms. Hood?

15 **Q Right.**

16 A I believe Mr. Lee, that was Mr. Lee. And
17 I believe he said he thought she might have had
18 running lights on.

19 **Q Okay.**

20 A But he knew that she did not have
21 headlights on.

22 **Q At the time that she passed him, right?**

23 A Right.

24 **Q He could not see her headlights at the**
25 **time of impact, right?**

1 A No. She was ahead of him.

2 Q Of course. And this wreck occurred right
3 at the cusp of the time where it was getting dark,
4 right?

5 A Yes.

6 Q Okay. And, so if you had automatic
7 headlights on, they don't come on until that point
8 where it gets just dark enough, right?

9 MR. WHELAN: Object to form.

10 Q They're not on all day?

11 MR. WHELAN: Object to form.

12 A I don't -- I mean, I don't know. I think
13 every car is individually -- I don't think I can
14 say that.

15 Q All right.

16 A I'm not an expert on that vehicle and when
17 the lights come on and off.

18 Q Fair enough. And then finally we have
19 Mr. Kuck's statement, which had changed, right?

20 A Yes.

21 Q The first statement he gave to the
22 insurance company said, all I could see were
23 headlights coming at me, right?

24 A And Mr. Kuck suffered a minor head injury,
25 to my best recollection, which means he may or may

1 not have remembered properly.

2 Q Okay. But in any event, you would agree
3 with me that generally people's memory of events
4 are better closer in time to the actual event?

5 A Assuming they did not have a head injury.

6 Q Right. Even assuming they did have a head
7 injury, you know?

8 A People tend not to recall things when they
9 --

10 Q Okay.

11 A -- have a head injury.

12 Q There's nothing ever in your file
13 indicating the extent or impact his head injury
14 might have had on his memory, right?

15 A Not to my knowledge.

16 Q Okay. And, so were there any other --
17 Well, and then finally we have Ms. Hood's
18 statement that her headlights were on, right?

19 A That's what she said until the trial.

20 Q Right. And there were no other statements
21 that you relied on in your liability investigation
22 regarding the headlights, right?

23 A The police officer. I believe there was
24 Mr. Tanrath. Like I said, I think there were four
25 or five people that --

1 **Q Okay.**

2 A -- that all testified.

3 **Q The police officer said that the lights**
4 **were off when he got there, right?**

5 A When she got there, yes.

6 **Q She, excuse me.**

7 A The car was still running --

8 **Q Okay.**

9 A -- but the headlights were off.

10 **Q All right. But, again, not a impression**
11 **of the actual time of impact? The police officer**
12 **didn't see that, right?**

13 A That's correct.

14 **Q Okay. And what's your best recollection**
15 **of Tanrath's -- what you considered?**

16 A I believe Mr. Tanrath, if I remember
17 correctly, was the vehicle behind Mr. Kuck. And I
18 believe that he said that -- I mean, it would be
19 speculation. I believe he said she did not have
20 headlights on.

21 **Q Okay.**

22 A But I can't remember exactly what he said.

23 **Q All right. But, again, he was behind the**
24 **Kuck's vehicle, which Ms. Hood hit head on?**

25 A Had limited view, yes.

1 **Q** All right. So at best there's some
2 question about -- And when I say at best, I mean at
3 best for USAA, there was some question at that
4 point in time between the statements about whether
5 the headlights were on or off, right?

6 MR. WHELAN: Object to form.

7 **A** We believed at that time, that the
8 witnesses that we had, had given us credible
9 information, and that we believed that her
10 headlights were not on.

11 **Q** Okay. And that was -- Sorry.

12 **A** Which she ultimately admitted to in trial.

13 **Q** And that was USAA's position from even
14 before you got the claim, that the --

15 MR. WHELAN: Object to form.

16 **Q** -- headlights were off, right?

17 MR. WHELAN: Object to the form.

18 **A** It was part of our evaluation that her
19 headlights were off.

20 **Q** Right. And what I'm getting at is, that
21 was part of the evaluation, even in the presuit
22 phase of the U.I.M. claim?

23 **A** I didn't handle the presuit, but based on
24 information I've seen --

25 **Q** Right.

1 A -- I would make that assumption.

2 **Q That's how it's documented in the claims**
3 **file?**

4 A Right.

5 **Q Okay.**

6 MR. WHELAN: Object to the form.

7 **Q So when we got Mr. Poplin's report, which**
8 **you would agree with me is the only scientific**
9 **report studying the headlights, right?**

10 A It's the only one that I'm aware of, yeah.

11 **Q And that report indicated that she did**
12 **have headlights on, right?**

13 A High beams.

14 **Q Okay. And that report was prepared for**
15 **USAA?**

16 MR. WHELAN: Object to the form.

17 A It was prepared for Chris Nickels.

18 **Q He was hired by USAA, right?**

19 A He was hired by USAA to represent Ms. Hood
20 in the bodily injury claim, yes.

21 **Q So at that point, would you agree with me**
22 **based on these statements that the best information**
23 **that we had, the most reliable information would**
24 **have been Mr. Poplin's report indicating that the**
25 **lights were on?**

1 A I believe his report indicated that the
2 high beams were on based on the condition of the
3 light. Science is not perfect.

4 **Q Right.**

5 A I had witnesses that said to the contrary.
6 And the fact that she had high beams on and she,
7 herself, said that the lights were automatic. I
8 don't recall her ever saying that she turned her
9 lights on.

10 Her testimony all along was that, my
11 lights were automatic.

12 **Q Right.**

13 A Which means they would have come on.

14 **Q Right.**

15 A They would have come on at a low beam, not
16 a high beam. She never once in, to my knowledge,
17 said that she touched the light switch and put
18 those lights on high beam.

19 **Q Right. And I understand the distinction**
20 **you're trying to draw.**

21 But my point is, just as a common sense
22 thing, we've got conflicting statements, right? I
23 mean, the statements aren't all in a line. We have
24 some conflict in the statements; you would agree
25 with that, right?

1 MR. WHELAN: Object to form.

2 A We all know that witnesses are not
3 perfect. And we have varying differences in the
4 witness statement, but they all led me to the fact
5 that we believe her headlights were not on.

6 Q Okay.

7 A Which she supported at trial.

8 Q And in cases where we have differing
9 witness statements, oftentimes we do turn to an
10 expert to do an analysis to try to come up with a
11 more accurate picture of what happened, correct?

12 MR. WHELAN: Object to the form.

13 A I don't want to say a more accurate. I
14 would say that we look at experts to give us an
15 opinion.

16 Q Okay.

17 A To determine whether or not our belief --
18 or our investigation with our witnesses is
19 supported.

20 Q Right. But we don't hire experts and say,
21 here is what our case is about; you have to take
22 this position and let me know where to send the
23 check --

24 A Absolutely --

25 Q -- right?

1 A -- not, never.

2 **Q Right. We hire experts and say, here is**
3 **what we're trying to find out, will you go through**
4 **the scientific process to determine it, right?**

5 A That's what we would ask them to do.

6 **Q Right. And we do that because the**
7 **scientific process and methodology is going to be**
8 **more reliable than believing or disbelieving**
9 **conflicting witness statements, right?**

10 A I don't necessarily agree with that.

11 **Q Okay.**

12 A I mean, there were -- You know, we need to
13 talk about the issue that we felt there may have
14 been some contamination of the evidence. We
15 weren't there to --

16 Jack Daniel wasn't asked to go and view
17 that, his investigation of that head lamp.

18 **Q But he was hired my Chris Nickels, right?**

19 A Correct.

20 **Q And certainly you're not indicating that**
21 **you think an attorney hired by USAA would do**
22 **anything improper to tamper with evidence, right?**

23 A I'm not saying the attorney did anything.
24 I'm just saying, I don't -- since we weren't there,
25 I don't know that he even looked at the headlight

1 that was associated with -- I don't know that.

2 **Q Okay. But the report indicated that he**
3 **did?**

4 A The report indicated that he did, yes.

5 **Q Okay. And do you have any reason to**
6 **believe that his report was inaccurate, or that he**
7 **was lying in his report?**

8 A I don't have reason to believe he was
9 lying.

10 **Q Okay.**

11 A But science is not perfect either.

12 **Q Okay.**

13 A And, once again, it said she had high
14 beams on.

15 **Q Subsequent to that, did you give**
16 **Jack Daniel authority to retain an expert?**

17 A He retained a consultant.

18 **Q And what did that consultant say about**
19 **Mr. Poplin's report?**

20 A Without reading it, his statements, I
21 don't remember.

22 **Q Okay. Do you recall that consultant**
23 **agreeing with Mr. Poplin's report?**

24 A To my knowl -- to my best recollection, I
25 do believe that he believed -- He did agree with

1 some of the report, yes.

2 **Q Okay.**

3 A I don't remember if he agreed with all of
4 it.

5 **Q And isn't it true that when you gave**
6 **Mr. Daniel authority to hire that expert, that it**
7 **was on the basis of hoping that expert would be**
8 **able to counter Mr. Poplin's report?**

9 A I don't, I don't agree with that at all.
10 When USAA hires an expert, we hire an
11 expert to give us the true facts.

12 **Q Okay.**

13 A So if Mr. -- I don't even remember his
14 name, Tyler whoever. If he had given us a report,
15 I would have wanted him to give me his honest and
16 true opinion based on his investigation, regardless
17 of how it went.

18 **Q Okay. And wasn't the purpose --**
19 **His name was Black, Mr. Black.**

20 A Okay. Mr. Black.

21 **Q -- of hiring Mr. Black to hopefully he**
22 **would support USAA's position on the case?**

23 A To the best of my recollection, I believe
24 that I asked, or discussed with Jack hiring
25 Mr. Black to review the report by Mr. Poplin

1 because we were not there when the report was done,
2 when the investigation was done.

3 Q And Mr. Black did do that, correct?

4 A Yes. He reviewed the report.

5 Q 257, which is the page titled, Consulting
6 Engineer.

7 Give you a chance to read through that.

8 A Okay.

9 Q Okay. And this is Jack Daniel's report to
10 you on Mr. Black, correct?

11 A Correct.

12 Q You didn't prepare this?

13 A No.

14 Q Did you rely on it?

15 A Yes. I would have relied on it.

16 Q All right. And this says that Mr. Black's
17 opinion -- this is the third sentence -- the bulb
18 inspection that was performed by the opposing
19 expert appears to have been properly conducted,
20 right?

21 A Yes.

22 Q Do you have any reason to doubt
23 Mr. Black's opinion on that matter?

24 A Only the fact that I had the witnesses.

25 Q Okay. In the last paragraph, the second

1 sentence says, in a recent conference call,
2 Mr. Black suggested he might be more effective in a
3 consulting role because if he is named as an
4 expert, he may ultimately be forced to give certain
5 concessions to plaintiff's counsel.

6 You see that?

7 A I do see that.

8 Q Okay. Jack said -- The next sentence
9 says, at this point we do not foresee any critical
10 concessions Mr. Black would be forced to give, but
11 calling him as a witness could overcomplicate the
12 case, right?

13 A Uh-huh.

14 THE COURT REPORTER: Yes?

15 A Yes. I'm sorry.

16 Q And, in fact, in this case Mr. Black was
17 never named as an expert, right?

18 A No, he was not.

19 Q And his opinion on the lighting issue was
20 never disclosed to USAA's insured, right, or her
21 counsel?

22 A I don't know whether he told you or not.

23 Q Okay. Do you understand the difference of
24 why some experts are consulting experts versus
25 disclosed experts?

1 A Yes.

2 Q Okay. And do you understand that one of
3 those distinctions is that with a consulting
4 expert, under the rules, the court rules, you don't
5 have to provide the information that expert
6 provides?

7 A Correct.

8 Q Okay. And isn't this report saying that,
9 that perhaps we should keep him as a consulting
10 expert, because if he's named as an expert, he may
11 be forced to give certain concessions to
12 plaintiff's counsel?

13 A That appears to be what Jack is saying.

14 Q Okay. And in this case, didn't you,
15 ultimately, along with Jack, make the decision not
16 to disclose him as an expert?

17 A Correct. We had no reason to. Yes.

18 Q Okay. Well, you had no reason to, in
19 terms of helping USAA's case against Ms. Hood,
20 right?

21 A We relied on the witnesses. That was our
22 decision to rely on the witnesses.

23 Q I mean, if litigation is a search for the
24 truth, which we've talked about, would you agree
25 with me that having a second engineering expert

1 that looked at the same information as the first
2 engineering expert and relied at the same
3 conclusion, would add credibility to that opinion,
4 right?

5 MR. WHELAN: Object to form.

6 A I don't recall Mr. Poplin being an expert
7 at the trial.

8 Q And I'm not talking about trial. I'm
9 talking about where we are at the litigation at
10 this moment.

11 At this moment, Mr. Poplin's report was a
12 part of the litigation, correct?

13 A Yes.

14 Q It was being considered by USAA in
15 evaluating the claim, correct?

16 A Yes.

17 Q Okay. And USAA also had Mr. Black's
18 opinion as of February 20, 2017, right?

19 A Yes.

20 Q Mr. Black's opinion, essentially, was that
21 Mr. Poplin was right?

22 MR. WHELAN: Object to the form.

23 Q As to the headlights, correct?

24 A I believe he said that it looked like it
25 had been conducted properly.

1 **Q** All right. And Mr. Black, apparently,
2 according to the report you received, told
3 Mr. Daniel that if he was disclosed he would have
4 to give certain concessions to plaintiff's counsel,
5 right?

6 **A** That is what it says.

7 **Q** And as a result of that, he was never
8 disclosed to plaintiff's counsel or to USAA's
9 insured, Ms. Hood, right?

10 MR. WHELAN: Object to form.

11 **A** He was a consultant. We opted not to use
12 him as an expert, so we apparently did not disclose
13 him.

14 **Q** Right. You would agree with me that if
15 the purpose of litigation is a search for the
16 truth, his opinion would certainly play into the
17 analysis of what actually happened at the wreck,
18 right?

19 MR. WHELAN: Object to the form.

20 **A** His opinion was only one part of a massive
21 investigation that we made.

22 **Q** I agree with you.

23 But his opinion was an important part of
24 being able to determine what actually happened,
25 right?

1 MR. WHELAN: Object to the form.

2 A His opinion said that she had her high
3 beams on.

4 Q Right.

5 A We did go one step farther --

6 Q Right.

7 A -- and make another investigation of that
8 particular vehicle.

9 Q Right.

10 A We didn't just ignore the report. We went
11 and found more information to either support or not
12 support.

13 Q Right. And my point is that, earlier, you
14 raised some objections with Mr. Poplin and said,
15 well, because we weren't there, we don't know if
16 the information was accurate and he had to consider
17 that at that time, right? You recall saying that?

18 A We still don't know if the information is
19 accurate.

20 Q So what USAA did was hire another --

21 A Yes.

22 Q -- its second, because Mr. Poplin was
23 hired by USAA --

24 MR. WHELAN: Object to form.

25 Q -- right? He was hired by USAA through

1 **Chris Nickels; would you agree with that?**

2 MR. WHELAN: Object to the form.

3 A The letter is written to Chris Nickels.
4 So I can only assume Chris Nickels hired him. I am
5 not part of Chris Nickels' investigation. I am
6 part of the U.I.M. investigation.

7 **Q I understand. And this case is not**
8 **against you personally, it's against --**

9 A No, I know.

10 **Q -- USAA. That's --**

11 A And when I say I, I mean USAA.

12 **Q Right. And that's why I make that**
13 **distinction about what USAA knew, as opposed to**
14 **what you knew, okay, because it's a different**
15 **entity.**

16 Mr. Black was hired with your authority in
17 order to investigate those same issues, correct?

18 A Yes.

19 **Q All right. And he was able to say, in his**
20 **opinion, that the investigation Mr. Poplin did was**
21 **done properly, correct? We've already said that.**

22 A Yes, sir.

23 **Q Okay.**

24 MR. WHELAN: Object to form.

25 **Q At that time we made the decision that**

1 despite having -- you made the decision, I suppose,
2 despite having two scientific expert reports that
3 said the lights were on --

4 MR. WHELAN: Object to the form.

5 Q -- that we were going to believe these
6 people; one of which you said your file indicated
7 had brain damage; another one who was behind the
8 vehicle, another one who was behind the other
9 vehicle that we hit, and another one that just said
10 I didn't see her, over these two expert reports,
11 right?

12 MR. WHELAN: Object to form.

13 A First off, Mr. Poplin is the only one that
14 did an investigation of the actual headlight and
15 made a report.

16 Q Right.

17 A Mr. Black reviewed Mr. Poplin's report.
18 He did not actually do his own investigation of the
19 report. So it's incorrect to say that we have two
20 reports saying the same thing. There aren't two
21 reports saying the same thing.

22 Q Right. Well, Mr. Black's report is a
23 confirming report?

24 MR. WHELAN: Object to form.

25 Q Right? It confirms what Mr. Poplin did?

1 MR. WHELAN: Object to the form.

2 A He says that he believes that the -- Based
3 on what I'm reading --

4 Q Right.

5 A -- he says he believes that it was
6 properly conducted.

7 Q Right. And that's what I'm getting at.

8 A But he also goes on to say that there are
9 potential credibility issues that we can't ignore.

10 Q Right.

11 A I may have looked at this completely
12 different had there not been credibility issues. I
13 don't know.

14 Q Right. But when you did look at it, in
15 your analysis you gave more weight to the
16 statements than to the expert reports; is that
17 fair?

18 A After we sent Matti (Phonetically) out to
19 do an investigation pertaining directly to that car
20 and how the lights worked.

21 Q Okay. In evaluating the claim at the
22 amount that it was evaluated at, okay, did the
23 damages play more of a role, or did the liability?

24 A When we evaluate a claim, we evaluate the
25 claim based on the damages as they're presented to

1 us. And then we adjust that based on the liability
2 determination that we make.

3 **Q All right.**

4 A And remember, that we were only two
5 percent away from getting a zero verdict, so.

6 **Q What I'm asking you is, we have to look at**
7 **this moment in time what we had available, okay.**

8 **If we took the headlight issue, the**
9 **potential comparative fault away, at this point in**
10 **time as of February, 2017, would you agree with me**
11 **that the valuation of the claim would go up?**

12 A Of course. If we took that away, the
13 value of the claim would have gone up. But we
14 haven't mentioned the fact that there was a speed
15 issue, too, that we were taking into consideration.

16 **Q Right. How much would the valuation you**
17 **expected to have gone up?**

18 A It's hard to say.

19 **Q All right.**

20 A I mean, if we completely took it away, of
21 course it would have then been a hundred percent.

22 **Q Okay.**

23 A But if we determined that there was still
24 some liability issue, that could have affected --

25 **Q Right.**

1 A -- what we paid.

2 Q Okay. I'm going to show you 258, impact
3 of recent development. Our last settlement offer
4 at mediation was two hundred thousand. Plaintiff's
5 counsel suggested the case could be settled for an
6 amount between three and four hundred thousand, but
7 his lowest specific demand was six hundred fifty
8 thousand.

9 Do you see that?

10 A I do see that.

11 Q Okay. And at the time of the mediation,
12 the reserve on the case was set at two hundred and
13 fifty thousand, correct?

14 A Yes.

15 Q Okay. Do you know whether or not that
16 independent third-party adjuster was given
17 authority at the full reserve amount?

18 A I can't say definitively. I can only
19 guess.

20 Q What would your guess be based on?

21 A My guess would be that we gave full
22 authority.

23 Q And is that based on your experience in
24 handling mediations for USAA?

25 A That is correct.

1 Q Okay. And when you go to a mediation, you
2 typically have full authority up to the reserve
3 amount?

4 A Correct.

5 Q All right. Do you typically have any
6 authority above that?

7 A Not typically.

8 Q Do you know why in this case the full
9 authority was never offered?

10 A I wasn't there. I don't recall the
11 conversation with Jack afterward. I'm sure there
12 was conversation, but I don't recall it.

13 Q In your experience handling mediation for
14 USAA, if a plaintiff's lawyer says we can settle
15 the case between three and four hundred thousand,
16 you've offered two hundred, but you know you have a
17 reserve of two fifty, does that sound like a case
18 that you might be able to get done with a little
19 work?

20 Depending on what happened at mediation,
21 potentially, it could be.

22 Q And the reserve was never adjusted after,
23 after August 24 of 2016, right?

24 A No, it was not.

25 Q Once we got -- Once USAA got the

1 information from Mr. Black confirming Mr. Poplin's
2 investigation was done properly, the reserve was
3 never increased, right?

4 A No, it was not.

5 Q Okay. Could it have been at that time?

6 A It could have been.

7 Q Do you remember getting this report back
8 -- Strike that.

9 Do you recall getting a report on your
10 case after the mediation?

11 A I do not recall getting a written report.
12 I'm sure that Jack would have reported to me.

13 Q Okay.

14 A I do not recall in what method or form.

15 Q But it would -- Safe to assume that you
16 received a call or an e-mail or a letter, some
17 communication about what happened at the mediation?

18 A Yes.

19 Q Okay. And as you sit here today, you
20 don't recall what that is?

21 A I do not recall.

22 Q Okay. But we would be able to look in the
23 ALIS file to see if you documented anything?

24 A If I document anything, yes.

25 Q On the last page of that letter is Jack's

1 value range, which is still ninety-five thousand
2 and two hundred forty-five thousand.

3 Do you see that?

4 A Yes.

5 Q And you have a plaintiff's lawyer who has
6 said we can settle the case between three and four
7 hundred thousand.

8 Do you see that on the last page?

9 A Let me read it and see what it says.

10 Q Yeah. Sorry.

11 A It was suggested that you could settle
12 between three and four hundred thousand, yes,

13 Q Let me just ask you based on your
14 experience. When a plaintiff's, claimant's lawyer
15 says, we can settle this case between X. and Y., is
16 that generally over what they'll actually settle
17 the case for?

18 A Generally.

19 Q Okay. And, so in this case is it safe to
20 say that if they're saying between three and four
21 hundred thousand, we have a valuation from defense
22 counsel that up to two hundred and forty-five
23 thousand and we've got an internal reserve set at
24 two hundred and fifty thousand, this looks like a
25 case that we might be able to get resolved at this

1 point?

2 A On the surface it looks that way, yes.

3 Q Okay. Did anything that you're aware of
4 happen to try to get the case resolved at that
5 point?

6 A Not to my recollection.

7 Q The last line of that letter says, please
8 let us know if you're agreeable with using a
9 videographer to independently document the lighting
10 setup.

11 You would have responded to that, right,
12 in some manner?

13 A Yes, I would have.

14 Q Okay. Probably via e-mail?

15 A Or a phone call with Jack. I don't know.

16 Q Give you back 258. You can keep that, as
17 well.

18 The second paragraph, first full
19 paragraph, the last sentence says, additionally, if
20 we need to call the videographer as a witness, he
21 will not have to render or concede opinions about
22 the accident that might be damaging to our defense.

23 Do you see that?

24 A I see that.

25 Q Okay. And at this point, are -- is it

1 basically strategizing to figure out how to
2 cherry-pick which evidence we want our insured and
3 the jury to see?

4 MR. WHELAN: Object to form.

5 A I don't agree with the word cherry-pick.

6 Q What word would you use?

7 A I believe that each side weighs their
8 evidence based on its merits, and presents a proper
9 defense or case for their client.

10 Q Right. In this case, you're not defending
11 anyone, right? You don't have an individual
12 person?

13 A Correct.

14 Q Really what this case is defending USAA's
15 money; you agree with that, right?

16 A No. I don't like the way you're saying
17 that.

18 Q Okay. Well, what --

19 A We are trying to val -- We are trying to
20 make an appropriate evaluation of the case, based
21 on the evidence we have to offer a fair and
22 reasonable value of the claim, which, apparently,
23 we believed was set at two fifty.

24 Q Right. And in order to be fair and
25 reasonable, why wouldn't we then make all the

1 **evidence available to everyone so that everyone can**
2 **see it and come to a fair and reasonable agreement?**

3 MR. WHELAN: Object to form.

4 A I guess for the same reason that when we
5 try to get evidence in that would help us present
6 our case. Sometimes a judge tells us we can't do
7 it.

8 Q Right. Because, really, what we're trying
9 to do, what USAA is trying to do in this situation
10 with Jack, is only present evidence that is helpful
11 to the defense, right?

12 MR. WHELAN: Object to form.

13 A That is what you do in a trial. That is
14 the same thing that you do on your side. You're
15 not going to present any evidence on your side that
16 will be derogatory to your client.

17 We present the information that we feel is
18 right, that we feel is the truth, that we feel will
19 give a jury a fair review of the case.

20 Q A fair review based on the evidence we
21 present, not based on all the evidence we've
22 collected, right?

23 A We're not required to give all the
24 evidence we collect.

25 Q Do you know USAA's ethics, they're on the

1 wall, do you?

2 A I believe it's honesty, loyalty,
3 integrity. I don't remember the others.

4 Q Okay.

5 A There's three or four.

6 Q All right.

7 A So there may be one other.

8 Q You have children?

9 A I do.

10 Q You talked about your granddaughter, so I
11 assumed.

12 When you were raising children, do you
13 tell them that if they don't tell the whole truth,
14 is the same thing as telling a lie?

15 A I'm sure that I've said that to my son.

16 Q All right. I mean, dishonesty doesn't
17 have to be a boldface lie, right, it could just be
18 not saying the whole story; would you agree with
19 that?

20 A Repeat your question.

21 Q Would you agree with me that if someone
22 doesn't tell the full truth, they omit some things,
23 that's dishonesty, or can be dishonest?

24 A I don't believe that's dishonest.

25 Q Would you agree with me that saying

1 something that is contrary to the truth is
2 dishonest?

3 A Yes.

4 Q Okay. Would you agree with me that if one
5 person says the headlights were on and another
6 person says the headlights were off, that one of
7 those statements is not true?

8 A I don't believe that. Because I believe
9 people tell, they tell what they truly believe in
10 their mind that they saw. So I don't believe
11 that's dishonesty at all.

12 Q And that's not what I'm asking. That
13 wasn't my question.

14 My question is, if one person says the
15 headlights were on and one person says the
16 headlights were off, would you agree with me that
17 one of those statements is not true?

18 A Well, one of them is not true, but --

19 Q Right.

20 MR. WHELAN: Are you done with your
21 answer?

22 A Yes.

23 MR. WHELAN: You need to take a
24 break?

25 A Yeah.

1 MR. WILLEY, IV: Okay. Let's take a
2 break. Anytime you want.

3 (Whereupon, a recess was had from
4 12:31 p.m. To 12:37 p.m.)

5 BY MR. WILLEY, IV:

6 Q All right. Had a little break there.

7 I don't want you to tell me anything
8 specific about your pay, but I'm going to ask some
9 very general questions, okay.

10 How are you paid? Are you -- And what I'm
11 asking is salary, hourly, bonuses, et cetera.

12 A I am paid a straight salary.

13 Q Okay.

14 A I get two bonuses a year; one is
15 two-weeks' pay at Christmas.

16 Q Okay.

17 A And then we get a bonus in February,
18 neither of which are guaranteed.

19 Q Right. The Christmas bonus is always
20 two-weeks' pay?

21 A It always has been in the twenty-four
22 years I've been there, yes.

23 Q Okay. What is the February bonus? How is
24 that calculated?

25 A I believe it's a percentage base on the

1 profitability of the company --

2 **Q Okay.**

3 A -- for the year.

4 **Q And is it your understanding that that**
5 **percentage is calculated as over the entire**
6 **company, or is it just your office, your team?**

7 A I believe it's -- Oh, my gosh. I believe
8 it's the entire company, yeah.

9 **Q Okay. All right. Do you have an**
10 **employment contract?**

11 A No.

12 **Q Okay. If you were going to try to find**
13 **out that information, how it was calculated, where**
14 **would you go find it?**

15 A We have an employee meeting every year
16 that actually gives us a breakdown and shows us
17 where, how they calculate it.

18 **Q Is that meeting at the same time every**
19 **year?**

20 A Generally it's the end of January, yes.

21 **Q Okay. And at that meeting, do they give**
22 **you documents that say that or --**

23 A No.

24 **Q -- is it a slide?**

25 A It's just a video.

1 **Q** Video, okay.

2 All right. Do you receive any bonuses,
3 other than those two?

4 **A** No.

5 **Q** Okay. What is the reprimand process in
6 your position at USAA?

7 **A** What do you mean by reprimand?

8 **Q** So I will give you an example.

9 So some companies have like the first
10 thing you get a written warning, which is notated
11 in the file. The second time you get a formal
12 written warning. A third time you get ten percent
13 off your next check, you know, whatever.

14 What is that in your position, what's
15 your --

16 **A** You would just initially get a verbal
17 warning.

18 **Q** Okay.

19 **A** Then you would get a process improvement
20 plan, and then you would go on the form.

21 **Q** What was the last part, go on --

22 **A** Form, it would be a form.

23 **Q** Okay. And what does that look like?

24 **A** I have no idea. I've never --

25 **Q** Okay.

1 **Have you ever got a verbal warning?**

2 A Yes.

3 **Q Okay. When?**

4 A Just recently.

5 **Q Okay. Any before that?**

6 A Oh, I'm sure. In twenty-four years, I
7 can't imagine that I haven't had warnings, you
8 know. No one's perfect.

9 **Q I know. I get in trouble all the time,**
10 **so.**

11 **Is the verbal warning documented anywhere?**

12 A It might -- I mean, documented, no, I
13 don't believe. It might be mentioned in our
14 quarterly reviews.

15 **Q Okay.**

16 A I don't, necessarily, recall, but.

17 **Q Have you ever had a process improvement**
18 **plan?**

19 A I did.

20 **Q Okay. When was that?**

21 A October through December of last year.

22 **Q Okay.**

23 A It was a sixty-day process improvement
24 plan.

25 **Q And can you tell me a little bit about the**

1 **basis for that.**

2 A Basis meaning why it happened?

3 **Q Right.**

4 A Sure. I am sixty-three years old, my
5 husband is seventy-eight years old. And I will get
6 emotional, so you just have to bear with me.

7 MR. WHELAN: Let me get some Kleenex.

8 **Q And let -- And, Ms. Moats, let me make it**
9 **a little easier.**

10 **Can you just tell me the category of what**
11 **it had to do with.**

12 A I had -- due to health issues with my
13 husband --

14 **Q Okay.**

15 A -- that started, I want to say maybe in
16 April or May and continued through September,
17 October. My work had gotten behind, in the fact
18 that I was not documenting my work quickly enough.

19 **Q Okay.**

20 A Wasn't that I wasn't doing the work, I was
21 responding to e-mails, giving authority; that kind
22 of stuff.

23 **Q Okay.**

24 A But I was not documenting it in the file.
25 And, so I was put on a process improvement plan for

1 sixty days. We caught my work up. And I worked
2 very hard to maintain, regardless of my home life,
3 which it's difficult.

4 Q Right. And I understand and appreciate
5 that. And, like I said, I don't want to get into
6 the details, just kind of categories.

7 Prior to that, have you ever been put on a
8 process improvement plan?

9 A As far as I know, in twenty-three and a
10 half years, I have never --

11 Q Okay.

12 A -- been put on any kind of a plan.

13 Q Okay. In terms of documenting your files
14 and the work getting done, how is that measured?

15 A I don't know that there is a real
16 measurement to it. You know, my manager may send
17 me an e-mail and ask me a question and I would
18 respond back and say, oh, I've got that information
19 I just haven't put it in the file.

20 Q Okay. Is there any sort of time line
21 that's expected, you know, for you to follow?
22 Like, I will give you an example.

23 I know that some companies say every file
24 has to be, have a entry every so many days. And
25 there's a tickler to that affect. You, even if

1 **it's just, no update so that we know you touched**
2 **the file.**

3 A That is addressed in our huddles every
4 morning. We have a ninety-day. We look to see and
5 make sure that all files have been documented
6 within the last ninety days.

7 **Q Okay. Do you huddle every morning?**

8 A We huddle Monday through Thursday.

9 **Q And do you take part in that?**

10 A If I'm available.

11 **Q Right. 'Cause you could be in a**
12 **mediation?**

13 A Because of mediations, I'm not always
14 available.

15 **Q Okay. Do you participate via video or**
16 **phone?**

17 A We have Skype phone that we all connect
18 to.

19 **Q Okay.**

20 A It's a Skype meeting.

21 **Q All right. Are you part of the instant**
22 **messaging system? Do you have access to that --**

23 A Yes.

24 **Q -- on your computer?**

25 A I have I.M.

1 **Q And do you use that?**

2 A I do.

3 **Q Okay. Ms. Howard told us about the K.D.**

4 A Yes.

5 **Q Does that also apply to your position, as**
6 **far as where you would go to look for information**
7 **if you needed it?**

8 A Yes.

9 **Q Okay. Is there anything else like that,**
10 **an information database that you would use?**

11 A Well, not generated. I mean, generated by
12 USAA. That is the database we would use, but
13 there, of course, are others, you know, Lex-Nex;
14 things like that, I.S.O.

15 **Q Anything else you want to tell me?**

16 MR. WHELAN: Object to form.

17 A No.

18 MR. WILLEY, IV: Okay. All right.
19 Well, I appreciate you being here and your
20 time. And Mr. Whelan may have a few
21 questions.

22 MR. WHELAN: I do.

23 You need a break?

24 THE WITNESS: No. I'm fine. I get
25 emotional. I'm sorry.

CROSS-EXAMINATION

BY MR. WHELAN:

Q I'm going to pull out the, from Exhibit 5 the new suit transmittal form that's Bates 131 through 141.

Mr. Willey showed you this document, and he told you, repeatedly, that Jack Daniel had estimated ten thousand dollars of medical bills based off that assessment.

Do you remember that?

A I remember one of Jack's letters saying ten thousand dollars; yes, sir.

Q Right. But when Mr. Willey was asking you questions this morning and he was saying that this evaluation that Jack gave you was based off, what Mr. Willey called Jack's estimate of ten thousand dollars in medical bills.

Do you recall that?

A Yes.

MR. WILLEY, IV: Object to the form.

Q Now I want you to look -- Is page 137 in that stack?

A It is.

Q Okay. If you look at the third sentence

1 of that top paragraph. Doesn't it say, doesn't
2 Mr. Daniel say that the damages exceed ten thousand
3 dollars?

4 A Exceed ten thousand; yes, sir.

5 Q All right. And then if you would turn to
6 the next page 138 under analysis of damages where
7 it says, the very first sentence, the complaint
8 states that the damages in this matter exceed ten
9 thousand dollars.

10 Is that what it says?

11 A Yes, sir.

12 Q And that's different than estimating the
13 medicals at ten thousand dollars, isn't it?

14 MR. WILLEY, IV: Object to the form.

15 A Yes. It is different.

16 Q Okay. And were you taking Mr. Willey at
17 his word when he was telling you that Mr. Daniel
18 estimated the medical bills at ten thousand
19 dollars?

20 MR. WILLEY, IV: Object to the form.

21 A Yes.

22 Q Now, Mr. Willey also told you that this
23 report is dated October 21, 2015 had, quote, the
24 same facts as the report that Mr. Daniel sent in
25 March of 2016.

1 **Do you know if that's true?**

2 **MR. WILLEY, IV: Object to the form.**

3 A I don't have the March, so I can't --

4 **Q But we can look at those letters and see**
5 **whether they're really the same.**

6 A Whether they're the same, right.

7 **Q Okay. And when you got this case analysis**
8 **and Mr. Daniel had said that the medical damages**
9 **exceeded ten thousand dollars, you knew what her**
10 **injuries were at that time, didn't you?**

11 **MR. WILLEY, IV: Object to the form.**

12 A I believe that I knew that she had the
13 fractured ankle and the fractured ribs. I don't
14 know that I knew that she had surgery.

15 **Q Okay. In fact if we look at 132 -- I**
16 **think that's in your stack.**

17 A Yeah, it is.

18 **Q 132 is your transmittal to Jack from June**
19 **of that year. And if you look on that page, you**
20 **knew that she had a broken ankle and broken ribs,**
21 **right?**

22 A Correct.

23 **MR. WILLEY, IV: Object to the form.**

24 **Q Now, Mr. Willey said many, many times that**
25 **USAA hired Mr. Poplin.**

1 **Do you remember that?**

2 A Yes --

3 MR. WILLEY, IV: Object to the form.

4 A -- I do.

5 **Q Okay. Now, who was it that hired**
6 **Mr. Poplin?**

7 MR. WILLEY, IV: Object to the form.

8 A Chris Nickels, to my knowledge. But it
9 was Chris Nickels.

10 **Q Who did Chris Nickels represent?**

11 A Ms. Hood in the bodily injury claim
12 against -- the Kuck's claim against Ms. Hood and
13 Mr. Johnson's claim.

14 **Q Against Ms. Hood?**

15 A Against Ms. Hood.

16 **Q Who was Mr. Nickels' client?**

17 A Ms. Hood.

18 **Q That report -- Did Mr. Nickels get that**
19 **report for USAA, or did he get it for Ms. Hood?**

20 MR. WILLEY, IV: Object to the form.

21 A He got for his client.

22 **Q Okay. Since he objected.**

23 **Who did Mr. Nickels get that report for?**

24 MR. WILLEY, IV: Object to the form.

25 A Ms. Hood.

1 Q And Ms. Hood's lawyers were, in addition
2 to Mr. Nickels, who else were they?

3 A The plaintiff counsel --

4 Q Right.

5 A -- the two of them.

6 Q Mr. Smith?

7 A Mr. Smith and Mr. Willey.

8 Q All right. Now, the --

9 Okay. Let's look at 257. This is the
10 document Mr. Willey showed you where Jack Daniel
11 wrote about the consulting engineer.

12 And Mr. Willey said when he was asking you
13 questions that Jack Daniel told you that Mr. Black
14 would have to give some concessions, as a result
15 that's why Mr. Daniel didn't enlist Mr. Black as a
16 witness.

17 Do you recall that?

18 MR. WILLEY, IV: Object to form.

19 A I recall him saying it, yes.

20 Q All right. Mr. Willey saying that?

21 A Yes.

22 MR. WILLEY, IV: Object to the form.

23 Q All right. Now, looking at this document,
24 do you see in the middle of the page, I guess the
25 third paragraph of this consulting engineer

1 section --

2 A Yes.

3 Q -- it says that Mr. Black suggested he may
4 ultimately be forced to give certain concessions to
5 plaintiff's counsel.

6 Do you see that?

7 A I see that.

8 Q All right. But then, the next sentence
9 says, at this point, we; and we is Jack, right --

10 MR. WILLEY, IV: Object to form.

11 Q -- Carlock, Copeland?

12 A Correct.

13 Q And he says, do not foresee any critical
14 concessions.

15 Do you see that?

16 A I do see that.

17 Q Okay. So was it Jack Daniel who said that
18 he thought that Mr. Black would have to give up
19 concessions?

20 MR. WILLEY, IV: Object to the form.

21 A Would you repeat the question.

22 Q Yes, ma'am. So you see that -- There's
23 these two sentences.

24 A Right. I --

25 Q In the first one Mr. Black suggests he may

1 have to give certain concessions. In the second
2 one, Jack Daniel says he doesn't see any critical
3 concessions?

4 A Right.

5 Q But he thinks that calling another expert
6 could overcomplicate the case.

7 Do you see that?

8 A I see that.

9 Q All right. Now, who was it, Mr. Black or
10 Mr. Daniel, who thought that there may be
11 concessions that would have to be given?

12 A Mr. Black said that.

13 Q Okay. In this letter, did Mr. Daniel
14 suggest that there was any concession that he was
15 worried that Mr. Black would have to give?

16 A No.

17 Q And then, in fact, if you look at the very
18 last sentence of this, Mr. Daniel says that, is not
19 excluding the possibility of using Black at trial,
20 isn't it?

21 MR. WILLEY, IV: Object to the form.

22 A That is correct.

23 Q Just read that last sentence.

24 A It says, we still have time to name
25 Mr. Black as an expert should it become necessary.

1 Q Okay. Now, Mr. Black never gave any
2 opinion, as far as whether Ms. Hood's high beams
3 were on or off, did he?

4 MR. WILLEY, IV: Object to the form.

5 A He did not.

6 Q Okay. His opinion was that he looked at
7 Mr. Poplin's report and he said, it appears to have
8 been properly conducted, right?

9 MR. WILLEY, IV: Object to the form.

10 A That is correct.

11 Q Okay. Well, since he objected.
12 Tell me what Mr. Black's opinion was
13 that's stated in this letter.

14 MR. WILLEY, IV: I'm going to object
15 to the form.

16 Q Go ahead.

17 A It says the bulb inspection that was
18 performed by the opposing expert appears to have
19 been properly conducted.

20 Q Okay. And Mr. Willey also told you, he
21 said, you're not defending anyone in this case,
22 you're defending USAA's money. I can't remember
23 exactly how he said it.

24 MR. WILLEY, IV: That's about right.

25 MR. WHELAN: Okay.

1 **Q Aren't you defending the policyholders of**
2 **USAA?**

3 **MR. WILLEY, IV: Object to the form.**

4 A He's not saying anything -- You're not
5 saying anything that I haven't already said to you.

6 My job is to properly evaluate a claim and
7 pay what we owe. We're not in the business to pay
8 what we -- more than we owe. And our job is to
9 protect the membership as a whole, USAA members as
10 a whole.

11 MR. WHELAN: Okay. Thank you, ma'am.

12 That's all I have.

13 MR. WILLEY, IV: One -- two,
14 actually.

15 REDIRECT EXAMINATION

16 BY MR. WILLEY, IV:

17 **Q Did you know that USAA wrote the check to**
18 **Mr. Poplin paying him for his report?**

19 A I don't know that. I don't know that I've
20 ever seen a check.

21 **Q Would it surprise you if that occurred?**

22 A No. But it also could have been paid by
23 Mr. Nickels.

24 **Q Typically doesn't defense counsel have to**
25 **get permission from USAA in order to hire an**

1 expert?

2 A Yes, they do.

3 Q And typically doesn't USAA write the check
4 to retain that expert?

5 A Not always.

6 Q And I didn't ask you about always.
7 Typically, doesn't USAA write the check to retain
8 the expert?

9 A It can happen.

10 Q Okay. One more.

11 I'm going to ask you about the letter
12 that -- 257, 258, 259.

13 Who signed the letter?

14 A Jack Daniel.

15 Q He wrote the letter, as far as you know?

16 A To my knowledge.

17 MR. WILLEY, IV: Okay. Thank you.

18 MR. WHELAN: All right. Off the
19 record.

20 THE COURT REPORTER: You all need
21 this one transcribed?

22 MR. WILLEY, IV: Yes.

23 MR. WHELAN: Yes, please.

24 MR. WILLEY, IV: Please.

25 (Whereupon, the deposition was concluded

at 12:58 p.m.)

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ERRATA SHEET
DO NOT WRITE ON TRANSCRIPT - ENTER CHANGES HERE

IN RE: Therese Hood v. USAA

CASE NO. 2018-CP-10-0666

PAGE NO.	LINE NO.	CHANGE	REASON

Under penalties of perjury, I declare that I have
read my deposition and that the facts stated in it
are true and correct subject to any changes in form
or substance entered here.

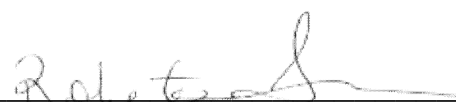
1 CERTIFICATE OF OATH

2
3 STATE OF FLORIDA

4 COUNTY OF HILLSBOROUGH

5
6 I, ROBERTA TURNER, Registered Professional
7 Reporter and Notary Public, State of Florida, duly
8 commissioned, qualified and authorized to
9 administer oaths and to take and certify
10 depositions, do hereby certify that the above-named
11 KATHY MOATS was by me, before the giving of
12 her deposition, first duly sworn to testify as to
13 the truth, the whole truth and nothing but the
14 truth.

15 WITNESS my hand and official seal this
16 3rd day of April, 2019.

17
18
19 
20 ROBERTA TURNER, RPR, FPR, CLR, CCR (GA)
21 Registered Professional Reporter
22 NOTARY PUBLIC - STATE OF FLORIDA
23 My Commission No. FF 235676
24 Expires: 09-28-19
25



1 REPORTER'S DEPOSITION CERTIFICATE

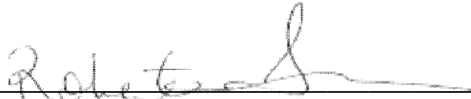
2 STATE OF FLORIDA

3 COUNTY OF ORANGE

4
5 I, ROBERTA TURNER, Registered Professional
6 Reporter, hereby certify that I was authorized to
7 and did stenographically report the deposition of
8 KATHY MOATS; that a review of the transcript
9 was requested; and that said deposition was later
10 reduced to computer transcription under my personal
11 supervision, and pages 4 through 163 is a true and
12 complete record of my stenographic notes.

13
14 I further certify that the deposition was
15 taken at the time and place specified herein above
16 and that I am not a relative or employee or
17 attorney or counsel of any of the parties, nor am I
18 a relative or employee of any of the attorneys,
19 counsel connected with the action, nor am I
20 financially interested in the action.

21 Dated this 3rd day of April, 2019.

22
23 
24 ROBERTA TURNER, RPR, FPR, CLR, CCR (GA)
25 Registered Professional Reporter
NOTARY PUBLIC - STATE OF FLORIDA

1 TURNER REPORTING, INC.
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3 APOPKA, FLORIDA 32704
4 (407) 497-6070

5 APRIL 3, 2019

6 KATHY MOATS
7 C/O ROBERT W. WHELAN, ESQ.
8 Nelson, Mullins, Riley & Scarborough, LLP
9 Liberty Center, 6th Floor
10 151 Meeting Street, Suite 3500
11 Charleston, South Carolina 29401

12 RE: Therese Hood v. USAA
13 CASE NO. 2018-CP-10-0666

14 The transcript of the above-referenced proceeding
15 has been prepared and a copy is enclosed here for
16 your review.

17 Any corrections you wish to make to the transcript
18 should be made on the errata sheet. Please do not
19 write on the transcript itself.

20 Please complete review of your transcript by May 3,
21 2019 and return the errata sheet to our office.
22 You need not return the entire transcript.

23 Sincerely,

24 
25 _____
26 Roberta Turner, RPR, FPR, CLR, CCR, (GA),

27 CC: Roy T. Willey, IV, Esq.
28 Robert W. Whelan, Esq.

29 TURNER REPORTING, INC.
30 407-497-6070

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STATE OF SOUTH CAROLINA.	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Therese Hood,	)	CASE NO. 2018-CP-10-00666
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	
	)	ORIGINAL
United Services Automobile	)	
Association,	)	
	)	
DEFENDANT.	)	
	)	

June 25 to June 28, 2019

Charleston, South Carolina

B E F O R E:

The Honorable Kristi Curtis

A P P E A R A N C E S:

Roy T. Willey, IV, Esquire
For the Plaintiff

Eric Marc Poulin, Esquire
For the Plaintiff

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For the Defense

Certified Transcript Provided For: Anastopoulo Law Firm

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I N D E X

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(DW) - DENOTES DEFENSE WITNESS

(IC) - DENOTES IN CAMERA

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Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

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TRIAL PROCEEDINGS

(Trial begins 6/25/19, 9:38 a.m., with motions as follows:)

THE COURT: All right. I have attempted to read as much as I could overnight regarding various motions in limine. I did look through the transcript of the previous trial. Tried to get familiar with what we are doing today. So let me first ask Mr. Willey -- is it Mr. Whelan?

MR. WHELAN: Yes, ma'am. Thank you, Your Honor.

THE COURT: Am I pronouncing your name correctly?

MR. WHELAN: That is correct.

THE COURT: First I know that you had indicated you wanted me to hear the motion for summary judgment. So y'all correct me if I am wrong just with the posture of this.

You previously file a motion for summary judgment. It was heard my Judge McCoy. She denied the motion but gave you leave to refile it.

And my understanding was that that was premised at least in part on the fact that discovery was ongoing and had not been completed. So has additional discovery taken place since the time that she ruled?

MR. WHELAN: Yes, Your Honor. So we filed that basically before any discovery had been done. And Mr. Willey opposed it saying I need to do discovery.

And so that is exactly what she did. She said, I am

1 going to dismiss it with prejudice, you can renew it after
2 some discovery is done. So if he has taken some
3 depositions -- we have traded some documents. And I tried
4 to say this in the pretrial brief, but I am frankly
5 surprised to be trying this case this week because we -- I
6 expected him to do additional discovery.

7 We had asked him for additional documents. He had
8 asked us for additional documents. We are sort of working
9 that out. We had a motion -- we filed a motion to amend
10 the answer in February of this year. It was not set for a
11 hearing until last Wednesday. And then just luck this case
12 went from 180 on the master roster to 23 on the short list
13 the Tuesday before the hearing.

14 So we show up to argue the motion to amend the answer.
15 And I say to Judge Culbertson I expect Mr. Willey is going
16 to say this thing is on the short list, I tell you, Judge,
17 I don't think it is going to trial because he wants more
18 discovery from me, I want more discovery from him.

19 And Mr. Willey stands up and says, Judge, we have
20 got -- we have completed discovery, we are ready for trial,
21 we expect to start on Monday.

22 And Judge Culbertson said, okay, well, I am going to
23 deny the motion. If your trial is continued past this week
24 then you can amend the answer. So plaintiff says ---
25 (WHEREUPON, Mr. Willey stands.)

1 MR. WHELAN: Is that not right?

2 MR. WILLEY: That is not right.

3 MR. WHELAN: I believe it is. Judge Culbertson said
4 your motion to amend is denied however -- oh, okay, that is
5 right, he said, however, if you get past this week you can
6 refile your motion to amend. That is what is said.

7 And so, anyway, Mr. Willey says I am ready for trial.
8 And I talked to my client. They say, well, let's get it
9 over with; you know, let's go -- let's bring this case to a
10 head.

11 So that is why we are here. And as soon as Mr. Willey
12 said we are ready for trial we filed a renewal of our
13 motion for summary judgment.

14 And so that is why I think it is ripe to be heard
15 right now. And I would ask that it be heard. Because this
16 is such an unusual case and I just don't see how a jury is
17 going to be able to process all of these issues concerning
18 underinsured motorist coverage.

19 And really what they are doing is attacking how the
20 legislature has set up UIM coverage. I mean the
21 legislature has said when you defend a UIM case you, the
22 insurer, are standing in the shoes of the defendant.

23 THE COURT: Well, I mean what I understood his
24 argument to be is that you can't take directly
25 contradictory positions in both your defense of your client

1 and in defense of the other driver in the UIM coverage.

2 MR. WHELAN: Well ---

3 THE COURT: It is a little different than just saying
4 you can't aggressively defend the action.

5 MR. WHELAN: I don't -- I don't think that -- well,
6 first of all, I am not sure exactly what their arguments
7 are. They seem to have a few.

8 THE COURT: Well, let me do this first. Let me before
9 we get into the merits of it ---

10 MR. WHELAN: Okay.

11 THE COURT: --- Mr. Willey, let me just hear from you
12 as to whether or not I need to hear this motion for summary
13 judgment this morning.

14 MR. WILLEY: Your Honor, it is my position that this
15 motion cannot be heard. As Your Honor noted, it was filed
16 Friday of last week. Rule 56(C) is quite clear in when a
17 motion for summary judgment must be served. And it says
18 the motion shall be. Not may be. Shall be served at least
19 ten days before the time fixed for the hearing.

20 In this case there is no dispute that that did not
21 occur. That that occurred in this case. It did not occur
22 in this case. It was filed Friday.

23 And the reason for that is very simple. The reason is
24 I did not stand up on -- at the hearing last week and say
25 there is no more discovery to be done. There could be more

1 discovery to be done, frankly.

2 But the case was on the short list. No motion for a
3 continuance had been filed. No motion for scheduling order
4 had been filed.

5 And what I told Judge Culbertson in that case were two
6 different things. One, due to the timing issue that it
7 looked very likely based on my experience with Charleston
8 rosters that if we were Number 23, given the short number
9 of cases before us and the amount of days that were
10 expected to take, that I expected us to be up for trial
11 next week and be called for trial next week. That's what I
12 told Judge Culbertson. And here we are. Obviously that
13 played out.

14 Corollary to that we actually did argue the merits of
15 the motion to amend. Just so the court is clear, that
16 wasn't my sole position. My sole -- my other position on
17 the merits were that if Mr. Daniel represents USAA -- which
18 he does. He filed an answer not on behalf of Mr. Johnson.
19 Mr. Johnson was represented by Geico Indemnity Company.
20 Mr. Daniel signed his answer, which I have, the notice of
21 appearance and conditional answer of UIM carrier to
22 plaintiff's complaint, as the attorney for USAA GIC. Not
23 as the attorney for Mr. Johnson.

24 And so in that situation Mr. Daniel does not have the
25 Tri-car type relationship that we have in a case like

1 Maybank where a lawyer is hired by a liability carrier to
2 defend an individual. In that case Mr. Daniel is a direct
3 agent of the insurance company whose sole purpose is to
4 look out for the insurance company.

5 Mr. Johnson was already protected in this case. He
6 had the benefit of a covenant not to execute signed by my
7 client and underlying counsel. The judgment meant nothing
8 to him.

9 Mr. Daniel was sole representing USAA in a direct
10 agency. And so in that case there can't be an advise of
11 counsel defense anyway.

12 Now that doesn't really matter because he denied the
13 motion. And we will talk about when we go through our
14 motions in limine why some of that is true.

15 But as to the motion for summary judgment the rule is
16 quite clear. And what it says is it shall be served at
17 least ten days before the time for -- fixed for a hearing.
18 It doesn't give the Court any discretion to shorten that
19 time.

20 And the reason for that is this: As the Court knows,
21 handling litigation often times when you are going through
22 discovery you don't get affidavits. You may take some
23 depositions. You may not take other depositions.

24 When you are faced with a motion for summary judgment
25 often times you have to go out and get affidavits either

1 from people that you have not deposed or that you never
2 thought you would need to depose because the issues hadn't
3 been raised.

4 And so the rule provides that the adverse party may
5 serve opposing affidavits not later than two days before
6 the hearing. Well, that would have given me working all
7 weekend until Sunday to try to get affidavits together in
8 order to serve them on Monday which was yesterday when we
9 were picking a jury.

10 And so obviously the purpose of the rule is so that a
11 party can protect itself against this kind of motion.

12 With the case being up for trial I never took Mr.
13 Daniel's deposition. Because what Mr. Daniel has to say in
14 this matter is totally irrelevant. He was USAA's agent.
15 So anything he did, he did for the benefit of USAA and his
16 actions are imputed to them. So to the extent that is
17 raised it is irrelevant.

18 But with respect to the motion for summary judgment it
19 is our position that it can't be heard on the basis of Rule
20 56. It is quite clear.

21 And I think the policy prescription for the rule is
22 obvious. Because if we were to go forward with a motion
23 for summary judgment and Your Honor were to grant that
24 motion I would have been prejudiced by not having the
25 opportunity to go out and gather affidavits or to take

1 deposition testimony or call witnesses live for a motion
2 hearing if required in order to defeat that motion due to
3 the shortness of time.

4 THE COURT: But this has already been argued once and
5 defended once before Judge McCoy, right? So I mean this is
6 not -- you can't really say this is catching you off guard
7 when you have already argued this one time before a circuit
8 court judge.

9 MR. WILLEY: Well -- well, it is, Your Honor. When we
10 argued it before we were very early in the process and
11 their basic argument was that there was no duty, based on
12 the argument that you just heard from Mr. Whelan, that the
13 UIM statute gives them carte blanche to say anything that
14 they need to do to defend their money in court.

15 That is not -- our position was that is not what the
16 UIM statute allows them to do. They cannot take disparate
17 positions in two separate litigations solely for that
18 purpose. So that was the basis.

19 Now -- and there's other bases in there. But at that
20 time discovery was so new that is what we talked about.
21 And the judge denied that motion. That is important. It
22 wasn't I am holding it in abeyance and you can come back
23 later. It is denied.

24 This renewed motion for summary judgment is a new
25 motion. Yes, based on reading the very short motion it

1 appears to be on the same grounds since they didn't file
2 any other supplemental memoranda or a new motion and called
3 it a renewed motion.

4 Frankly, it should probably be stricken based on the
5 fact that it doesn't outline what the basis for the
6 motions -- motion is. But it does refer to the previous
7 motions. So assuming that it is on all of the bases
8 included in there -- we didn't argue all of those at that
9 time because discovery had not got to that point.

10 I made a strategic decision in this case based on my
11 reading of the advice of counsel defense not to move
12 forward with Mr. Daniel's deposition, not to do discovery
13 on that issue. And I won that motion. Their motion to
14 amend was denied as to that defense. And so they can't
15 raise that defense in this case.

16 And now essentially they are trying to move for
17 summary judgment on the same grounds. I mean the grounds
18 of the summary judgment motion aside from the duty issue
19 are very similar. He told us to do all of this so we did
20 it.

21 In any event, he would be their agent.

22 But my point is I haven't been given the opportunity
23 because this motion -- in fact, I don't even know if it was
24 filed yet. It was sent to me last week. Was not done
25 within the prescribed window.

1 What would happen very differently is if this case
2 were not on a trial roster, we were not prepared to try it.
3 I got that motion for summary judgment renewed. Which by
4 the way, he did not have to renew. I had no idea if he was
5 going to renew it at any point.

6 I could then notice the deposition of Jack Daniel,
7 come before the court again and say I need to take Mr.
8 Daniel's deposition and we will be prepared to hear the
9 motion after that.

10 That didn't happen in this case. And we are now here
11 for a trial. and so I think it would be improper at least
12 according to the rules to hear the motion.

13 THE COURT: Okay.

14 MR. WHELAN: Thank you, Your Honor. We stated the
15 rule. You have Rule 56 and you also have Rule 6. And Rule
16 6 -- Rule 56 talks about ten days. Of course this motion
17 was filed over a year ago and it is now only being renewed.
18 But, regardless, Rule 6 talks about ten days as well,
19 unless otherwise ordered by the court. So Your Honor does
20 have discretion to hear this motion.

21 And the other thing is there is a case, Brown versus
22 Pearson, a decision whether to reconsider a motion for
23 summary judgment that was previously denied without
24 prejudice is within the trial judge's discretion. So I do
25 think it is within Your Honor's discretion to hear this

1 motion.

2 Now with respect to affidavits you are right, he
3 already had a chance to put in affidavits. But regardless,
4 we are here on the morning of trial. So his evidence
5 should be marshaled. He should have his evidence. And if
6 there is some affidavit he wasn't able to get, he should
7 tell us about it.

8 But regardless, as far as why you should exercise your
9 discretion, Your Honor, Mr. Willey stood up in court before
10 Judge McCoy and says -- and said don't grant this motion
11 because I still need to do discovery.

12 Judge McCoy says, Mr. Whelan, you can refile your
13 motion after he does his discovery. He just told you he
14 made a strategic decision last week to not pursue anymore
15 discovery. I find out about that on Wednesday.

16 He obviously knows this is a case that there's a lot
17 of issues at law. So I immediately renew my motion, not
18 file a new one. And here we are.

19 And I don't want to get into the merits prematurely,
20 but he is right that a big component of our argument
21 concerns duty, which is a matter of law for the court, not
22 for the jury.

23 THE COURT: And I mean everything that you would raise
24 on summary judgment you can certainly raise at the directed
25 verdict stage. I am guessing that there is nothing that

1 can't be raised at the directed verdict stage.

2 MR. WHELAN: Well, Your Honor, I agree with that. But
3 I don't know what case I am trying. I don't know what duty
4 he says have been reached.

5 If he says -- if his argument is that it is a duty not
6 to take a inconsistent possession and that USAA cannot --
7 had to admit that the lights were on, even though there was
8 evidence saying that they were off, that there is no issue
9 for the jury to decide. I mean that is -- that is a fact.

10 So that -- so the question is duty. And there is no
11 case that says there is such a duty. The cases are the
12 opposite. If you look at the -- what conduct is he
13 complaining of? He is complaining of USAA's conduct in the
14 UIM suit.

15 When Jack Daniel -- I believe this is his theory. And
16 I would like to -- I would like to figure out right now
17 what case we are going to try and what the issues are. But
18 if the only issue is was it in bad faith for Jack Daniel to
19 sign that request to admit, I think you can rule on that as
20 a matter of law.

21 Beyond that we get to the issues of reasonableness,
22 which I won't address just yet. But I think under -- well,
23 I said I won't address it, so I will put that aside. And
24 damages, how was she damaged?

25 THE COURT: Okay. Well, why don't we do this; let me

1 go ahead and start hearing the motions in limine. We have
2 got a jury coming at 10:30. We are going to pick a jury.
3 And then I will hear your motion for summary judgment.

4 After we have picked the jury we will send them to
5 lunch. Maybe an extended lunch so that I can hear the
6 motion. And we will go from there.

7 I have been over the motions in limine. If we could
8 maybe start with you, Mr. Willey. We will see ---

9 MR. WILLEY: May I use the podium?

10 THE COURT: -- how far we can get before the -- sure.

11 MR. WILLEY: It is a little easier to spread out.

12 THE COURT: We will see how far we can get before the
13 jury panel is coming in.

14 MR. WILLEY: Your Honor, what I'd like to do first is
15 just give you a very brief background of some of the facts
16 as we see it. It has been the position in this case, which
17 is the subject of some of our motions in limine by counsel
18 for USAA and by USAA therefore, that the filing of the bad
19 faith suit ends any claims for negligence or bad faith. In
20 other words, any acts committed after the filing of the bad
21 faith suit. Which was filed prior to the trial in the
22 underlying suit.

23 THE COURT: If you will go over the timing with me.
24 We had the Johnson case where Ms. Hood sued Mr. Johnson.

25 MR. WILLEY: Right.

1 THE COURT: And then we have -- can you tell me if
2 that one was filed first, or did the Kuck's they sued Ms.
3 Hood and Mr. Johnson and that case has not been heard is my
4 understanding.

5 MR. WILLEY: That's right. The Kuck's case against
6 Ms. Hood and Mr. Johnson is still pending. Ms. Hood filed
7 her case against Mr. Johnson for the purposes of basically
8 obtaining the UIM money.

9 That case I was not involved with it until the very
10 end. It went through the discovery process. It went
11 through mediation. And then after mediation the bad faith
12 suit was filed.

13 And so prior to the trial of the underline case
14 involving Ms. Hood and USAA this case was filed. And that
15 is important because this is a case based on
16 reasonableness. And so reasonableness is not gauged by
17 what happens in the end. Reasonableness is gauged by what
18 the parties knew at the time they took the act or did not
19 take the act.

20 And so in this instance - and I think Mr. Whelan
21 agrees with this - anything that occurred after this suit
22 was filed is not relevant to this case because this is a
23 case about reasonableness.

24 Now the exception to that is one-fold. And that is in
25 the damages context. Because the law in South Carolina is

1 that a party can recover all damages that proximately flow
2 from the negligence.

3 And so we see this all the time in a car wreck case
4 where a wreck case is filed and after the wreck case the
5 party continues to get treatment, get surgeries, incurs
6 damages. And so those damages are admissible.

7 But what the defendant does after that date, unless it
8 goes to punitive damages, is not admissible. So if the
9 defendant after that date runs that three -- same stop sign
10 three times, that has no bearing on what the defendant did
11 in the incident that is the subject of the lawsuit.

12 And so that is important here because there's a lot of
13 talk about what happened at the other trial and what Mr.
14 Daniel may have done at the other trial and what Ms. Hood
15 may have said at the other trial. None of that is relevant
16 in this case or admissible because it doesn't go to what
17 the parties knew, what USAA knew, prior to the filing of
18 this case.

19 Which is the sole question for reasonableness is what
20 they knew or should have known at the time they took the
21 acts that are complained of in this case. And of course we
22 didn't complain of any acts that occurred after the filing
23 of this case.

24 And that has been Mr. Whelan's position for the
25 duration of this case. That is why we did not get

1 discovery, we did not get any of Mr. Daniel's trial reports
2 from the trial. We did not get a lot of the discovery that
3 happened after the initiation of this suit.

4 So that is going to be the basis of some of these
5 motions in limine. And I just want the Court to understand
6 our position on that. Because I think that is important
7 and central to, "A", limiting the scope of this case, so
8 what is actually before the jury and not confusing it too
9 much; and, "B", reducing the amount of time that it will
10 take to try.

11 So our first -- with that our first motion in limine
12 is to exclude the plaintiff's trial testimony or any
13 mention of the plaintiff's trial testimony.

14 Her testimony was on September 4th, 2017. This
15 lawsuit was filed March 23rd, 2017. Therefore, her
16 testimony at trial or what she said has no bearing, no
17 weight at all, on what USAA knew or did not know at the
18 time they took the positions that they took with respect to
19 the headlights being on or off, when they took the
20 positions that they took in terms of evaluating the claim
21 prior to the bad faith suit being filed, and what they did
22 as a result of that in terms of the actual offers that were
23 made in the underlining case.

24 And so that is our first motion in limine. It is
25 pretty simple, after a suit is filed what happens after

1 that doesn't go to reasonableness of the acts that occurred
2 before it. You don't get to ---

3 THE COURT: Mr. Willey, I mean your client -- Ms. Hood
4 knew the circumstances of the accident. I am assuming that
5 what she knew, what she testified to about the accident,
6 would have been the same in March of 2017. It would have
7 been the same in September of 2017.

8 MR. WILLEY: The distinction ---

9 THE COURT: So how is that not relevant?

10 MR. WILLEY: Well -- well, the distinction is this.
11 It is not what she knew. It is what USAA knew at the time
12 they made their decisions. Ms. Hood is not on trial. They
13 are.

14 THE COURT: I understand that.

15 MR. WILLEY: And so ---

16 THE COURT: I mean presumably she would not have not
17 disclosed the facts of the action to USAA during the
18 mediation. I mean I can't imagine that she would have
19 taken a different position or, you know, held back some
20 facts that she wouldn't have disclosed to them previously.
21 I mean what could possibly be the difference?

22 MR. WILLEY: Let me color that in for you a little
23 bit. So during her deposition there was a lot of
24 conversation. Ms. Hood's position for the entire case has
25 been that her lights were automatic and they were on.

1 Okay.

2 USAA's expert said the lights were on. The Kuck's who
3 ended up suing her in their first recorded statement said
4 all I saw when she was coming at us were headlights. That
5 was the position all along.

6 At trial we made a strategic decision, because we were
7 in Jasper County and because the defendant was from Jasper
8 County, not to contest every issue. Ms. Hood did not ---

9 THE COURT: I understand. But there was also some
10 testimony you had -- was it Mr. Lee who said she went
11 around me and she had her running lights on but she didn't
12 have her headlights on. And you had some other people who
13 said she did not have her headlights on. And even the
14 Kuck's didn't they change their position about whether she
15 had her headlights on or did not have her headlights on?

16 MR. WILLEY: Well, no, not at the time that USAA took
17 the acts that are complained of. Those -- that was trial
18 testimony. What Mr. Lee actually said when pressed was did
19 you see her lights at the time. And the answer was no.

20 And so although that did end up coming in, it was, you
21 know, originally excluded because it is what happened at
22 the time of the accident.

23 The Kuck's said all I saw were lights coming at me.
24 Mr. Johnson didn't say whether her lights were -- he said,
25 I didn't see her, I assume if her lights were on I would

1 have seen her.

2 So no one definitively testified that at the time of
3 the wreck her lights were off in the underlying trial. The
4 Kuck's did not testify in the underlying trial.

5 But in any event, what happened in the underlying
6 trial is not relevant. Because what USAA had initially
7 were a couple of things. They had recorded statements from
8 the Kuck's. And then they hired an expert who did a lamp
9 filament analysis test. He ---

10 THE COURT: And was the Kuck's recorded statement that
11 the lights were on or that the lights were not on?

12 MR. WILLEY: Mr. Kuck said all I saw were lights
13 coming at me prior to -- prior to impact. And the facts of
14 this collision were Ms. Hood is traveling down the highway,
15 she is T-boned, and then shot over into oncoming traffic,
16 which are the Kuck's. And that is Mr. Kuck's recorded
17 statement.

18 And so in any event, even if he testified differently
19 at trial that is not relevant. What is relevant is what
20 USAA knew or should have known at the time they evaluated
21 the case, at the time they made the offers.

22 And they can get into all of that. If they have
23 something where Mr. Kuck told them something different
24 after that recorded statement which is prior to the acts
25 complained of that they took into account, they are

1 entitled to get into that.

2 But what they can't do is say, well what happened at
3 trial is XY and Z, we rolled the dice, we got it right and
4 so we should be rewarded by that simply because Ms. Hood's
5 attorneys, Mr. Smith at that case, made a strategic
6 decision not to hotly contest that. Partially because it
7 upset her so much. Every time we talked about USAA calling
8 her a liar, essentially, which is what they were doing, it
9 was very hurtful to her. And so ---

10 THE COURT: And so you are saying everything basically
11 after mediation is off-limits in this trial?

12 MR. WILLEY: After the filing of this case which was
13 in March of 2017. So there was ---

14 THE COURT: Let me hear from Mr. Whelan about the
15 first issue excluding the plaintiff's testimony from the
16 prior trial.

17 MR. WHELAN: Yes ---

18 THE COURT: And that leads to some similar issues.
19 Yes, sir.

20 MR. WHELAN: Thank you, Your Honor. Let me just
21 provide a little additional color concerning the light
22 issue. Because you asked about the Kuck's, and Mr. Willey
23 told you about Mr. Kuck.

24 And Mr. Kuck I believe the evidence was initially said
25 he didn't remember seeing lights. Then he said all I saw

1 was lights coming at me, at a time when he said he was
2 under a lot of pain medication. Then he said I didn't see
3 any lights. That is Mr. Kuck.

4 Mrs. Kuck told the police officer, the very night, I
5 did not see any headlights. That is still her testimony
6 today.

7 He told you about Lee who was a magistrate Judge who
8 said she came up tailgating behind me, passed me on the
9 left, did not -- she had her parking lights on.

10 Johnson couldn't see her. The judge didn't let that
11 part in. I didn't think Johnson could see her. Judge
12 Mullen didn't let that in. But that is what he said.
13 Johnson said: I looked and did not see her. If she had
14 lights I would have seen her.

15 There was another witness, Kerry Tanrath coming behind
16 the Kuck's. He said, well, my view was obstructed but I
17 could see the sign where her headlight was and there
18 wasn't -- I didn't see a light.

19 The police officer came up after the accident and said
20 her car was running but her parking lights weren't on, so I
21 didn't think her lights were on. The police officer found
22 her at fault. So you had all of the evidence. And then
23 you asked Mr. Willey a question, and I am not sure he
24 answered yes. What was the difference between her -- the
25 testimony she told USAA and the police and in her statement

1 and in her sworn deposition which was: I had my headlights
2 on, automatic low beam headlights.

3 Then this expert he keeps calling USAA's expert, which
4 was Ms. Hood's expert, Mr. Poplin, he found her high beams
5 were on. Okay. At dusk on this highway. It doesn't make
6 any sense.

7 She testified: Before my attorneys told me that Mr.
8 Poplin said my high beams were on, I had no idea and that
9 was a surprise to me.

10 But anyway at trial she said I don't contest my lights
11 were off. And Mr. Willey's co-counsel stipulated that her
12 lights were off.

13 And that is one of the many bizarre things about this
14 case is they are trying to hold USAA liable for not
15 admitting -- there is a request to admit. Admit her
16 headlights were off. Okay.

17 There is an expert hired by a different attorney
18 representing Mrs. Hood who says her high beams were on.
19 There is this conflicting testimony by Mrs. Hood. And then
20 there is all this stuff on the other side. And, yeah, Mr.
21 Kuck is kind of a wildcard.

22 But I think what they are trying to do is retry the
23 underlying case with, you know, partial evidence and then
24 throwing in this confusing subject of insurance and
25 underinsurance motorist coverage. I just cannot see how it

1 is going to work.

2 But with respect to this motion, Howard versus State
3 Farm does say that an insurer's -- an insurer's conduct is
4 judged at the time there is a denial or at the filing of a
5 bad faith suit. So I agree with that part.

6 But I don't agree that what happened later is not in
7 any way relevant. I mean for them to put on evidence and
8 suggest to the jury that her lights were on when her
9 counsel stipulated in a court of law just like this in
10 front of a jury just like that they were off is an abuse of
11 justice. I think this whole case is crazy, frankly.

12 And, you know, Mr. Willey says, well, it should come
13 in for damages. Okay, so he is going to tell them that
14 the -- you know, that this jury awarded two-and-a-half
15 million dollars but not -- you know, we can't talk about
16 the evidence that was excluded in that case that would have
17 been known to USAA but that the jury didn't hear about.

18 I mean, again, I will stop preaching about how crazy
19 this case is but just say that I think this motion should
20 be denied because I think it would be unfair. And ---

21 THE COURT: So you want to be able to go into her
22 trial testimony regarding the headlights?

23 MR. WHELAN: Absolutely.

24 THE COURT: But you recognize that the crux is what
25 y'all knew at the time that you basically denied the

1 claim -- was there ever an offer?

2 MR. WHELAN: Yes.

3 MR. WILLEY: Yes.

4 THE COURT: And what was the offer -- an offer was
5 made at mediation?

6 MR. WHELAN: Yeah, at mediation the -- USAA had
7 250,000 in authority. They got up to 200. The plaintiff's
8 last demand was 650 but they indicated they would take
9 between 300 and 400. And that -- and ---

10 THE COURT: And what were the limits?

11 MR. WHELAN: The limits were a million dollars. So
12 the plaintiff's own counsel is evaluating this thing well
13 within limits.

14 We have talked about all of the testimony that there
15 was to contest liability. I mean and the other thing is
16 the plaintiff won in this case. And if you can win and
17 then retry the whole case all over again I just don't see
18 where litigation ever stops.

19 MR. WILLEY: And, Your Honor, let me just to speak to
20 that. So that is exactly what this motion in limine seeks
21 to do, which is not retry the underlying case. That is not
22 what is on trial today.

23 What is on trial today is USAA's conduct prior to this
24 lawsuit being filed, which is well before the underlying
25 case was ever tried.

1 And counsel just conceded to you that under Howard vs.
2 State Farm anything that occurs in the insurer's conduct
3 after a lawsuit is filed isn't relevant to reasonableness.
4 Well, in the same vein, nothing that they did not know at
5 that time or that had not occurred at that time can go in
6 to show that they were more or less reasonable. Which is
7 the sole fact in front of the jury for this trial, did USAA
8 act reasonably or not.

9 And anything that is admissible has to go to make that
10 fact one way or the other more likely or not. And he just
11 conceded that under the Howard case the law in South
12 Carolina is that nothing that occurs afterwards can bear on
13 that question either way.

14 And, you know, so we are not trying to retry the
15 underlying case. That is exactly what we are trying to
16 avoid.

17 MR. WHELAN: Well, to be fair, I did not concede that
18 nothing that happened after that would be relevant. I
19 think that it could be relevant. But I do agree that the
20 reasonableness is judged at that point in time.

21 But, for example, Ms. Hood changing her testimony
22 down -- down the road I do think that is relevant.

23 You know, the fact that the plaintiffs didn't even
24 call this expert who they claim is the source of this whole
25 case, Mr. Poplin who they listed as a witness they didn't

1 call as an expert in that trial.

2 I just don't see -- I think it is -- I just don't see
3 how the jury should not be able to hear that if this case
4 continues.

5 MR. WILLEY: And, you know, briefly. We know in trial
6 there's a lot of decisions made for a lot of reasons. And
7 Mr. Smith will probably be here this week and tell us why
8 some of those decisions were made.

9 But my guess is that you would not want to call an
10 expert that was paid by the UIM carrier on the other side
11 even if his report agreed with you because it probably
12 would not be a very favorable witness. I don't know. We
13 will hear from Mr. Smith.

14 But the point is none of that is relevant. The only
15 thing this case is about is what USAA knew or should have
16 known prior to the filing of it. And they had no idea how
17 Ms. Hood was going to testify. And in fact, you know,
18 it -- under Howard v. State Farm I think the law is clear.

19 THE COURT: I just I have a fundamental problem with
20 not being able to show what her ultimate testimony was. I
21 mean it is sworn testimony. I understand there is trial
22 strategy for doing different things. But if there is trial
23 strategy that your client employed then there is certainly
24 trial strategy that USAA could employ when there is a
25 reasonable good faith basis in which to do it.

1 MR. WILLEY: But I can't bring any of that up. I
2 can't bring up -- I mean I will concede to the Court I
3 can't bring up anything they did at trial. That would be
4 an appealable issue that I would lose all day every day.

5 What they did at trial has no bearing on their
6 reasonableness at the time. The only thing from that trial
7 that is relevant goes to damages and what were her actual
8 damages in the case. That is it. It has already been
9 determined by a court.

10 All of the other issues are side issues that were not
11 known. Unless USAA has, you know, a crystal ball to know
12 exactly how a trial is going to go. Which I don't think
13 they would testify to under -- under the case law. And I
14 don't -- none of that can come in.

15 And I know it doesn't seem right. But the exact
16 purpose is to keep us from trying the underlying case all
17 over again.

18 MR. WHELAN: Your Honor, may I make another point
19 please on this?

20 So this is all about USAA contesting liability. And
21 the jury in this case found the plaintiff to be 49 percent
22 at fault. She was two percent away from nothing. And I
23 assume that they have -- you know, now that I think about
24 it, obviously Mr. Willey wants to keep her -- the fact that
25 they stipulated her lights were off out of the trial, but

1 he also wants to keep out the fact that they found her two
2 percent away from nothing.

3 You know, I -- like I said, I talked about
4 reasonableness earlier. I think that demonstrates
5 reasonableness. She was two percent away from nothing.
6 But I think we need to get that into evidence. I think
7 that shows the reasonableness.

8 He said USAA didn't have a crystal ball. Well, But
9 they were pretty close because they thought it would be
10 50 -- 50/50. It was 49 percent.

11 So I don't see how -- I think that the jury needs to
12 hear that. And I do think that is going to take us into
13 some additional issues as well. But I wanted to make that
14 point.

15 MR. WILLEY: Well, Your Honor, the -- USAA did know
16 that because their counsel stood up in opening and said
17 that we weren't going to do that. Okay. And then we did.
18 So ---

19 MR. WHELAN: Weren't going to do what?

20 MR. WILLEY: Weren't going to stip- -- weren't going
21 to agree that her headlights were off. So they -- you
22 know, that was their whole case even for opening.

23 So, you know, that issue is -- is aside. I mean that
24 is not relevant to what they knew or should have known at
25 the time. It only goes to damages. That is it. I mean

1 that is the law in South Carolina.

2 MR. WHELAN: So I think, Mr. Willey, if I am
3 understanding him right, said that he said in opening
4 statement to the jury that ---

5 MR. WILLEY: Not me.

6 MR. WHELAN: Or that Mr. ---

7 MR. WILLEY: Mr. Daniel.

8 MR. WHELAN: --- that his co-counsel ---

9 MR. WILLEY: No, I said Mr. Daniel did not know at
10 that time what position we were going to take as to the
11 lights.

12 MR. WHELAN: Well, that is right ---

13 MR. WILLEY: So ---

14 MR. WHELAN: --- because ---

15 MR. WILLEY: --- obviously USAA didn't take that into
16 account in their evaluation of the case. Which is what the
17 issue in this trial is.

18 MR. WHELAN: That is another interesting point.
19 Because Mr. Willey and his co-counsel the whole case
20 maintained that her lights were on, her lights were on, her
21 lights were on, and her lights were on. And then, as he
22 said, they got to trial and they made a strategic decision;
23 they pulled the rug out from under him. And unbeknownst to
24 Mr. Daniel were going to have Ms. Hood -- you know, the
25 whole case is about the lights and then Ms. Hoods is going

1 to say, ah, maybe they were off after all.

2 So and now ---

3 THE COURT: So, Mr. Willey ---

4 MR. WHELAN: --- what they want to do in this case is
5 go back in time ---

6 THE COURT: Let me just interrupt one moment. So I
7 mean by your theory the jury would not know the results of
8 the Johnson case, the verdict, certainly not the
9 comparative negligence issue; none of that would come in
10 front of the jury?

11 MR. WILLEY: They are entitled to know the verdict
12 because it goes to damages. Part of her damages in this
13 case are part of that uncollected verdict. And so that
14 goes to damages in this case. But that's it. They are no
15 allowed to know.

16 And my position is -- and I agree with their motion in
17 limine. They have a motion in limine, for example, to keep
18 out her injuries in the underlying case. I agree with
19 that. Because I am not concerned necessarily with how USAA
20 in terms of the dollar value evaluated the case, because
21 they never even offered what they evaluated the reasonable
22 value of the case at.

23 So I agree with that, that her injuries in the
24 underlying case are not relevant. Just like nothing else
25 that happened at the underlying trial is relevant except

1 for the damages figure because it goes to damages in this
2 case.

3 And the law in South Carolina unlike the law on breach
4 is even after a lawsuit is filed all damages that
5 proximately flow from the negligence complained of may be
6 recovered even if they come after the filing of the suit.
7 And that's what we have here.

8 THE COURT: Well, how about the 49 percent comparative
9 negligence is it your position that that comes in front of
10 the jury or that does not come in front of the jury?

11 MR. WILLEY: My position is that does not come in
12 front of the jury. The issue and damages of the case are
13 twofold. One, the amount of 2.5 million which were the
14 full damages that they determine she was entitled to. And
15 then the 1.275 which is what the verdict was reduced to
16 because there is an uncollected part of that verdict that
17 still is out there.

18 And so I think those two numbers come in front of the
19 jury on that basis. Here is what her damages were
20 ultimately determined to be. Here is what amount the jury
21 ultimately after reduction determined she was entitled to.
22 Here is what she actually has collected from USAA which is
23 still not that entire amount. Still five years after this
24 incident we are back in court trying to collect the verdict
25 we got in the first case.

1 THE COURT: You are talking about the difference
2 between the million and the million one hundred and
3 something thousand?

4 MR. WILLEY: Right, they get an additional 25,000 in
5 liability setoff. So it is -- I think in round numbers it
6 is 250,000.

7 MR. WHELAN: How in the world -- USAA did not cause
8 \$250,000 in damages to her. She had a -- those damages
9 were caused by Antoine Johnson. Antoine Johnson had the
10 wreck with her. She got a verdict against Antoine Johnson
11 for damages Antoine Johnson caused.

12 Those damages were two point five - you know, down to
13 one and a quarter or whatever - that Antoine Johnson
14 caused. It would have been the same whether there was
15 underinsured motorist or not. USAA did not cause those
16 damages. All USAA does is it steps in and it pays up to
17 the limits. Which here was a million dollars. Which it
18 did plus interest.

19 But that -- the 250 is not an element of damages in
20 this case.

21 THE COURT: Well, it appeared to me what your damages
22 were going to be were basically the cost of litigation.

23 MR. WILLEY: Well, now I think you are -- I think --
24 there's a few things. I think you are entitled to all
25 consequential damages.

1 And I think in this case we are entitled to damages --
2 you know, the Tyger River Doctrine, while it is a liability
3 carrier position -- it is actually a workers' comp case
4 which has been interpreted through its progeny. The
5 question is is an insurance company that has privity of
6 contract with an insured allowed to treat them worse than
7 an insurance company would be allowed to treat a claimant
8 who is making a claim against its insured.

9 And although there is no law in South Carolina on
10 this, there is law in other jurisdictions on it. And I
11 believe that the Supreme Court of this state would say no
12 an insurance company is not allowed to treat its insured
13 worse than it would be allowed to treat a claimant who is
14 making a claim against the insured under Tyger River and
15 its progeny.

16 And so if they chose to go into the courtroom and roll
17 the dice rather than offer the full amount of their own
18 evaluation and get it wrong, they are responsible for the
19 full amount. They don't get to just do what they should
20 have done in the first place which is pay the value of the
21 claim.

22 And, you know, under -- when you look at -- when you
23 look at what the essential argument -- in this case, as I
24 understand it from defense counsel is, well, we get to try
25 the whole underlying case to the extent that we want to try

1 it and it goes in our favor to prove true some of the
2 things we thought before irrespective of why that was
3 decided but none of that matters because we already paid
4 what we were supposed to pay in the first instance. And
5 that's not how it works.

6 All consequential damages can be recovered. So it is
7 cost of litigation. It is the emotional turmoil that she
8 has gone through in her life over the last five years.

9 I mean, you know, we will get into some of this in the
10 case. But this is a woman of faith who is then called a
11 liar. I mean a liar. That is what they called her, you
12 know, by the insurance company that she trusted and she
13 served this country in order to have the right to even buy
14 a policy under.

15 You know, there is an emotional aspect to this case as
16 well. And so I think -- and there is more elements of
17 damages than that. I am not going to preview my whole
18 case. I suspect that is why Mr. Whelan wants to hear the
19 summary judgment motion.

20 But those are just some of the things in this case
21 that Ms. Hood is entitled to recover here.

22 THE COURT: I am going to deny the motion in limine as
23 to her prior trial testimony. I do think that goes -- I
24 mean that is her sworn testimony. And I think it bears on
25 the reasonableness of USAA's actions.

1 Moving on to Number 2, a letter that she wrote to the
2 family prior to trial.

3 MR. WILLEY: So there is a letter that was written to
4 the Kuck's in August of 2015 which again USAA did not have.
5 It was written to the Kuck's. USAA was not copied on it.
6 They weren't included on it. Again, it doesn't go to what
7 USAA knew or should have known at that time.

8 And what Ms. Hood does in this letter is a lot of
9 different things. One, she asks how they are doing. And
10 so she recognizes they are an innocent party. Obviously
11 they were.

12 And then she tries to explain her understanding about
13 the various insurance policies work. Based on what, I
14 don't know. This was not sent with any authorization from
15 any attorney. And in fact, you know, any attorney would
16 have told her not to do it.

17 But it confuses the issues. It gets the insurance
18 wrong. And basically what she says is she lets them know
19 that she has a million dollar policy and she thinks it
20 would be in their interest to be an active participant to
21 try to get that so USAA will give you some money. And then
22 gets the insurance wrong as to Geico and the findings of
23 fault. And ends by saying the reason I am telling you all
24 of this is because you seem like a nice and honest couple
25 that just happened to be involved. I don't want you to

1 think I am asking you to say anything. The attorneys told
2 me I was too nice and talked too much, but my gut is
3 telling me I should inform you about this. And it goes on.

4 But the point is this: What she wrote to the Kuck's
5 has no bearing, once again, on what USAA knew or should
6 have known with respect to their adjustment of the
7 underlying claim.

8 THE COURT: This was not disclosed prior to the
9 mediation?

10 MR. WILLEY: Right.

11 MR. WHELAN: I am not -- we are going to have a
12 challenge in dividing exactly what evidence, you know,
13 existed when. But I am -- actually I know that that letter
14 was disclosed before mediation.

15 And this is her -- I mean it is witness tampering.
16 She wrote these witnesses and said please say that my
17 lights were on. And she says it will be profitable if you
18 do so.

19 THE COURT: I mean I -- you are asking me to rule on
20 the letter I haven't seen.

21 MR. WILLEY: Okay. I am happy to give you the letter.
22 I mean I would just point out that for all of the
23 discussion about not wanting to try the underlying case,
24 that's exactly what Mr. Whelan is encouraging us to do. I
25 mean if all of these issues were part of the underlying

1 case.

2 So, you know, if that is the case I can tell you this
3 is not a two- or three-day trial, this is a two-week trial.
4 And I am happy to stay through next week. But now that we
5 are getting into to trial testimony, for example, of what
6 was a - I don't recall exactly. But it was at least a
7 better part of a week. You know, there is a lot to unpack
8 in there.

9 And if that is admissible as to Ms. Hood, it is
10 admissible as to everyone. And I -- you know. It is a lot
11 to get through.

12 MR. WHELAN: But that was before the trial. I don't
13 know the date of that letter, but it was -- oh, here it is.
14 (WHEREUPON, pause for Court to review letter.)

15 THE COURT: I guess I thought that there was some
16 mention of headlights in here, but I am not seeing that.

17 Mr. Whelan, what is your position, sir?

18 MR. WHELAN: I am just pulling up that letter, Your
19 Honor. Excuse me.

20 Okay. So this is dated August 3rd which was a year-
21 and-a-half before the bad faith suit was filed. And you
22 can see that she says in the very -- the second paragraph:
23 I am enclosing a copy of the police report. You will see
24 that the police officer named me as the person who caused
25 the accident.

1 And she says there is no idea how I could have hit
2 Antoine. She asked about another witness. She says, I
3 know my attorney asked your representative or you
4 personally to provide a statement. It is your right to say
5 no, but I think it will be profitable for both of us.

6 And then she talks about Geico's insurance is \$25,000.
7 And then she talks about USAA and says there is a million
8 dollars. And then she says if I am not found at fault then
9 USAA will be giving you some money. However, if I am found
10 at fault then you will be at the mercy of Geico.

11 So if my lights were on then you get a --- we can
12 share a million dollars. If my lights are off then you are
13 going to be stuck with 25.

14 THE COURT: Was this admitted in the underlying trial?

15 MR. WILLEY: No. And it is not -- it wouldn't be
16 relevant in the underlying trial. And in fact whatever the
17 police report said wouldn't be admissible in the underlying
18 trial. And it wouldn't be reasonable for anybody to rely
19 on who a cop found at fault because they know it is not
20 admissible in the underlying trial.

21 And when Ms. Hood was asked about this issue she - in
22 a subsequent deposition - she indicated she was confused
23 about the insurance issues.

24 And that is what this is about. I think the key word
25 of that letter that they would like to get in more than any

1 other is profitable.

2 MR. WHELAN: Well, I think it is a pretty
3 extraordinary circumstance to have one witness writing to
4 another witness saying this is the -- these are the
5 amounts, if you say this then you will get this.

6 And I should point out that the police ---

7 THE COURT: Well, if that wasn't entered in that case
8 and wasn't relevant to those issues I mean how is that
9 relevant to how Geico acted -- or how USAA acted at the
10 time of the mediation? I don't see the relevance.

11 MR. WHELAN: Well, that was a call that Judge Mullen
12 made. I mean it was -- we certainly tried -- or Mr. Daniel
13 certainly tried to get it into evidence. And Judge Mullen
14 ruled, you know, as was in her discretion I suppose, that
15 it wasn't coming in. But certainly that goes to
16 credibility.

17 Now back to Mr. Willey's point. He says that the
18 trial is irrelevant. Whether it is relevant or not, USAA
19 didn't know that that would be excluded from evidence. It
20 was reasonable for USAA to say here is a letter where Ms.
21 Kuck is suborning perjury from two witnesses and that is
22 going to affect her credibility. In addition to the fact
23 that she didn't tell the truth about some other things.
24 But this is a really important piece of evidence.

25 THE COURT: Well, I am going to grant your motion with

1 respect to that letter. I don't think it is irrelevant to
2 what USAA did at the time of mediation.

3 MR. WILLEY: I have three more which I hope we can
4 just agree on. And then I have one that we did not submit
5 which is based on some argument they raised in their
6 pretrial brief. Which I honestly did not read until about
7 midnight last night.

8 THE COURT: Well, let me just save us a little bit of
9 time here. I don't see how those last three having any
10 reference to motions in limine to exclude evidence.

11 Mr. Whelan, are you in agreement with that?

12 MR. WHELAN: I am, Your Honor.

13 THE COURT: I'm sorry?

14 MR. WHELAN: I'm sorry, I do agree with that.

15 THE COURT: And law firm advertising are you in
16 agreement that that does not come in?

17 MR. WHELAN: Unless somehow they make it relevant.

18 THE COURT: I can't imagine he is going to open that
19 door. That is granted. That is Number 4. On Number 5 no
20 reference to tort reform. That seems reasonable to me.

21 MR. WHELAN: Yeah, as long as he is just saying no
22 reference to tort reform. There is some really broad
23 language in this motion. But I agree that we are not going
24 to talk about tort reform.

25 MR. WILLEY: Well, right. And the broad language I

1 guess kind of goes into another which has become part of
2 the fabric of this case which is the trial over attorney's
3 fees. How much attorney's fees were collected by the
4 attorneys based on our agreement with Ms. Hood is totally
5 irrelevant. And I ---

6 THE COURT: I understood he was -- he did not want to
7 go into the attorney fee agreement.

8 MR. WHELAN: That is right.

9 MR. WILLEY: Okay. Good.

10 And then the other piece of the motion in limine may
11 take a while. So I don't know if you just want me to kind
12 of highlight it.

13 THE COURT: Well, give me -- give me a little clue.

14 MR. WILLEY: Okay. So I am going to take the position
15 that anything as to this advise of counsel defense, which
16 has already been denied, there are some subparts of that,
17 cannot come into evidence.

18 And this includes direct advice that Mr. Daniel gave
19 to USAA through letters, through reports, through
20 conversations, and otherwise, because it has been
21 determined by the court and the law of these cases that
22 that is not a defense that can be presented. And I have
23 got Lee working on that but.

24 THE COURT: All right. Well, I am showing it is right
25 at 10:30. Let's go ahead and bring the jury in. And then

1 we will hear, Mr. Whelan, your motions in limine.

2 We will plan our timing after we see how long it takes
3 us to select this jury. I see that I have -- Mr. Willey, I
4 believe I saw your voir dire.

5 MR. WHELAN: Your Honor, if I am approach. I have
6 some that is I don't believe is anything controversial.
7 And it may all be covered in Mr. Willey's. I just need
8 to ---

9 (WHEREUPON, document provided to the court.)

10 MR. WHELAN: I am sorry that I have not done that but.

11 THE COURT: Mr. Willey, do you have a hard copy of
12 your voir dire?

13 MR. WILLEY: Yes.

14 THE COURT: If not, I can pull it up.

15 (WHEREUPON, document provided to the Court by Mr. Willey.)

16 MR. WILLEY: Your Honor, and just to save you some
17 time. Looking at the voir dire, Number C -- or Letter C,
18 Alexis McCumber is not going to be participating in any
19 part of the trial of this case. D, Kenneth Davis isn't
20 going to participating in any part of the trial of this
21 case. E, Akim Anastopoulo, is not going to be
22 participating in any part of the trial of this case. G,
23 David Hoffman, is not going to be participating in any part
24 of the trial in this case. So I believe they can all be
25 stricken.

1 MR. WHELAN: Your Honor, I would ask that David
2 Hoffman and Akim Anastopoulo be asked about just because of
3 their -- I mean they are each of their law firms. And if
4 somebody -- if a jury member knows Akim or knows Mr.
5 Hoffman then I think that we need to know about that.

6 MR. WILLEY: Well, Your Honor, if that is the standard
7 then I would ask that all 56 lawyers at Nelson Mullens'
8 South Carolina office be asked about because they are also
9 part of the law firm. That is not a standard. The
10 question is who is going to present the case.

11 But if that is the case then I am going to ask for the
12 reverse of that, which is that all of the partners at
13 Nelson Mullins also be listed off and asked if they have
14 ever known them or had a relationship or been represented
15 by them.

16 MR. WHELAN: These are the names -- I mean the law
17 firms are names. They are their law firms.

18 MR. WILLEY: Right. And Nelson Mullens is known as
19 Nelson Mullens Riley and Scarborough.

20 MR. WHELAN: And I will be happy to ask Nelson Mullens
21 Riley or Scarborough.

22 THE COURT: Well, Mr. Willey, I am looking at your
23 question, have you ever been associated with or represented
24 by the following law firms. And it does ask about the
25 Anastopoulo Law firm. I think that covers it.

1 MR. WHELAN: I agree.

2 MR. WHELAN: Your Honor, can we ask if anybody is
3 friends from -- with any member of the law firm perhaps? I
4 mean that says were you associated -- every been -- have
5 you ever been associated with or represented by the
6 following law firms.

7 MR. WILLEY: I have no objection if he wants to also
8 ask do they have any friends that are employed by any of
9 those firms. I think that is fine.

10 MR. WHELAN: Yes.

11 THE COURT: Okay. So the issue was friends?

12 MR. WHELAN: Yeah, I am okay with that if Your Honor
13 isn't going to ask about Mr. Anastopoulo and Mr. Hoffman.
14 I just, you know, want to make sure that -- well, should
15 we -- maybe if would be better to say or knows anyone.

16 THE COURT: Well, what I was just going to say is do
17 you have -- do you or any member of your family have a
18 close personal or business relationship to any of these?

19 MR. WHELAN: That is excellent.

20 THE COURT: And then ask a question about
21 representation.

22 MR. WILLEY: Okay. Thank you.

23 THE COURT: And these are -- A through M here, those
24 are the potential witnesses?

25 MR. WHELAN: Well, the witnesses start at I believe H.

1 THE COURT: And that covers all the witness names ---

2 MR. WHELAN: Well, they added a couple in their
3 pretrial brief. One is Kevin Smith.

4 THE COURT: I believe that's included.

5 MR. WHELAN: Oh, he is? Oh, oh.

6 THE COURT: In theirs.

7 MR. WHELAN: Yeah, I actually had him up there with
8 the attorneys. But they listed him as a witness. So, yes,
9 Kevin Smith is F. And then the other witnesses start at H.
10 And then they've also listed Woodrow Poplin, Woody Poplin,
11 as a witness.

12 MR. WILLEY: And, Your Honor, just so that I put this
13 on the record so that I'm not caught later as
14 misrepresenting something. Candidly, I didn't expect you
15 to deny the first motion in limine; and so there may be
16 additional witnesses from the trial of the case that we
17 need to call. We've not talked about that or had the
18 opportunity to discuss it, so I don't know that.

19 But I just want to put that out there. Because to the
20 extent that trial testimony comes in and was given and is
21 relevant, there may need to be some additional explanation
22 of that.

23 THE COURT: And, I mean, you know who testified at
24 trial?

25 MR. WILLEY: I know who was present at the trial,

1 right. I mean there were jurors, there was witnesses. I
2 don't recall all of the juror's names at the trial. But to
3 the extent they --

4 THE COURT: How would the jurors from a previous
5 trial ---

6 MR. WILLEY: Well, to the extent they relied on the
7 testimony, which I understand is now a basis of their
8 theory for why they did what they did a year prior to that
9 because they thought they somehow knew that jurors were
10 going to rely on certain aspects of testimony to come to a
11 comparative finding may be -- may be relevant in the case
12 if we're getting into trial testimony and how that weighed
13 into the comparative issue. Again, I haven't looked it ---

14 THE COURT: Let's address that issue when we get to
15 it.

16 MR. WILLEY: Okay.

17 THE COURT: It looks like we're going to be about five
18 or ten more minutes. While the jurors are still checking
19 in, let's take a quick break.

20 MR. WHELAN: Your Honor, I do have some issues with
21 their voir dire that I can address at any time that you're
22 ready.

23 THE COURT: Well, let me tell you, I'm not asking
24 Number 10.

25 MR. WHELAN: Okay. That was a biggie.

1 THE COURT: I didn't see anything else that looks
2 particularly ---

3 MR. WHELAN: My only comments were going to be with
4 respect to one and two, as far as asking the jurors to
5 state the details of their lawsuits or state the details of
6 an auto accident where they sustained medical treatment. I
7 think that's attempting to affect the jury pool.

8 But if that needs to be done, then I'd ask that it be
9 done with --- for both of those.

10 THE COURT: Well, certainly. But I think we can ask
11 whether they were a plaintiff or a defendant and basically
12 what type of case it was.

13 MR. WHELAN: Okay.

14 THE COURT: I'm not going to ask them to go into
15 details.

16 MR. WHELAN: That's fair.

17 THE COURT: Just -- and I'm going to exclude anything
18 that involves debt collection. I'm not going to ask them
19 to respond to that.

20 MR. WHELAN: Okay.

21 And then the other point -- and I assume that you are
22 not going to ask them to state the details of their
23 automobile accident injuries requiring medical treatment?

24 THE COURT: No. I certainly wouldn't have people have
25 to go into their medical history too much here in open

1 court.

2 MR. WHELAN: And then the only other comment I had was
3 their request number five that asks about do you feel
4 justice was done.

5 THE COURT: Yeah, I'm not going to ask that.

6 MR. WILLEY: Your Honor, just two points on those. As
7 to number two, I think that the details of the wreck they
8 were involved in, in terms of who was at fault and what
9 happened, are going to be rele- -- I mean, if we are
10 litigating the underlying issues in this case, that would
11 certainly be relevant in a car wreck case.

12 If, for example, someone told us that the facts of the
13 case were that they T-boned someone and ran a stop sign,
14 that would be important in a case where the defendant ran a
15 stop sign and T-boned someone, to know that. And so those
16 are the types of details we're asking about, what are the
17 facts of the case where you sustained injuries.

18 I think, you know -- typically I would agree; but I
19 think in this case, with some of the rulings we've had, I
20 think we need to be able to know that because it could go
21 to prejudice of the jury. If someone says, well, you know,
22 this happened to me and I didn't get a million dollars, I'm
23 not going to, you know, give her a second amount
24 irrespective of the facts.

25 And I think if we did attorney letter voir dire, which

1 I almost asked for but I didn't in this case, certainly ---

2 THE COURT: I wouldn't have granted it anyway.

3 MR. WILLEY: Certainly we would have been allowed to,
4 you know, go into that. So I would just -- I would say
5 that as to -- as to two.

6 And then as to five, I think that's important because
7 this is a case about whether or not an insurance company
8 did what they were supposed to do. And if somebody has a
9 bias one way or the other, every claim they've ever made
10 has been paid by USAA or otherwise, and they feel like
11 insurance companies are always honest, I think we're
12 entitled to know that. If they've had three claims and
13 they've all been denied and delayed and then defended and
14 they drug them through the ringer, I think USAA is entitled
15 to know that so that they can get a fair trial, because ---

16 THE COURT: Well, I mean, you're going to know if they
17 were injured, if they had to file a claim, if they were
18 forced to file a lawsuit. I'm going to allow that or
19 whether it was settled prior to trial. So I think you can
20 glean a lot of that information that way.

21 Mr. Willey, do you have any other issues with -- I
22 don't remember who started this ---

23 MR. WILLEY: I have ---

24 THE COURT: I think, Mr. Whelan, actually I think you
25 did.

1 MR. WHELAN: Yeah, I did.

2 THE COURT: Any other issue you have before I move to
3 Mr. Willey?

4 MR. WHELAN: Your Honor, you just made the -- I think
5 this is just a loose -- prejudice you said. But you said
6 he's going to know if anyone was forced to trial, and
7 so ---

8 THE COURT: Well, I'm going to ask them, okay, were
9 you -- you were involved in a lawsuit.

10 MR. WHELAN: Right.

11 THE COURT: Did you have to file a claim.

12 MR. WHELAN: Okay.

13 THE COURT: Or did you file a claim. Did it go to a
14 lawsuit ---

15 MR. WHELAN: Okay.

16 THE COURT: --- or did it not go to a lawsuit.

17 MR. WHELAN: That's good. I just didn't -- the forced
18 to trial.

19 THE COURT: No, I won't say did this mean insurance
20 company forced you to go to trial. I will not say that.

21 MR. WILLEY: Which is what happens.

22 But, Your Honor, as to their voir dire, number three,
23 I would just ask that you not ask that. I think that
24 that's handled in the standard voir dire, and I think it's
25 very specific and indicates a preference.

1 THE COURT: I would agree.

2 MR. WHELAN: Your Honor, is there a way to make that
3 neutral?

4 THE COURT: I mean, I generally ---

5 MR. WHELAN: A bias for or against corporations or
6 insurance companies? I thought it was. But it could -- I
7 agree it could probably be made -- we could say for or
8 against corporations or insurance companies. I think
9 that's a standard federal -- on the federal questionnaire.

10 THE COURT: Mr. Willey?

11 MR. WILLEY: I think it still indicates a preference.
12 Because you're asking if there's a bias as to this party.
13 I think the standard voir dire is knowing the parties in
14 this case will you be able to render a fair and impartial
15 verdict. They know one is the claimant, Ms. Hood. They
16 know one is an insurance company, USAA. And so they can
17 answer the question on that basis. I think an additional
18 question just indicates a preference.

19 THE COURT: I agree. I'm not in favor of that.

20 And frankly, number four, I'm always going to assume
21 that the jury is going to follow my instructions and if
22 it's covered in jury instructions it's just not something
23 that I charge. If they felt that way at the beginning,
24 they shouldn't feel that way at the end.

25 MR. WHELAN: Okay. So Your Honor is going to

1 charge -- Mr. Willey said something about as a question
2 about bias. You're going to ask if anyone would be biased
3 affecting either of the parties. I'm not sure that's on
4 either of our lists.

5 THE COURT: I'm glad to do that. This was going to
6 ask is there anyone who would biased -- who would be biased
7 for any reason either for or against the parties of this
8 lawsuit.

9 Anything else regarding voir dire?

10 MR. WHELAN: Not from the defense, Your Honor.

11 MR. WILLEY: No, Your Honor.

12 THE COURT: Okay.

13 [Off the record momentarily]

14 THE COURT: Okay. Let's take a quick break.

15 [Whereupon, a recess is taken 6/25/19, 10:46 a.m. to
16 10:57 a.m.]

17 MR. WHELAN: I was wondering if I might follow up on
18 something if you have a moment?

19 THE COURT: Sure.

20 MR. WHELAN: On the -- Ms. Kuck letter, Mr. Willey
21 represented to you that that was not available to USAA
22 before the mediation. I have a letter from Jack Daniel to
23 Kathy Moats, who was the USAA person looking at this case,
24 dated May 12th, 2016, which was seven months before the
25 mediation. And there is a heading of the letter, titled

1 plaintiff's letter to Mr. and Mrs. Kuck.

2 And the letter goes on for a page-plus of
3 single-spaced writing concerning that letter. He says:
4 The letter to the Kuck's should significantly damage
5 plaintiff's credibility with any objective juror. There
6 are potential admissibility issues, he says; however, this
7 information can be redacted.

8 Because it talks about insurance, if we need to
9 present the actual letter, you know, et cetera, et cetera.

10 And so I believe your ruling was it wasn't relevant to
11 the mediation, and I think that might have been based on
12 Mr. Willey's statement that USAA did not know about it
13 then. But this letter shows not only did they know about
14 it, but they considered it as something that would come in
15 at trial and affect her credibility before the mediation.

16 THE COURT: Yes, sir?

17 MR. WILLY: Two things. One, I did not say that they
18 did not have this at mediation. What I said was I don't
19 know when they got it but I know that they weren't copied
20 on it. So they didn't get it at the same time the Kuck's
21 did.

22 And as far as I know -- we can go back and look at
23 when the evaluation of the case was made. Whether they had
24 it or not doesn't really matter because they made the
25 evaluation they made and they never made that offer at the

1 evaluation that they made in this case. And so ---

2 THE COURT: I'm not following you.

3 MR. WILLEY: So the -- so the evaluation of this case,
4 the reasonable amount that they should pay Ms. Hood and
5 they evaluated to be 250,000, they admit they never paid
6 that or offered that.

7 And so irrespective of what went into that calculation
8 in terms of making the evaluation, which is what Mr.
9 Daniel's letter apparently goes to, it doesn't matter
10 because the unreasonableness is not offering what you
11 determine the reasonable evaluation of the case to be to
12 your insured. Not ---

13 THE COURT: I think you said that his authority was up
14 to 250 and that they made an offer of 200, I think he said,
15 top offer?

16 MR. WILLEY: Well, the -- and we'll -- that's correct.
17 And we'll get into the deposition testimony but -- if we
18 argue the summary judgment motion.

19 But in the deposition testimony USAA's folks make it
20 quite clear that the reserve is their reasonable evaluation
21 of the amount that should be paid.

22 THE COURT: And so how can you say that their -- that
23 they didn't take that into account?

24 MR. WILLEY: I'm not. What I'm saying is it doesn't
25 matter. Because even if they did take it into account on

1 the evaluation, they never offered the amount that they
2 determined was the reasonable amount that should settle the
3 claim.

4 They were unreasonable just by virtue of not offering
5 the amount that they determined should be paid to Ms. Hood,
6 their insured. And so that's a distinction in this case.

7 This isn't a case about a plaintiff's lawyer asking
8 for the moon and the stars and them not offering it. They
9 never even offered their own evaluation.

10 And the letter -- all the letter does is -- I mean it
11 just muddies the issues in the case. They can say, they
12 can get up there and say that at the time we made our
13 evaluation of the case we took all of this into account.
14 That's fine.

15 The case boils down to is you never offered that
16 amount to Ms. Hood, did you? No.

17 It's unreasonable not to offer the amount that you
18 evaluate as a reasonable settlement value of the case to
19 your own insured.

20 MR. WHELAN: I would like us to remember this is a
21 motion for summary judgment, because there's just no --
22 there's just no law to support any of this.

23 So before, he told you that we need to figure out what
24 USAA knew before the mediation. Now he just told you that
25 doesn't matter and it's about USAA only offering 200 when

1 their top reserve was 250.

2 And if there's some law that you have to do that,
3 then, I mean, every case there's going to be a second case
4 afterward. There just is no law on that.

5 MR. WILLEY: Well, there is law on that.

6 But the second piece is we're talking about different
7 claims. We're talking about different things. The first
8 case we are talking about the reasonableness of USAA's
9 actions in a mediation. Here we're talking about the
10 reasonableness of USAA's offer and evaluation and whether
11 or not to offer that evaluation.

12 That's a different issue than what occurred later.
13 And that's all fleshed out in the discovery. And we'll go
14 through it in fine detail. But they're separate issues and
15 they are separate claims made in the complaint. And so,
16 you know.

17 THE COURT: Can we bring the jury?

18 THE BAILIFF: Yes, ma'am.

19 THE COURT: Okay. I'll think about it.

20 Let's bring the jury on in.

21 [Whereupon, the jury panel enters the courtroom
22 6/25/19, 11:05 a.m.]

23 JURY VOIR DIRE

24 THE BAILIFF: Your Honor, the panel is complete.

25 THE COURT: Thank you so much.

1 Ladies and gentlemen, thank you again for being here
2 this morning. We're going to move straight into selection
3 of the jury for our next case. This is also a civil case,
4 Therese Hood versus United Services Automobile Association,
5 also known as USAA Insurance.

6 The plaintiff is represented today by Attorney Roy
7 Willey. Mr. Willey, if you would please introduce yourself
8 to the jury panel.

9 MR. WILLEY: Hi. I'm Roy Willey. It's my pleasure to
10 represent Ms. Hood.

11 THE COURT: And the plaintiff, Ms. Therese Hood, is
12 also present. Ma'am, if you wouldn't mind standing for us
13 so the jury can just see you.

14 [Whereupon, Ms. Hood complies]

15 THE COURT: Thank you so much. Thank you.

16 Let me first ask, ladies and gentlemen, is there
17 anyone related by blood or marriage, or with a close
18 personal or business relationship, with Ms. Therese Hood?

19 [Whereupon, there is no response]

20 THE COURT: Is there any member of the jury panel with
21 a close personal or business relationship with Attorney Roy
22 Willey, or related by blood or marriage to Mr. Willey?

23 [Whereupon, there is no response]

24 THE COURT: Is there any member of the jury panel
25 employed by Mr. Willey or the Anastopoulo Law Firm? Either

1 you or a member of your family employed, again, by Mr.
2 Willey or the Anastopoulos Law Firm?

3 [Whereupon, there is no response]

4 THE COURT: Is there any member of the jury panel who
5 is a current or former client of Mr. Willey or the
6 Anastopoulos Law Firm?

7 [Whereupon, there is no response]

8 THE COURT: Thank you.

9 And USAA is represented today by Attorney -- is it
10 Roy? I'm sorry.

11 MR. WHELAN: Robert, Your Honor.

12 THE COURT: Robert.

13 If you would please also introduce yourself to the
14 jury panel.

15 MR. WHELAN: Thank you, Your Honor.

16 I am Robert Whelan. Katie Mellen and I represent
17 USAA. And Kathy Moats, from USAA, is with us.

18 THE COURT: Ladies and gentlemen, first let me ask is
19 there any member of the jury panel related by blood or
20 marriage, or a close personal or business relationship,
21 with Ms. Kathy Moats -- Ms. Moats, would you stand for us
22 for just a moment? Thank you.

23 [Whereupon, Ms. Moats complies]

24 THE COURT: --- who is present in the courtroom, or
25 with Attorney Robert Whelan?

1 JUROR NUMBER 114: Your Honor, does that include being
2 a customer of USAA?

3 THE COURT: They're your insurance carrier?

4 JUROR NUMBER 114: [No response]

5 THE COURT: I'm glad to get that information from you.
6 And tell me your name.

7 JUROR NUMBER 114: Frances Glanville, Number 114.

8 THE COURT: And, Ms. Glanville, they are your
9 insurance -- they cover your automobile ---

10 JUROR NUMBER 114: My auto and renters insurance.

11 THE COURT: Okay. And you don't have any personal
12 acquaintance with Ms. Moats?

13 JUROR NUMBER 114: No.

14 THE COURT: Would the fact that this involves your
15 insurance carrier prevent you from being a fair and
16 impartial juror in this case?

17 JUROR NUMBER 114: No, Your Honor.

18 THE COURT: You feel you can give both the plaintiff
19 and the defendant a fair trial?

20 JUROR NUMBER 114: I do.

21 THE COURT: Thank you for that information.

22 JUROR NUMBER 71: Your Honor, I also am a -- have
23 USAA.

24 THE COURT: And tell me your name, ma'am.

25 JUROR NUMBER 71: Elizabeth Deacon, Juror 71.

1 THE COURT: Okay. Ms. Deaton, again, Juror Number 71.
2 And, ma'am, would that prevent you from being a fair and
3 impartial juror?

4 JUROR NUMBER 71: No, ma'am.

5 THE COURT: You believe you can give both the
6 plaintiff and the defendant a fair trial?

7 JUROR NUMBER 71: Yes, ma'am.

8 THE COURT: Thank you so much for the information.
9 Since I'm asking, let me go ahead and ask ---

10 JUROR NUMBER 5: Tom Alexander, Number 5. I have
11 USAA.

12 THE COURT: And, Mr. Alexander, would that prevent you
13 from being a fair and impartial juror, sir?

14 JUROR NUMBER 5: No, ma'am.

15 THE COURT: You can give both the plaintiff and the
16 defendant a fair trial?

17 JUROR NUMBER 5: Yes, ma'am.

18 THE COURT: Thank you for the information.
19 Yes, sir?

20 JUROR NUMBER 169: Yes. Frank Knowlton, Juror Number
21 169. A USAA member, and being a USAA member would not
22 impact my decision in any way.

23 THE COURT: Do you believe you can be a fair and
24 impartial juror?

25 JUROR NUMBER 169: Yes, ma'am.

1 THE COURT: Thank you for the information, Mr.
2 Knowlton.

3 Yes, sir?

4 JUROR NUMBER 154: Ra'shaad Johnson, Juror 154. I had
5 them for auto insurance.

6 THE COURT: And, Mr. Johnson, would that prevent you
7 from being a fair and impartial juror, sir?

8 JUROR NUMBER 154: No, ma'am.

9 THE COURT: Would it impact your ability to hear this
10 case in any way?

11 JUROR NUMBER 154: No, ma'am.

12 THE COURT: Thank you, Mr. Johnson.

13 JUROR NUMBER 215: Mark Phlieger, Juror Number 215. I
14 have a USAA credit card.

15 THE COURT: Okay. And would that have any bearing on
16 your ability to be fair and impartial?

17 JUROR NUMBER 215: No, Your Honor.

18 THE COURT: Thank you for the information, sir.

19 JUROR NUMBER 220: Kimberly Pugh, Juror 220, and I
20 have it for both homeowners and auto. And, no, it wouldn't
21 affect me.

22 THE COURT: Ms. Pugh, you believe you can be a fair
23 and impartial juror in this case?

24 JUROR NUMBER 220: Yes.

25 THE COURT: Okay. Thank you so much for the

1 information.

2 Is there any member of the jury panel - I don't know
3 if I've asked this yet or not - who is close personal or
4 business relationship or related by blood or marriage to
5 Attorney Robert Whelan?

6 [Whereupon, there is no response]

7 THE COURT: And, Mr. Whelan, tell us the name of your
8 law firm, please, sir.

9 MR. WHELAN: It's Nelson Mullens Riley and
10 Scarborough.

11 THE COURT: Is there any member of the jury panel that
12 is currently or formerly represented by either Mr. Whelan
13 or his law firm Nelson Mullens Riley and Scarborough?

14 JUROR NUMBER 215: Mark Phlieger, 215. Nelson Mullens
15 is my attorney. Mason Hope.

16 THE COURT: And is he out of the Charleston office?

17 JUROR NUMBER 215: He's out of the Columbia office.

18 THE COURT: Okay. And he is currently representing
19 you?

20 JUROR NUMBER 215: Yeah.

21 THE COURT: Okay. Mr. Phleiger, is it?

22 JUROR NUMBER 215: Right.

23 THE COURT: Sir, I'm going to excuse you from this
24 particular case. Thank you. You can have a seat.

25 [Whereupon, panel member standing]

1 THE COURT: Yes, ma'am?

2 JUROR NUMBER 73: Erica Degroff, Juror 73. I work for
3 a company, King specialist, and Nelson Mullens represents
4 our company. Ed White there, our attorney.

5 THE COURT: Ed White is the attorney for your ---

6 JUROR NUMBER 73: For the ---

7 THE COURT: --- employer?

8 JUROR NUMBER 73: Yes.

9 THE COURT: And who is your employer?

10 JUROR NUMBER 73: King Specialist of Charleston.

11 THE COURT: Okay. And do you feel that that would
12 impact your ability to be a fair and impartial juror?

13 JUROR NUMBER 73: No, ma'am.

14 THE COURT: Do you believe that you could give both
15 the plaintiff and the defendant a fair trial?

16 JUROR NUMBER 73: Yes, ma'am.

17 THE COURT: Okay. Thank you, Ms. Degroff, for that
18 information.

19 Is there any member of the jury panel who has an
20 employment relationship -- either you yourself, or anyone
21 in your family, is employed by Nelson Mullens Riley and
22 Scarborough?

23 [Whereupon, there is no response]

24 THE COURT: Is there any member of the jury panel that
25 has a relationship, either a personal or a business

1 relationship, with some additional law firms. I'm going to
2 give you this information: Carlock Copeland Law Firm, the
3 Hoffman Law Firm, or Clawson and Staubes.

4 So you have a personal relationship with an attorney
5 there, you are related by blood or marriage to an attorney
6 there, you are a current or former client of that law firm,
7 or you do business with. Again, that's Carson -- I'm
8 sorry, Carlock Copeland, the Hoffman Law Firm, and Clawson
9 and Staubes.

10 Yes, ma'am?

11 JUROR NUMBER 73: Degroff, 73. Again, worked for a
12 healthcare company. We do a lot of workers' comp cases,
13 and the Hoffman Law Firm comes up a lot. I work for one of
14 the physicians that is frequently deposed.

15 THE COURT: Okay. And that's particularly the Hoffman
16 Law Firm?

17 JUROR NUMBER 73: Yes, ma'am.

18 THE COURT: And, again, would that impact your ability
19 to be a fair and impartial juror?

20 JUROR NUMBER 73: No, ma'am.

21 THE COURT: Thank you so much for the information.

22 Is there any member of the jury panel who has ever
23 been involved in a lawsuit either as a plaintiff or a
24 defendant; if you've ever sued anyone or been sued, other
25 than a debt collection suit?

1 MR. WHELEN: Your Honor, may we approach?

2 THE COURT: Sure.

3 [Whereupon, an off-the-record bench conference is held
4 6/25/19, 11:13 a.m.]

5 THE COURT: Okay. Once again, anyone ever been
6 involved in a lawsuit, other than debt collection, as
7 either a plaintiff or a defendant; in other words, you sued
8 somebody or you were sued in something other than debt
9 collection?

10 JUROR NUMBER 220: Juror 220, and I had a settled out-
11 of-court suit about thirty years ago, a medical
12 malpractice.

13 THE COURT: Okay. So you had a medical malpractice
14 claim?

15 JUROR NUMBER 220: Yes.

16 THE COURT: And it was settled out of court?

17 JUROR NUMBER 220: Yes.

18 THE COURT: Thank you so much for the information.
19 Yes, ma'am?

20 JUROR NUMBER 266: Juror 266. I fell forty feet when
21 a deck collapsed. It was felt negligently. But that was
22 about fifteen years ago so.

23 THE COURT: I'm sorry. You had a fall from ---

24 JUROR NUMBER 266: Yes. A deck collapsed.

25 THE COURT: A deck?

1 JUROR NUMBER 266: Yes.

2 THE COURT: And was there a claim made ---

3 JUROR NUMBER 266: Yes.

4 THE COURT: --- as a result of your injuries? Was
5 there actually a law suit?

6 JUROR NUMBER 266: Yes.

7 THE COURT: And were you successful in the law suit?

8 JUROR NUMBER 266: Yes.

9 THE COURT: And this was about fifteen years ago?

10 JUROR NUMBER 266: Correct.

11 THE COURT: Thank you so much for the information.

12 And, sir?

13 JUROR NUMBER 265: Two sixty-five. My wife and I own
14 three massage entities in northern Ohio. We were sued on
15 multiple occasions.

16 THE COURT: You were defendants?

17 JUROR NUMBER 265: Defendants. And we were once the
18 plaintiff against the landlord.

19 THE COURT: Okay. So the case in which you were the
20 plaintiff, that was a landlord-tenant type of ---

21 JUROR NUMBER 265: Yes.

22 THE COURT: --- breach of contract type of case? When
23 you were sued, can you tell us what kind of case it was?

24 JUROR NUMBER 265: The first one was a discrimination
25 case. The second one was an employee who wanted to get

1 compensated as a non-exempt employee and they were an
2 exempt status.

3 THE COURT: And did you actually go to court on each
4 of those cases?

5 JUROR NUMBER 265: Settled all three of them.

6 THE COURT: Thank you so much for the information.

7 Yes, sir?

8 JUROR NUMBER 13: Number 13, Kent Armeson. About
9 thirty years ago I was involved in a vehicle accident with
10 my mother. There was a lawsuit. Settled.

11 THE COURT: And was your mother determined to be the
12 at-fault driver, or she ---

13 JUROR NUMBER 13: No. She was the plaintiff.

14 THE COURT: Okay. And she filed a claim for her
15 injuries?

16 JUROR NUMBER 13: Yes.

17 THE COURT: And did you also have a claim for
18 injuries?

19 JUROR NUMBER 13: Yes.

20 THE COURT: And did you have to actually file a
21 lawsuit, or was it settled?

22 JUROR NUMBER 13: It was settled.

23 THE COURT: Settled prior to going to court?

24 JUROR NUMBER 13: Right.

25 THE COURT: Thank you, sir.

1 JUROR NUMBER 51: Juror Number 51. Eight years ago my
2 wife and I were in a lawsuit. We were the plaintiffs, and
3 we settled out of court; but USAA was the defendant in the
4 lawsuit.

5 THE COURT: It was a car wreck case?

6 JUROR NUMBER 51: Yes.

7 THE COURT: And both you and your wife had some
8 personal injuries?

9 JUROR NUMBER 51: My wife did.

10 THE COURT: And, sir, since this involved the same
11 insurer would that prevent you from being a fair and
12 impartial juror in this particular case?

13 JUROR NUMBER 51: No.

14 THE COURT: And, again, you're Juror Number 51?

15 JUROR NUMBER 51: Number 51.

16 THE COURT: Thank you so much for the information.

17 Ladies and gentlemen, at the beginning I skipped over
18 several important people here.

19 Also joining Mr. Willey at plaintiff's table is
20 Attorney Eric Poulin. Mr. Poulin, if you would introduce
21 yourself to the jury panel, as well.

22 MR. POULIN: Thank you, Your Honor.

23 Good morning. My name is Eric Poulin. I work with
24 Roy, and together we represent Terry in this case.

25 THE COURT: Thank you so much.

1 And also at defense table seated next to Mr. Whelan,
2 Ms. Mellen, who is also an attorney with Nelson Mullens.
3 If you would also introduce yourself.

4 MS. MELLEN: Good morning. Katie Mellen with Nelson
5 Mullens, here on behalf of USAA.

6 THE COURT: Ladies and gentlemen, is there anyone in
7 the jury panel related by blood or marriage, or with a
8 close personal or business relationship, with either Mr.
9 Eric Poulin or Ms. Katie Mellen?

10 [Whereupon, there is no response]

11 THE COURT: Thank you.

12 I think we may have covered some of this question
13 already but if you haven't previously responded: Have you
14 ever been involved in an automobile accident of any kind
15 where you sustained injuries requiring medical treatment?
16 Other than the folks who've already responded, is there
17 anyone else who's been involved in an automobile accident
18 and sustained some personal injuries?

19 [Whereupon, there is no response]

20 THE COURT: Other than the folks who've already given
21 us their information, anyone who's had any dealings with
22 the defendant USAA Insurance Company? Other than the
23 jurors who've already indicated that they've either got
24 coverage with them or so that you were involved in a
25 lawsuit with them some years ago? Anyone else?

1 [Whereupon, there is no response]

2 THE COURT: Is there any member of the jury panel
3 who's made a claim after an automobile accident for
4 injuries or property damages? Other -- if you've already
5 disclosed to us, that's fine. But anyone else that you've
6 made a claim after an automobile accident for either
7 injuries or property damage?

8 JUROR NUMBER 161: It's been several years ago; but,
9 yeah, I had an accident where there was property damage.

10 THE COURT: And tell me your name, sir.

11 JUROR NUMBER 161: Kent Keller. I'm Juror 161.

12 THE COURT: And, Mr. Keller, would your experience
13 prevent you from being a fair and impartial juror in this
14 case?

15 JUROR NUMBER 161: No, ma'am.

16 THE COURT: Thank you for the information, Mr. Keller.
17 Ms. Deaton?

18 JUROR NUMBER 71: We had a car accident and there was
19 damage to the car. We filed a claim for the car.

20 THE COURT: And so you have made a claim for property
21 damage ---

22 JUROR NUMBER 71: Right.

23 THE COURT: --- as a result of that?

24 Ms. Deaton, can you be a fair and impartial juror in
25 this case?

1 JUROR NUMBER 71: Yes, ma'am.

2 THE COURT: Thank you for the information.

3 Did I ask if any members of the jury panel have
4 underinsured motorist coverage? To your knowledge, do you
5 currently have underinsured motorist coverage? And if I
6 can just -- if you'll raise your hand if this applies to
7 you and we'll -- we're just going to start down the line.

8 That's really the only question I'm going to ask you
9 is whether you have that coverage. So if we start in the
10 first row here, does that apply to anyone? Second row, I
11 think we had some hands. If you'll just give us your name
12 and juror number.

13 JUROR NUMBER 169: Yes, Frank Knowlton, 169; and it's
14 a part of my coverage brought.

15 THE COURT: Thank you.

16 Mr. Johnson?

17 JUROR NUMBER 54: Ra'shaad Johnson, 154. And it's
18 part of my insurance.

19 THE COURT: Thank you, sir.

20 Anybody else in the second row? I know we had some
21 hands in the third row.

22 JUROR NUMBER 51: Lathan Carey, Number 51. Auto
23 coverage.

24 THE COURT: Thank you.

25 JUROR NUMBER 172: One seventy-two. Auto coverage.

1 THE COURT: Okay. And you are Miss ..?

2 JUROR NUMBER 172: Ladson, Osarka.

3 THE COURT: Thank you so much.

4 Anybody else on the third row?

5 [Whereupon, there is no response]

6 THE COURT: Okay. Over here we had some hands.

7 Anyone who has underinsured motorist coverage?

8 JUROR NUMBER 5: Tom Alexander, Number 5.

9 THE COURT: Thank you, sir.

10 JUROR NUMBER 265: John Szabo, Number 265.

11 JUROR NUMBER 13: Number 13. I am about 90 percent
12 sure I have it but.

13 THE COURT: Thank you, Mr. Armeson.

14 JUROR NUMBER 235: Two thirty-five.

15 THE COURT: Mr. Roberts?

16 JUROR NUMBER 235: Yes, ma'am.

17 THE COURT: Thank you, sir.

18 JUROR NUMBER 281: Kristie Walters, 281.

19 THE COURT: Thank you, ma'am.

20 JUROR NUMBER 55: Juror 55.

21 THE COURT: Ms. Caswell?

22 JUROR NUMBER 55: Yes.

23 THE COURT: Thank you.

24 I have a few other names. We've already been over Mr.
25 Whelan's. A few other potential people that I need to ask

1 you about. Attorney Jackson Daniel, also known as Jack
2 Daniel, Chris Nickels, Kevin Smith. I think we've covered
3 everyone else. Anyone have -- related by blood or marriage
4 -- and are all three of these individuals attorneys?

5 MR. POULLIN: Yes.

6 THE COURT: Anyone related by blood or marriage, or a
7 close personal or business relationship, with Mr. Jackson
8 Daniel, Chris Nickels, or Kevin Smith, all three of whom
9 are attorneys?

10 [Whereupon, there is no response]

11 THE COURT: Anyone who is a client, currently or
12 formerly, of any of these three individuals?

13 [Whereupon, there is no response]

14 THE COURT: Is there any member of the jury panel who
15 has an attorney in their immediate family?

16 JUROR NUMBER 220: Juror 220, and my son is an
17 assistant U.S. Attorney in Raleigh.

18 THE COURT: I'm sorry?

19 JUROR NUMBER 220: He's an assistant U.S. Attorney in
20 Raleigh.

21 THE COURT: In Raleigh, North Carolina?

22 JUROR NUMBER 220: Correct.

23 THE COURT: Thank you so much.

24 Yes, ma'am?

25 JUROR NUMBER 73: Erica Degroff, Juror 73. My father

1 is an attorney.

2 THE COURT: And does he practice in South Carolina?

3 JUROR NUMBER 73: No. Indiana.

4 THE COURT: Thank you so much.

5 Anyone else have an attorney in their family and they
6 will own up to it?

7 [Whereupon, there is no response]

8 THE COURT: Is there any member of the jury panel who
9 has filed a claim against an insurance company which was
10 denied? Anyone ever had an insurance claim denied?

11 [Whereupon, there is no response]

12 THE COURT: Okay. And it looks like we have two other
13 individuals out of Tampa, Florida, a Ms. Diane Martin and a
14 Ms. Missy Howard, again, of Tampa, Florida. Anyone happen
15 to be related by blood or marriage, or have a close
16 personal or business relationship with either of those two
17 individuals?

18 [Whereupon, there is no response]

19 THE COURT: Okay. Anything further from either the
20 plaintiff or the defendant?

21 MR. WILLEY: Can we approach?

22 THE COURT: Sure.

23 [Whereupon, an off-the-record bench conference is held
24 6/25/19, 11:24 a.m.]

25 THE COURT: Ladies and gentlemen, a couple of other

1 names I need to ask you about. First is Mr. David Hood,
2 who I believe is present in the courtroom.

3 MR. HOOD: Yes, ma'am.

4 THE COURT: This gentleman. And then another
5 individual by the name of -- I'm not sure what his real
6 first name is. Is it Woodward?

7 MR. WILLEY: Woodrow, I believe. But he goes by
8 Woody.

9 THE COURT: Goes by Woody ---

10 MR. WILLEY: That is what I ---

11 THE COURT: --- Poplin. P-O-P-L-I-N. We think his
12 first name is Woodrow.

13 Again, anyone related by blood or marriage, or with a
14 close personal or business relationship, with either of
15 those individuals?

16 [Whereupon, there is no response]

17 THE COURT: One last question. Is there any member of
18 the jury panel that you have a close friend who is an
19 attorney? Anybody friends with an attorney?

20 Yes, sir? In the back.

21 JUROR NUMBER 51: Number 51, Aubrey Woody.

22 THE COURT: And what kind of an attorney is he?

23 JUROR NUMBER 51: Real estate.

24 THE COURT: Thank you so much for that information.

25 Yes, ma'am?

1 JUROR NUMBER 55: Tara Caswell, Juror 55. And I was a
2 litigation paralegal here for a long, long time. That's my
3 former career. And I know quite a few attorneys. And Ed
4 Buckley I worked with for about four years, and he's a very
5 good friend of mine. He's a litigator at Young Clement.

6 THE COURT: Thank you so much for that information.
7 Anyone else?

8 [Whereupon, there is no response]

9 THE COURT: Okay. Thank you.

10 And Mr. Whelan, Mr. Willey, if I could get you all to
11 approach for just a minute.

12 [Whereupon, an off-the-record bench conference is held
13 6/25/19, 11:25 a.m.]

14 THE COURT: Okay. Ladies and gentlemen, we're going
15 to prepare a list that is randomly generated by our
16 computer system. Typically, this will go off without a
17 glitch. Yesterday we were having a few computer issues in
18 this courtroom.

19 Please don't think you're being picked on if you're
20 either on the list or you're not on the list. The computer
21 generates this list randomly. If you're -- if it's your
22 second time being picked, nobody's deliberately picking on
23 you. It's just randomly generated. If you weren't picked
24 either time, your name never comes up, again, it's either
25 your lucky or unlucky day, however you want to look at it.

1 [Off the record momentarily to generate list]

2 THE COURT: Ladies and gentlemen, I'm going to give
3 the parties about ten minutes to go through this list. You
4 are -- I'm going to let y'all take a break at this point,
5 if you would like to take a break. Please be back in your
6 seat at 11:40.

7 [Whereupon, a recess is taken 6/25/19, 11:31 a.m. to
8 11:46 a.m.]

9 JURY SELECTION

10 THE CLERK OF COURT: Please use numbers 1 through 20
11 on your far left -- far left. You each have four strikes.
12 The plaintiff will strike first. So not the juror number,
13 the numbers on the far left. Because sometimes we will
14 have an attorney call a juror number.

15 MR. WILLEY: The plaintiff strikes Number 13.

16 MR. WHELAN: Defendant strikes Number 6.

17 THE CLERK OF COURT: Defendant strikes Number 6.

18 MR. WILLEY: Plaintiff strikes Number 14.

19 MR. WHELAN: Defendant strikes Number 17.

20 MR. WILLEY: Plaintiff strikes Number 8.

21 THE COURT: I'm sorry. That was Number 8?

22 THE CLERK OF COURT: Yes.

23 THE COURT: Thank you.

24 MR. WHELAN: Defendant strikes Number 4.

25 THE CLERK OF COURT: Number 4.

1 MR. WILLEY: Plaintiff strikes Number 5.

2 MR. WHELAN: Defendant strikes 19.

3 THE CLERK OF COURT: Okay. Now selecting for our
4 first alternate, using numbers 21 through 23. You each
5 have one strike.

6 MR. WILLEY: Plaintiff strikes Number 23.

7 MR. WHELAN: Defendant strikes 21.

8 THE CLERK OF COURT: Now selecting for a second
9 alternate, using numbers 24 through 26.

10 MR. WILLEY: Plaintiff strikes 25.

11 MR. WHELAN: And the defendant strikes 24.

12 THE CLERK OF COURT: All right. So can you please
13 follow along so we can make sure that we all have the same
14 remaining. So I have Numbers 1, Number 2, Number 3, Number
15 7, Number 9, Number 10, Number 11, Number 12, 15, 16, 18,
16 20, 22, and 26.

17 MR. WILLEY: That is what plaintiff has.

18 MR. WHELAN: That's correct.

19 THE COURT: Any motions with respect to the
20 empanelling of the jury?

21 MR. WILLEY: None from the plaintiff.

22 MR. WHELAN: None from the defendant.

23 THE COURT: Go right ahead.

24 THE CLERK OF COURT: When I call your name and juror
25 number, will you please gather all your belongings and take

1 a seat in the jury box.

2 Juror Number 240, Gwendolyn Rutledge.

3 [Whereupon, juror is seated in jury box]

4 THE CLERK OF COURT: Juror Number 184, Jessica
5 Maceyunas.

6 [Whereupon, juror is seated in jury box]

7 THE CLERK OF COURT: Juror Number 167, Desjohn
8 Kitchen.

9 [Whereupon, juror is seated in jury box]

10 THE CLERK OF COURT: Juror Number 55, Tara Caswell.

11 [Whereupon, juror is seated in jury box]

12 THE CLERK OF COURT: Juror Number 24, Joan Berry.

13 [Whereupon, juror is seated in jury box]

14 THE CLERK OF COURT: Juror Number 41, Jeffrey Brown.

15 [Whereupon, juror is seated in jury box]

16 THE CLERK OF COURT: Juror Number 220, Kimberly Pugh.

17 [Whereupon, juror is seated in jury box]

18 THE CLERK OF COURT: Juror Number 54, Marshall Carter.

19 [Whereupon, juror is seated in jury box]

20 THE CLERK OF COURT: Juror Number 251, Rebecca
21 Jackson.

22 [Whereupon, juror is seated in jury box]

23 THE CLERK OF COURT: Juror Number 5, Thomas Alexander.

24 THE CLERK OF COURT: Juror Number 242, Hillary
25 Sabbato.

1 [Whereupon, juror is seated in jury box]

2 THE CLERK OF COURT: Juror Number 254, Donnetia
3 Simmons.

4 [Whereupon, juror is seated in jury box]

5 THE CLERK OF COURT: Juror Number 172, Osarka Ladson.

6 [Whereupon, juror is seated in jury box]

7 THE CLERK OF COURT: And lastly, Juror Number 289,
8 Ashley Whaley.

9 THE COURT: Thank you. For our remaining jurors ---

10 [The Court confers with the clerk of court]

11 THE COURT: Ladies and gentlemen, I think this
12 releases you from your service this week. I am going to
13 ask you to call back after 6:00 p.m. to verify that fact,
14 but I think that the case we're about to try is the last
15 one on our trial roster for the week. But out of an
16 abundance of caution, if you'll please check with us after
17 6:00 p.m. tonight on the call-in number. Again, thank you
18 so much for your service to your community, and enjoy the
19 rest of your day and week.

20 [Whereupon, the jury panel exits the courtroom
21 6/25/19, 11:52 a.m.]

22 THE COURT: Mr. Willey, Mr. Whelan, would you approach
23 for just a moment?

24 [Whereupon, an off-the-record bench conference is
25 held]

1 THE COURT: Okay. Ladies and gentlemen, in just a
2 moment I am going to release you for lunch, and it's going
3 to be kind of a long break for you. I am going to ask you
4 to be back at 3:00 p.m. That's because we have a number of
5 legal issues that we need to take up while you are gone.

6 So I don't want you to think that we're just going to
7 be, you know, kicking back, and drinking coffee, and
8 reading the paper. We will be working almost straight
9 through to be ready for you when you come back at 3:00.

10 In the meantime, it's very important that you don't
11 discuss this case with anyone. At this point, both sides
12 have chosen you to be fair and impartial jurors. Sometimes
13 it's very natural that your friends and family, your
14 coworkers, they want to know what kind of case are you
15 serving on, who are the parties. They want to know all
16 about it. Sometimes when you just give them that little
17 bit of information you will unintentionally now elicit a
18 response back from them where they want to tell you all
19 about a situation they had or tell you their knowledge of
20 these particular parties or types of cases, and now we've
21 compromised your ability to be fair and impartial.

22 So I am going to ask you do not discuss the case with
23 your friends and family or anyone during the break, even to
24 tell them what kind of case it is or who the parties are.

25 There'll be a time at the conclusion of the case you

1 can discuss it with whoever you would like, or you can
2 decline to discuss it. That will be entirely up to you.
3 But at this early part of the process, please don't begin
4 discussing it with anyone.

5 I will also tell you that except for our alternates,
6 Ms. Ladson and Ms. Whaley, among the other twelve jurors
7 when you come back I am going to ask for you to go ahead
8 and select a foreperson.

9 You don't need any particular skills, qualifications,
10 to be the foreperson. The foreperson is going to preside
11 over the deliberations. At the very end you will sign the
12 jury verdict form on behalf of the entire jury panel. All
13 you need is just good common sense.

14 If there's a question that needs to be brought to my
15 attention, you'll write out the question on behalf of the
16 jury panel and send it with the bailiffs.

17 Other than that, again, all you need is -- everything
18 you have with you now makes you perfectly equipped to be a
19 foreperson. So if you'll select a foreperson from the
20 twelve. You can do that before you leave or you can do
21 that when you get back.

22 And enjoy your lunch. We'll see you back at three
23 o'clock.

24 [Whereupon, the jury exits the courtroom 6/25/19,
25 11:55 a.m.]

1 THE COURT: Okay. Would y'all rather break now or do
2 you want to let's keep working and break later?

3 MR. WHELAN: Let's keep working.

4 MR. WILLEY: Certainly we'd like to use the restroom.

5 THE COURT: Sure. Let's just take a break and we'll
6 come back in at 12:00. Is that all right?

7 MR. WHELAN: Okay. Great.

8 [Whereupon, a recess is taken 6/25/19, 11:56 a.m. to
9 12:07 p.m.]

10 THE COURT: Okay. Let's jump right in with the motion
11 for summary judgment.

12 MR. WILLEY: Your Honor, we did have a few other
13 pretrial motions -- two other pretrial motions.

14 THE COURT: That's right. We were -- we were -- still
15 had -- you gave me a little preview, but you're going to
16 have to remind me again because ---

17 MR. WILLEY: Okay. So the first one up is on the
18 advice of counsel issue.

19 MR. WHELAN: I was just going to make the point that
20 we broke, the jury came in right when we were talking about
21 that Kuck letter.

22 THE COURT: Yeah, we had -- we were talking about your
23 last motion in limine, and then we did talk about the Kuck
24 letter.

25 MR. WHELAN: Okay.

1 THE COURT: But we will reach it all.

2 MR. WHELAN: Sure. Thanks, Judge.

3 THE COURT: Thank you.

4 MOTION IN LIMINE

5 MR. WILLEY: Your Honor, the motion in limine is just
6 that any evidence that would go to support a defense of
7 advice of counsel should not be admitted in this trial.
8 The reason is very simple. There was a motion to amend
9 that was filed, it was heard, and it was denied. And any
10 attempt to now argue that defense through the evidence
11 would be contrary to the law of this case.

12 The basic issue that USAA seems to want to perpetuate
13 in this case is that they were reasonable because they did
14 what their attorney told them. And of course there is a
15 lot of discovery and background issues that would be
16 involved with that. If that were to be permitted as a
17 defense, we would of course have taken Mr. Daniel's
18 deposition. We would have been entitled to additional
19 documents, some of which they admit we're entitled to,
20 agreed to give them to us, and still haven't given them to
21 us.

22 We didn't press the issue. We won the motion to
23 amend. And as a result, we did not press the issue on the
24 additional discovery. We were prepared to try the case.

25 But it seems, from their pretrial brief - and this was

1 a surprise to me, frankly - that they intend to try the
2 case the exact same way as if they had never lost the
3 motion.

4 And the purpose of the motion, they knew this, which
5 is why they filed it, is that in order to get discovery on
6 an issue it has to be related to a claim or defense in the
7 matter. And until advice of counsel is a defense,
8 discovery on that issue is not proper.

9 Now, they did give us some documents that they thought
10 were helpful to their case that go to support that. But we
11 did not fully go through the discovery process. And these
12 were some of the arguments that we raised with Judge
13 Culbertson when he denied the motion.

14 So what we're apparently trying to do, based on the
15 reading of the pretrial brief, is still argue that issue in
16 this case. And, of course, that would be improper.

17 It's like losing a motion to amend on comparative
18 negligence in a wreck case and then coming in and still
19 trying to argue everything that the plaintiff did wrong.
20 It's simply improper because it's not a defense in this
21 case. And, in fact, it's explicitly not a defense because
22 their motion was denied.

23 And part of the issue that we argued before Judge
24 Culbertson -- and I don't think that I need to raise this
25 here since it's already the law of the case, but I will

1 just to give Your Honor some background, is what is the
2 advice of counsel of defense.

3 Well, advice of counsel of defense quite frequently
4 comes up in a bad faith case when there was a policy or
5 coverage position at issue and the insurer relies on
6 coverage counsel in order to help them interpret the terms
7 of the policy in relation to the state law. Here that's
8 not what we have.

9 What we have here is Mr. Daniel, hired by USAA, in the
10 pleadings which are on record in this case, which we marked
11 for Judge Culbertson and gave him, are signed in the
12 underlying case by Jack Daniel, attorneys for USAA General
13 Indemnity Company, appearing pursuant to the statute.

14 And so Mr. Daniel is a direct agent of them; and so
15 advice of counsel wouldn't be proper in this case, in any
16 event, because he is their agent.

17 It's not a situation where they were relying on his
18 advice in taking action separate there from. He is
19 actually a part of the process. And so anything that he
20 did would be imputed to them anyway, and so advice of
21 counsel wouldn't be proper.

22 To the extent they could make a reasonable basis to
23 have a defense, it would require us to do discovery in
24 order to be able to properly defend against that and not
25 prejudice my client's rights.

1 Given when the motion was called and the fact that we
2 did appear on the jury roster and there was no motion for a
3 continuance or a scheduling order pending, we weren't given
4 the opportunity to do that and, therefore, their motion to
5 amend was denied.

6 The basis for the motion to amend, by the way, just so
7 the Court understands, is three things that they say are
8 advice of counsel related: Underlying counsel denied a
9 request to admit. Underlying counsel acted
10 unprofessionally toward the insured. And USAA allegedly
11 should have accepted plaintiff's demand.

12 Now, I don't agree with those three things, but those
13 are the three bases that they put in their motion to
14 support the advice of counsel.

15 And here's the important part of that. Counsel
16 denying a request to admit is not advice; it's an act.
17 Counsel acting unprofessionally toward the insured is not
18 advice; it's an act. USAA allegedly should have accepted a
19 demand is not advice; it's an act.

20 And under the Maybank decision and it's progeny -- and
21 the Maybank decision isn't really applicable here. I use
22 it just to illustrate that the Court, even in the
23 tripartite relationship sense where the attorney is hired
24 for the benefit of the insurer to who the insurer owes the
25 ultimate duty, our court has said that insurer can have a

1 cause of action against that attorney for any acts that
2 that attorney does that damages the insurance company.

3 In this case it's even clearer because there is no
4 tripartite relationship. There is a direct privity
5 relationship. Mr. Daniel has a contractual and legal
6 obligation to USAA, as their attorney, to act in their
7 interest.

8 If they feel that some of the damage that resulted to
9 Ms. Hood and they are being accused of was done by Mr.
10 Daniel, they have a remedy for that. They can bring a
11 cause of action against him for his acts. But they can't
12 raise his acts as an advice of counsel defense. They've
13 already argued that. It's already denied. It's the law --
14 it's the law of the case.

15 But I just point that out to say that all of the
16 argument that we're going to hear about how this is
17 relevant is really not, because this is not -- this is not
18 an excess coverage or third-party bad faith case; this is
19 simply them saying, my attorney made -- if they're right,
20 if the plaintiffs are right, which they don't concede, and
21 Ms. Hood was damaged as a result of our actions, it's
22 because of the things that our attorney did, the remedy for
23 that under South Carolina law is for them to pursue Mr.
24 Daniel, not to raise it as an absolute defense to her
25 claims. Because in this case he was their direct agent and

1 not an attorney for some third party.

2 And so those are the -- that's the first argument,
3 which really drills it down. If you deny the motion -- or
4 if you grant the motion on the basis that it's already been
5 ruled upon, which of course we argue you should, that will
6 alleviate the necessity for further argument.

7 But the fact is, if you have a motion to amend denied
8 and therefore that defense is never brought into the case,
9 and therefore discovery on that defense is never done to
10 benefit the plaintiff, including the taking of the
11 deposition of the individual who allegedly gave the advice,
12 then obviously you can't go and amend at a later date, four
13 days later, when we have, you know, the law of the case is
14 what it is. And so that would be our first basis.

15 THE COURT: Mr. Whelan?

16 MR. WHELAN: Yeah. Thank you, Your Honor.

17 I think that Roy and I sort of agree on this. I might
18 try standing up here.

19 Because at the hearing I said to Judge Culbertson that
20 whether the -- so advice of counsel is an affirmative
21 defense that I think can get you a jury charge, and I think
22 it can be dispositive in some instances. And I told Judge
23 Culbertson that, at the hearing, that whether the motion is
24 granted or not the evidence will be the same. And I think
25 that Roy agreed with me.

1 And if I can hand up an excerpt of the transcript of
2 that hearing.

3 [Whereupon, Mr. Whelan proffers documents to the
4 Court]

5 MR. WHELAN: And, actually, the -- I want to focus on
6 the first paragraph, because he basically agreed with
7 all -- he basically reiterated the stuff I highlighted down
8 below.

9 But he told Judge Culbertson the advice of counsel
10 defense isn't applicable in this case because the advice of
11 counsel defense only comes up in these certain decisions
12 that wouldn't be applicable here, and in some punitive
13 damages cases just to show there was no gross negligence.
14 This is at the end of that very first paragraph.

15 This is none of those things. This is a simple
16 negligence case which he calls a bad faith case. So Mr.
17 Willey argued to Judge Culbertson that the advice of
18 counsel was just inapplicable under the facts that we're
19 dealing with.

20 And he argued to Judge Culbertson what he just argued
21 to Your Honor, which is that in this case Jack Daniel is
22 USAA. He said that Jack Daniel is actually a part of the
23 process. He just told you that. And he's directly liable
24 for -- or USAA is directly liable for his acts.

25 So USAA, according to him, is acting through Jack

1 Daniel, they're responsible for what he did. And if I'm
2 understanding his motion, I think he's trying to just
3 exclude evidence of what Jack Daniel did, what he was told,
4 what he told USAA. And if he is saying that Jack is our
5 agent, then that is how USAA is acting, is through Jack.

6 So I don't see how we can try this case without
7 talking about what Jack did, what Jack was told. He's the
8 only one communicating with the plaintiff's attorneys.
9 He's the one gathering evidence. So I think the plaintiffs
10 are trying to keep out -- keep Jack out of the case. But I
11 don't see how they do that when at the same time they're
12 saying our unreasonableness was what Jack Daniel did.

13 THE COURT: That was I guess my -- the question that
14 was in my mind is what exactly -- what evidence do we
15 anticipate that this is -- that you would elicit or that
16 you would move to exclude?

17 MR. WHELAN: Well, and Judge, if I can just say
18 something on that. I mean that sort of gets to why I asked
19 you to hear the motion for summary judgment because I still
20 don't know exactly what act it is that they say breached a
21 duty of good faith, caused some -- and caused some damages
22 to the plaintiff.

23 If they're talking about a reasonable evaluation --
24 like, first Mr. Willey said he was; and then he said he
25 wasn't when he was arguing the Kuck -- the Kuck letter

1 should stay out.

2 Then -- I mean I told you, and I can show you, the
3 letter from Jack Daniel talks about we found the Kuck
4 letter, the Kuck letter says this, this could affect her
5 credibility, when you talk about this request to admit that
6 seems to be the center of their case. You know, the
7 request to admit says admit her headlights were on.

8 All right, Jack's the one that looks at that and
9 answers it. And on the other side there is this report
10 from Woody Poplin that says her high beams are on. And
11 then Jack has all this other evidence that talks about her
12 lights being off.

13 So I'm not sure where they're going, but I don't see
14 how they get there without Jack Daniel. And I don't see
15 how we defend it without Jack Daniel.

16 And if I could just say one other thing. I know we're
17 going to talk about a Snyder vs. State Farm case in the
18 motion for summary judgment. I'm not sure if Your Honor
19 has had a chance to look at that, but we'll talk about it.

20 THE COURT: I looked at several, but I don't -- I
21 couldn't tell you exactly which cases I've read. I've read
22 some of the cases.

23 MR. WHELAN: Absolutely, Judge. I understand.

24 But in the Snyder -- the Snyder case is the Judge
25 Duffy opinion that is really discussing the issue of

1 evaluating the UIM cases, which is what we're here about.
2 And in that case, advice of counsel was not mentioned
3 anywhere in the opinion. And Judge Duffy looked at the --
4 an affidavit by Jay McDonald, the defense attorney, who
5 said, you know, I thought that the case was worth this.

6 So if they're trying to show that USAA's valuation,
7 which is Jack Daniel's valuation, was unreasonable, then
8 that's relevant evidence.

9 THE COURT: I guess that's not what I understood. I
10 understand -- what I understood Mr. Willey to say was that
11 the evaluation that the insurance company came up with was,
12 say, \$250,000 but you never actually offered what you
13 thought the value of the case was.

14 MR. WHELAN: Yes, ---

15 THE COURT: Was what I understood his argument to be.

16 MR. WHELAN: If that is what this case is about, then
17 I think that's a different issue. But I don't -- I don't --
18 -- he's just trying to just make anything part of this case.

19 Now I think he might be right if it's just -- if the
20 sole issue is that USAA when they went to that mediation
21 only offered 200 and they had 250 in authority then maybe
22 Jack Daniel doesn't play into that. I haven't really given
23 that a whole lot of thought.

24 But I think they're talking about all this other stuff
25 about, you know, these people said the lights were on but

1 really they weren't credible. And so maybe Mr. Willey
2 should address exactly what it is that he claims was done
3 in bad faith.

4 THE COURT: Well, I mean, first let me just ask what
5 evidence are you anticipating, Mr. Willey? I'm just
6 confused as to what we're thinking that would exclude.

7 MR. WILLEY: Your Honor, let me -- let me say a couple
8 of things.

9 One, I've not read the full transcript. We have
10 excerpts from five pages. I'm sure Mr. Whelan copied me on
11 his transmission to the Court requesting it, but I haven't
12 seen it.

13 So the issue in the pretrial brief that I was drilling
14 down on is really the exhibits that they marked, which are
15 Exhibits F, G, H, I, J, K, which are letters that Jack
16 Daniel wrote to USAA as part of his contractual obligation
17 to keep them informed of what was, you know, going on in
18 the litigation. They were advice letters; and they are not
19 letters that are a part of, in my view, this case or this
20 claim. But what they are trying to do, and the argument
21 that they will make is the argument that Mr. Whelan made
22 this morning, which is we received these from our counsel,
23 this is how he evaluated the case, and that's what we
24 relied on. That's an advice of counsel defense where there
25 is not one.

1 And so I would agree with him to the extent that Mr.
2 Daniel was the one that actually made the offer on behalf
3 of USAA. By the way, he wasn't. They sent a third party
4 adjuster to represent them at that mediation, gave the
5 third party adjuster the authority, and the adjuster was
6 repre- -- was there on USAA's behalf. But to the extent
7 Mr. Daniel took acts, that is a different situation than
8 trying to argue Mr. Daniel's advice is what we relied on in
9 reaching an evaluation and in taking the actions that we
10 took.

11 And so that's the distinction. These letters
12 mentioned in F through K in their pretrial brief giving
13 rise to this motion are letters that only went from Mr.
14 Daniel to USAA saying, here's where the case is, here's the
15 update, here are my thoughts on the case, et cetera, et
16 cetera.

17 And from that - and Ms. Moats admits in her
18 deposition - she controlled the litigation. USAA
19 controlled the litigation. Jack Daniel may have been the
20 face of USAA for part of that litigation, but USAA was in
21 control of it. They were the client.

22 And so these letters are totally irrelevant to any
23 claim or defense in the case. They would, I would submit
24 and acknowledge, be relevant and admissible in a case where
25 advice of counsel was a defense.

1 THE COURT: Well, how -- tell me how the jury is going
2 to evaluate whether USAA was being reasonable at the time
3 of mediation, when they made their offer, without looking
4 into what the thought process was to arrive at this
5 evaluation and to make those offers? I mean, that -- how
6 is that not relevant to what the jury has got to consider?

7 MR. WILLEY: Well, USAA is entitled to rely on their
8 investigation and any part of that investigation. There
9 were several individuals at USAA that did an investigation.
10 I think they can argue this is what we looked at, this is
11 what we arrived at, as far as an evaluation in the case.

12 But Mr. Daniel's letters to them are not relevant to
13 that issue because their actions -- first of all, he is a
14 part of USAA. Second of all, their actions are separate
15 and apart from that. These are just advice -- advisory
16 letters, essentially, that says I think an evaluation of
17 the case is X and Y.

18 And so if you're arguing that an evaluation of the
19 case that USAA came to was based on that advice of counsel,
20 if we had an advice of counsel defense in this case, that's
21 a different scenario. We don't.

22 But those aren't actions that Mr. Daniel took towards
23 the insured, Ms. Hood, who's bringing the case. If those
24 actions were to Ms. Hood and they said, I think you're a
25 liar and a scumbag and, you know, your case is worth three

1 dollars, that's a different scenario.

2 These letters were internal letters, which were
3 totally advisory in nature. Of course, Your Honor can
4 review them. But they have already lost on that motion.

5 So anything that Jack said in terms of advice, as they
6 call it, to USAA, is not relevant in this case because it's
7 not a defense.

8 And what we're trying to keep out are those letters
9 and the argument. He's made the argument this morning, in
10 fact, after losing the motion to amend, that Jack Daniel
11 evaluated the case as X. And so we were allowed to rely on
12 that. Well, that may be true if advice of counsel was a
13 defense in this case. But it's explicitly not a defense in
14 this case. And so that's our basis.

15 THE COURT: Well, how are you going to make your
16 argument that they didn't offer the amount of their
17 evaluation if you can't get into what he evaluated the case
18 at?

19 MR. WILLEY: Well, in fact, Mr. Daniel only ever
20 evaluated the case at \$245,000. USAA evaluated it at 250.
21 USAA sent the authority at 250 to settle, and their
22 representative never offered it. And so that doesn't come
23 through Jack Daniel. That comes through the claims file
24 and through Ms. Moats, who was handling the litigation
25 aspect of the case at the time of the mediation and for the

1 duration. I mean, since the -- since the underlying
2 lawsuit was filed and Ms. Moats handled it as the casualty
3 adjuster.

4 And so that -- you know, again, if there was advice of
5 counsel, it may be relevant. There's not, and so it's not.
6 We have to stick just to the acts, not to any advice that
7 Jack may have given.

8 And we may see through the course of testimony, in
9 fact, that the argument as to the reasonableness of the
10 evaluation is really moot in a way because they never
11 offered that amount. And so it's unreasonable -- if their
12 actions are unreasonable on their face, you know, we'll --
13 I mean, we'll get to that point in the argument.

14 But here the question of advice of counsel has been
15 ruled on. It's the law of the case. It is our first basis
16 of argument. And I don't think that they can re-litigate
17 it here and attempt to litigate it in the trial, when we've
18 had no opportunity since last Wednesday to conduct any
19 discovery on the matter.

20 MR. WHELAN: And if I could just correct a couple of
21 things that Mr. Willey said, that there were other
22 individuals who investigated the case. Ms. Hood was
23 attorney-represented within a week. The UIM case was
24 opened essentially when litigation was filed. There might
25 have been a month or two, maybe a month, before Mr. Daniel

1 was hired. There's really no investigation on the UIM
2 side. That's when there's a suit filed and you're served
3 with a copy of the UIM complaint, then you defend it.

4 And I'm happy to provide Your Honor with a copy of Mr.
5 Daniel's letters. They're not just this case is worth 250.
6 They're eight-page, six-page, nine-page letters saying this
7 is what Ms. Hood said, this is what Mr. Tanrath said, this
8 is what's going on with the litigation right now, this is
9 the stuff that's affecting the value.

10 And Mr. Willey I think just told you that it's really
11 USAA making the call and not Jack Daniel. But before, he
12 told you that Jack Daniel was, quote, actually a part of
13 the process and that USAA is directly liable for his acts.
14 So I just don't see how ---

15 THE COURT: I don't -- I don't think we can have it
16 both ways.

17 MR. WHELAN: Right.

18 THE COURT: And while I agree that USAA is not --
19 certainly cannot, at this point, disclaim all -- you know,
20 because Jack Daniel -- that that somehow absolves them of
21 any liability. But if he's their agent and, as you said,
22 he's acting -- they're acting directly through him, then I
23 think his letters are certainly relevant for a jury's
24 determination of whether or not USAA was acting reasonably.

25 So, I mean, in theory I agree with you that the advice

1 of counsel defense if it was -- that's already been ruled
2 on, then it's not a -- again, it doesn't absolve USAA of
3 liability, but -- and I guess we'll have to see the
4 evidence.

5 I haven't actually seen those letters. But my feeling
6 at this point is that they're coming in. But I'll -- I
7 will look at them for relevance when we get to that point.

8 MR. WHELAN: Thank you.

9 So would it be appropriate to get back into the Kuck
10 letter at this point? I think that was another plaintiff's
11 motion in limine.

12 THE COURT: I really -- I feel like we need to move to
13 the motion for summary judgment.

14 MR. WHELAN: Okay.

15 MR. WILLEY: I did have one final motion, Your Honor,
16 which is to sequester the witnesses.

17 THE COURT: I don't have any problem with that.

18 MR. WHELAN: I don't, either.

19 THE COURT: Okay.

20 MR. WHELAN: Who are the witnesses?

21 MR. WILLEY: Ms. Moats.

22 MR. WHELAN: Oh, no, no, no. No, Ms. Moats is USAA's
23 representative at the trial. She cannot be sequestered.

24 MR. WILLEY: Well, Your Honor, if his representation
25 to the Court is that she is here as USAA's corporate

1 representative, that's fine. But that wasn't his repre- --
2 that wasn't his representation to me last week. It was,
3 I'm not even sure if we're calling her and you can't
4 subpoena her and you can't require her to be there. So I
5 want to be very clear on that.

6 MR. WHELAN: Yeah, that's all very true, you can't --
7 she's a Florida resident. She's here. But you cannot
8 exclude the face -- I mean, she is who we have. Your Honor
9 already told the jury -- already told the jury that Ms.
10 Moats is here on behalf of USAA. It would be inappropriate
11 for her to have to leave the courtroom.

12 THE COURT: She can stay in the courtroom.

13 MR. WHELAN: Thank you.

14 THE COURT: Thank you.

15 MOTION FOR SUMMARY JUDGMENT

16 MR. WHELAN: So, Judge, on the motion for summary
17 judgment we just asked Mr. Willey a question about, you
18 know, what this case is actually about; what is the duty,
19 first, which is matter of law; second, how was it breached;
20 third, how did that breach result in damages; and third,
21 that's related, what are the damages.

22 And I'm trying to figure out what case we're going to
23 try. Now, it sounds like the focus is on whether USAA had
24 a duty to offer the \$250,000 in mediation. So they come in
25 with \$250,000. There are negotiations and they end at

1 \$200,000. The plaintiffs are at 650,000. There's a
2 mediator there, and the sides agree, with the mediator's
3 consent, to walk away.

4 The mediator -- this is a court-mandated mediation.
5 The mediator certified it. There's no allegation that it
6 was in bad faith.

7 It seems to me focusing on the issue of duty, which is
8 a matter of law for the Court -- and I should say that not
9 only the existence of the duty, but the scope of the duty,
10 is a matter for Your Honor.

11 So it's not enough to say there is a duty of good
12 faith. Just like it's not enough to say, you know, there's
13 a duty of reasonableness or a duty of good care. It has to
14 be applied to the facts of the case.

15 And there is no law anywhere that says that any party
16 anywhere in a mediation has a duty to offer all the money
17 that they think the case is going to be worth. If there
18 was, mediation wouldn't exist because the plaintiff would
19 have no reason to negotiate. They would just sit back and
20 say -- they would just leave because the defendant would
21 have a duty to pay whatever their top dollar was. It
22 factually doesn't make sense. There is no basis in the law
23 for it at all. And if he's aware of some case, I'm all
24 ears.

25 And I'd somewhat like to take this motion in turn so

1 we can address right now this issue of the duty, this
2 alleged duty to offer all of your policy limits at
3 mediation, and then when we're done with that if he has
4 some other ground I'd like to address that. I think that
5 would be the simplest way to move through what is a rather
6 complicated subject is that is okay.

7 THE COURT: Well, I mean let me just go ahead and ask
8 you. It seemed to me that their argument was that there is
9 a duty of fair dealing, it kicks in at the time that the
10 lawsuit is filed when she sued Johnson, and that by taking
11 one position -- and this is -- I don't know all the facts
12 of this. But in taking one position that the high beams
13 were conclusively on during the course of the wreck and
14 then taking the opposite approach and saying that the -- I
15 guess in the answer, saying that her headlights were off,
16 in the Kirk [sic] action, that that is a violation of the
17 duty to act solely to your insured.

18 MR. WHELAN: So to clarify what their position is, it
19 is that -- and maybe I should back up on the facts just a
20 little bit.

21 THE COURT: Sure.

22 MR. WHELAN: So of course you have Therese Hood
23 driving down the road. Antoine Johnson hits her. She hits
24 the Kuck's. So Therese Hood first sued Antoine Johnson.
25 Antoine Johnson counterclaims back against Therese Hood,

1 and then the Kuck's also sue Therese Hood.

2 So USAA has a liability coverage which requires them
3 to, (a), defend Therese Hood, and, (b), pay for the damages
4 she's responsible for.

5 Now, the Maybank case that Mr. Willey referenced --
6 there are tons of cases. The Mount Holly case that came
7 out a couple of weeks ago. All of them say the attorney
8 who's retained by the liability carrier, in this case Chris
9 Nickels, he does not have an attorney-client relationship
10 with USAA. He has an attorney-client relationship with
11 Therese Hood. Now, USAA is paying his bills, but he is the
12 agent of Therese Hood. He is her attorney.

13 And Therese Hood's position, as you will recall, is
14 that her lights were on. Now, they are apparently
15 contending it's bad faith for Therese Hood's attorney just
16 because he's being paid for -- paid for by USAA, he's -- he
17 does what she wants, her lights were on. He retains an
18 expert. The expert opines ---

19 THE COURT: This is Kevin Smith?

20 MR. WHELAN: No, ma'am. I'm sorry. This is Chris
21 Nickels with Clawson and Staubes.

22 THE COURT: Okay. And this is in the Johnson case or
23 this is in the Kuck case?

24 MR. WHELAN: Well, it's sort of both because Chris --
25 I have a handout in my -- that I used at the motion for

1 summary judgment that may be helpful, Your Honor; and it
2 may not, but I will hand it up. Anyway, you've seen that.

3 May I approach, Your Honor?

4 THE COURT: Uh-huh.

5 [Whereupon, Mr. Whelan proffers documents to the
6 Court]

7 MR. WHELAN: So that is a triangle of the suits. So
8 at the bottom you have the Hood -- Hood suing Johnson, and
9 then Johnson counterclaiming back against Hood.

10 THE COURT: Got you.

11 MR. WHELAN: All right. So in that case USAA gives --
12 pays for her attorney, and that's Chris Nickels.

13 Also, the Kuck's sue her. USAA also retains Chris
14 Nickels to defend her in that case. And it was Chris
15 Nickels and Therese Hood who took the position that her
16 lights were on.

17 And, of course, I don't have this on the triangle; but
18 Therese Hood was also represented by Mr. Willey and Mr.
19 Smith, Kevin Smith, her personal attorneys, who tried the
20 underlying action. And, of course, they said her lights
21 were on, too.

22 And so in this liability side it was that side that
23 retains an expert to support her. And the expert goes out
24 and looks at it and says, not that your headlights were on
25 but your high beams were on.

1 Now, on the other side Hood sues Johnson. Johnson has
2 \$25,000 in liability limits. Eventually, Geico pays the
3 liability limits. So then USAA's UIM kicks in. That's
4 Jack Daniel.

5 Now, the statute is very clear, 38-77-160. Jack
6 Daniel's job is to protect the interest of USAA. It is a
7 statutory right. 38-77-160 gives the insurer the right to
8 defend that case in its own interest. And there are cases
9 that say that is for the benefit of the insurer, not the
10 insured.

11 And it's their position that Jack Daniel should have
12 been simultaneously repre- -- you know, working for Ms.
13 Hood. It's bad faith for him to assert -- to deny this
14 request to admit.

15 So, anyway, you had all these eyewitness testimony
16 that we've talked about, both the Kuck's, Justin Lee, Kerry
17 Tanrath, the police officer, all saying some version of the
18 lights were off. Then they get this one expert report; and
19 the plaintiff's personal counsel, Kevin Smith, sends a
20 request to admit to Jack Daniel, admit that Mrs. Hood's
21 lights were on.

22 So Jack has all this evidence that they seem -- are
23 trying to get Your Honor to rule hold there is a duty to
24 ignore that evidence. And the ironic thing, the really
25 sort of frustrating thing about this, is after all that,

1 they get to trial and they concede that her lights were
2 off. And Mr. Smith stipulated that her lights were off.

3 So I think we have to start with the duty. There is
4 simply no duty for an insurer in a UIM action, under 38-77-
5 160, to represent Ms. Hood's interest. The law says the
6 opposite of that.

7 Then, I mean, if there was -- which I -- if there was,
8 then you would go to reasonableness. Would any reasonable
9 juror find that it was unreasonable to deny a request to
10 admit that would conclusively establish liability when you
11 had five eyewitnesses saying that her lights were on and
12 this expert report is -- says high beams and she says
13 headlights and she has these credibility issues?

14 THE COURT: Now, was speed an issue on -- had that
15 come up at the time of mediation? I know there was some
16 issue about something saying she was going sixty-three
17 miles an hour and, of course, that being a contested issue.
18 But was that something that had already come into play at
19 the time of mediation?

20 MR. WHELAN: Well, yes, to the extent that the
21 plaintiff in her recorded statement to USAA said she was
22 going thirty miles an hour at best and in her deposition,
23 sworn under oath, she was going, you know, about thirty
24 miles an hour.

25 And then this same expert that was retained, Mr.

1 Poplin, he downloaded her black box that showed she was
2 going sixty-two miles an hour.

3 So I don't think that really factors into the
4 existence of a duty or not. But I do -- I think that goes
5 to her credibility. But, yes, that is an issue.

6 THE COURT: Okay. Let me hear from you, Mr. Willey,
7 as to what duty USAA breached.

8 MR. WILLEY: All right. First, let's mark this as a
9 Court's Exhibit.

10 [Whereupon, Court's Exhibit Number 1, discovery
11 documents, is marked for identification by the court
12 reporter]

13 THE COURT: Okay. So tell me what this is that you're
14 handing up to me.

15 MR. WILLEY: So what you have here, Your Honor, are
16 the relevant -- some of the relevant pleadings, discovery,
17 in the case; the claims file, which includes the reports;
18 the documents in the claims file. Basically, the discovery
19 in the case.

20 Because we were not given the ten-day notice under 56,
21 I haven't had time to prepare a memorandum so I will limit
22 this to oral argument. But these are the important
23 documents.

24 And one other document that I'll show you, which is a
25 little I guess more important when we are talking about

1 this - I will just mark as Court's 2 - is the copy of the
2 check.

3 [Whereupon, Court's Exhibit Number 2, copy of check,
4 is marked for identification by the court reporter]

5 MR. WILLEY: So the duty in the case, you know, is
6 fairly straightforward. And Your Honor hit it right on the
7 head. And it actually comes from a case that Mr. Whelan
8 chose to cite, which is Snyder.

9 And, basically, the insurer has a duty to treat their
10 insured with a good faith and a fair dealing. That does
11 not mean that they cannot litigate a case. But what it
12 does mean is that they cannot take two disparate positions
13 before a court and essentially in one of those commit fraud
14 on the court and untruth on the court, because it can't be
15 both ways in order to protect their money in two different
16 cases.

17 THE COURT: So which would be the untruth, that the
18 headlights were on or that they were off?

19 MR. WILLEY: Well, that is a -- that is obviously a
20 question. But at the time that ---

21 THE COURT: So let me just -- because this is what I'm
22 struggling with.

23 MR. WILLEY: Right.

24 THE COURT: If they are -- if there are facts for you
25 and facts against you, is it your position that you cannot

1 -- as the insurer, you cannot spin the facts in one way in
2 one case and take those same set of facts, some for and
3 some against you, and spin them in the opposite direction
4 in a related case?

5 MR. WILLEY: Spin and taking a factual position, I
6 view as two different things. An insurer cannot say in one
7 case this is true in order to protect the liability
8 proceeds of their policy and then in another case say this
9 is false in order to protect the underinsured motorist
10 proceeds available under their policy, which is ---

11 THE COURT: And in theory I would agree with you, just
12 like a defendant cannot go plead guilty in general sessions
13 court to DUI ---

14 MR. WILLEY: Right.

15 THE COURT: --- and then when they get sued say, well,
16 I wasn't the driver, in a civil case.

17 MR. WILLEY: Right.

18 THE COURT: I mean, there's judicial estoppel that
19 says you cannot take two different positions regarding the
20 same set of facts to get a benefit in one and then disclaim
21 that same fact in a separate lawsuit involving the same set
22 of facts.

23 So I guess tell me what the -- because I know one of
24 these cases has not actually gone to court yet. So tell me
25 what absolute hard and fast position they took with the

1 headlights ---

2 MR. WILLEY: Sure.

3 THE COURT: --- that then they changed on.

4 MR. WILLEY: So with respect to the headlights, in the
5 answer to the Kuck's case, USAA took the position that --
6 in the answer, that her headlights were on. So in the case
7 where Ms. -- where the Kuck's were suing Ms. Hood
8 attempting to recover -- still attempting to recover for
9 liability proceeds, because that's the case that is still
10 pending, in the answer they took the position that her
11 lights were on. And they did that in Paragraphs 4 and 7 of
12 the answer, where it was pled that the lights were off and
13 they deny that. So I have the pleadings in that case.

14 [Whereupon, Mr. Willey reviews documents]

15 MR. WILLEY: This is the complaint and the answer in
16 that case.

17 [Whereupon, Court's Exhibit Number 3, complaint,
18 marked for identification]

19 [Whereupon, Court's Exhibit Number 4, answer, marked
20 for identification]

21 [Whereupon, Mr. Willey proffers documents to the
22 Court]

23 MR. WILLEY: And if you will look at Paragraphs 4 of
24 the complaint, it says a lot of things. Among them with --
25 it says Defendant Hood who was operating her vehicle with

1 no headlamps illuminated. If you read the answer it says
2 Defendant Hood admits so much of the allegations of
3 Paragraph 4 as alleges it occurred on this date at this
4 place; and as to the remaining, denied.

5 Seven, the same thing. She was negligent and, (c),
6 failing to properly illuminate her headlamps and lights in
7 violation of the code. Paragraph 7 in the answer, denied.

8 And so in this instance they took the position, in
9 order to protect the liability proceeds, which is what was
10 demanded in that case, that the headlamps were on -- were
11 off, excuse me. And then -- on. Excuse me. I'm sorry.

12 [Whereupon, Court's Exhibit Number 5, Request to
13 Admit, is marked for identification by the court reporter]

14 MR. WILLEY: And the important thing, Your Honor, in
15 the Kuck's case is what they relied on before that. And
16 one of the things that they relied on was the report that
17 USAA hired the expert, Woody Poplin, to do.

18 I provided you a copy of the check from USAA to Mr.
19 Poulin for that report. And it's in the pleadings. And
20 that report said that at the time of the collision her
21 lights were on.

22 In the other case, which was Hood v. Antoine Johnson,
23 which is the case solely about the UIM proceeds from USAA,
24 a request to admit was sent that said admit Plaintiff Hood
25 was operating her vehicle with her headlamps illuminated at

1 the time of collusion, and it was denied.

2 And here's what's important about that. Two things.
3 One, they had the benefit not only of Mr. Poplin's report
4 but in this case that Mr. Daniel on behalf of USAA actually
5 hired another expert, a Mr. Black who is a consulting
6 expert.

7 And part of the deposition testimony in this case,
8 that you will see with Ms. Moats, when we went through Mr.
9 Black's report, is they decided not to disclose Mr. Black
10 in that case because a second expert had said, that hired
11 by USAA, that Mr. Poplin completed the lamp filament
12 analysis test correctly and actually advised USAA that you
13 may not want to name me because I will have to make certain
14 concessions to the plaintiff, who is USAA's insured.

15 And so now, absent anything that anyone in the ether
16 is saying in order to try to get money, they have two
17 experts that they hired that both say at the time of the
18 collision the scientific methodology in testing shows the
19 lights were illuminated; and they took the opposite
20 position just to argue insured.

21 So with respect to ---

22 THE COURT: Did he do independent testing, or he just
23 evaluated what Poplin ---

24 MR. WILLEY: He evaluated Mr. Poplin's testing.
25 Because the way that a lamp filament analysis test works,

1 just for the Court's benefit, is once it's done it can't be
2 redone because part of that is testing the filament. And
3 so unless you preserve all of those components and do it
4 simultaneously, it can't be redone. But he looked at Mr.
5 Poplin's testing methodology and said it was done
6 appropriately.

7 And so, you know, the question for the Court -- the
8 duty is clear. I mean, the duty in Snyder and Tyger River
9 and Tadlock Painting Company and Howard v. State Farm, you
10 know, an insurance company cannot be unreasonable in
11 processing a claim under a mutually binding insurance
12 contract or a plaintiff can recover consequential damages.

13 It doesn't say they can do it as long as they are
14 doing it under this statutory construction over here.
15 Which existed, by the way, at the time of all of these
16 cases -- or most of these cases. It said they can never do
17 it. And in this case, their insured was Ms. Hood.

18 The second thing that I will point out to the Court,
19 which goes to the argument earlier -- and I have multiple
20 duties and multiple breaches. I think that's the clearest
21 one under the law, because they're taking different
22 positions in court to protect money.

23 Another one that USAA knows about -- and this is an
24 Oklahoma case, and in this case USAA was a defendant. It's
25 Newport v. USAA case. And the important thing about this

1 case is when you read through our insurance law in South
2 Carolina -- in fact, when you read the Meyers opinion,
3 which he referenced, which is the Duffy opinion, they cite
4 to a case. And the case is Buzzard v. Farmer's Insurance
5 Company. That case is 824 P.2d 1105, Oklahoma, 1991.

6 [Court's Exhibit Number 6, case, marked for
7 identification]

8 [Document presented to the Court]

9 THE COURT: Is that what you have just handed me?

10 MR. WILLEY: That is not. That is a separate case.
11 And I am only using that case to the extent to show how
12 Oklahoma law parallels South Carolina law in terms of the
13 negligent insurance adjusting aspect.

14 And I will -- I will readily admit to the Court that
15 there is not a lot of law in South Carolina dealing with
16 UIM bad faith and negligence. And that's either because
17 most of the time the insurance companies act in good faith
18 towards their insured, given the strength of the Tyger
19 River case and its progeny, or people just don't bring the
20 claims.

21 But in the Meyers case, they cite to that case. And
22 in the Newport case, here are the facts. The New- -- it's
23 an uninsured case, which is the same sort of case. It's a
24 first party bad faith case, just like an underinsured case
25 is a first party bad faith case.

1 And the Newport's maintained UM coverage with stacked
2 policy limits totaling 1.5 million dollars. Terry, the
3 defendant in that case, was uninsured; and so this was the
4 only coverage at issue.

5 In May 1994, USAA set the value of the Newport claim,
6 internally their reserves, from 750,000 to 900,000, taking
7 into account its determination of liability as 80 percent
8 on the part of Terry and 20 percent on the part of Mr.
9 Newport.

10 Now, that's interesting because that is the exact same
11 position that USAA took in this case. From the moment that
12 the case was opened by a lady named Missy Howard, who
13 handled the BI aspect of the claim initially, all the way
14 through the process with Ms. Moats handling it and the
15 litigation aspect of the case, the allocation of liability
16 remained the same. It was 80 percent on Mr. Johnson, 20
17 percent on Ms. Hood. That took into account all the
18 information they had; lights, speed, everything. Same
19 thing in this case.

20 USAA hired an attorney in that case and gave him
21 750,000 authority, which was the bottom of their reserve -
22 their reserve at that point was 750 to 900 - to negotiate a
23 settlement.

24 Three offers below that amount were rejected by Ms.
25 Newport. Trial of the claims resulted in a unanimous jury

1 verdict of 1.5 million dollars on the claim for policy
2 proceeds.

3 USAA -- this is an appeal of that verdict, because
4 there were other aspects including punitive damages. But
5 this is not used to say this is South Carolina law. There
6 are aspects of this case that have been overturned in
7 Oklahoma. But the analysis is sound under the Buzzard
8 decision which, as of 2008 when we wrote the Meyers opinion
9 -- excuse me -- 1997 when we did Meyers and 2008 when we
10 did Snyder, we relied on it as interpreting how to
11 interpret our law based on what other states are doing.

12 And that case says, much like our case: An insurer
13 has an implied in-law duty to act in good faith and deal
14 fairly with the insured to ensure that the policy benefits
15 are received. The essence of a bad faith action is the
16 insurer's unreasonable bad faith conduct, including the
17 unjustified withholding of payment due under a policy. The
18 decisive question is whether the insurer had a good faith
19 belief at the time its performance was requested that it
20 had justifiable reason for withholding payment under the
21 policy.

22 And that's quoting the Buzzard case.

23 And in this case what they said was because of the
24 reserve being set, litigation supervision at USAA was given
25 authority to settle the claim for up to 900,000, however,

1 the lawyer was hired and only given authority to 750
2 authority.

3 Authority -- and they admit in their case law at this
4 point is scant.

5 But here's the key point. And I think this is the
6 point where our Supreme Court would reach. And I think all
7 of the case law supports this: An insurer may not treat
8 its own insured in the manner in which an insurer may treat
9 third-party claimants to whom no duty of good faith and
10 fair dealing is owed.

11 And that is the commonsense analysis dial-back of
12 that. And I could have gone through this case without
13 mentioning USAA or the facts of this case and given you all
14 that based on our law, recognizing that some parts of this
15 are not good here; but I think that sentence says it all:
16 An insurer may not treat its own insured in the manner in
17 which an insurer may treat third-party claimants to whom no
18 duty of good faith and fair dealing is owed.

19 And what we have in South Carolina is a case right on
20 point. And the case says when the reasonable thing to do
21 with that third-party claimant, for the benefit of the
22 insured, is to settle within the policy limits and you
23 don't do it, that is negligence.

24 And what we have here is we don't have to speculate.
25 The Snyder case, there was a lot of speculation about what

1 should the valuation of the case be, how much should it be
2 worth, State Farm should have -- in that case State Farm
3 didn't make an offer. They said we don't think that case
4 is worth anything.

5 The insurance company is allowed to do that. But when
6 they evaluate a case at a certain level and then try to
7 low-ball their insurer by never even making an offer of
8 that amount, particularly when the mediation comes down to
9 this: The insurance company at 200,000, the plaintiff's
10 lawyer saying we could get it done for somewhere between
11 three and 400,000, and they have 250,000 in authority and
12 never make it -- and I asked Ms. Moats at her deposition
13 about this, and she was honest; she said generally when a
14 lawyer says this is the amount I would take to settle the
15 claim, that is usually higher than they would take. And so
16 you had in this case probably an opportunity to settle it
17 for 250 at the mediation. That was never pursued because
18 they never put the money on the table.

19 And Ms. Moats' deposition is helpful on this topic
20 because -- I'm quoting from Page 137. And I say:

21 (Q) Okay, I'm going to show you 258, impact of recent
22 development. Our last settlement offer at mediation was
23 200,000. Plaintiff's counsel suggested the case could be
24 settled for an amount between three and 400,000 but his
25 lowest specific demand was 650,000. Do you see that?

1 (A) I do see that.

2 (Q) Okay. At the time of the mediation the reserve
3 on the case was set at 250,000, correct?

4 Answer:

5 (A) Yes.

6 138:

7 (Q) In your experience handling mediation for USAA,
8 if a plaintiff's lawyer says we can settle the case between
9 three and 400,000, you've offered 200,000, but you know you
10 have a reserve of 250; does that sound like a case that you
11 might be able to get done with a little work depending on
12 what happened at mediation?

13 (A) Potentially, it could be.

14 Question -- and that was her answer.

15 Question:

16 (Q) And the reserve was never adjusted after August
17 24, 2016; right?

18 Answer:

19 (A) No, it was not.

20 THE COURT: Let me ask you this. I mean, how was your
21 client damaged then, if she got a verdict greatly in excess
22 of, you know, their evaluation of 250? I mean, even if
23 they had made a demand for the 650, even if they had
24 accepted that, she got more than that at trial. So how is
25 she -- ultimately, she did better at trial than if they had

1 reasonably offered ever penny that they had authority for.

2 MR. WILLEY: As to -- as to that cause of action, she
3 did better at trial. But she's still entitled to recover
4 her consequential damages for having to go through the
5 process when they did not do what they should have done,
6 which is offer that money which would have resolved the
7 process.

8 They don't get to roll the dice and then say, well, it
9 worked out for you so we don't have to be held accountable
10 and they continue doing this in every case, taking
11 disparate positions in liability and UIM cases indefinitely
12 because the math works better. Ultimately, it works out
13 better for them than it will work out for the plaintiff.

14 They have a duty to their insured. When they breach
15 that duty she's entitled to damages, consequential damages,
16 from that. And as to that cause of action, those are the
17 damages that she's entitled to. And that's clear in South
18 Carolina law. We have good authority for that.

19 And I -- you know, I continue with Ms. Moats, if you
20 go through 139 and 140 on this. And I asked her; I said,
21 on 140:

22 (Q) And so in this case it's safe to say --

23 And I'm going to skip.

24 (Q) ... it looks like a case we might be able to get
25 resolved at this point.

1 Answer:

2 (A) On the surface it looks that way, yes.

3 (Q) Did anything that you are aware of happen to try
4 to get the case resolved at that point?

5 Answer:

6 (A) Not to my recollection.

7 And when I asked her, on page 142, I say:

8 (Q) Tell me about the reserve and what that means and
9 I think it's important.

10 She said:

11 (A) We're trying to -- we're trying to make an
12 appropriate evaluation of the case based on the evidence we
13 have to offer -- based on the evidence we have to offer a
14 fair and reasonable value of the claim, which apparently we
15 believed was set at 250.

16 And they never did it. She admits in her own
17 deposition that they were unreasonable in not offering the
18 250. It's where the Court ended up in this analysis of
19 this specific factual position. It's based, in South
20 Carolina law, that an insurer cannot just run carte blanche
21 and do whatever they want to do, rolling the dice, you
22 know, with their insured.

23 And Ms. Hood -- you know, I mean we'll hear testimony
24 from her. But the consequential damages in this -- in this
25 case are severe.

1 THE COURT: Well, but they offered 200. Your lowest
2 demand was 650. So tell me how -- I mean, what difference
3 would it have made if they're -- if they offered the 250
4 and your lowest demand was 650 ---

5 MR. WILLEY: Well, that's not accurate. So the -- so
6 the report that we've reviewing there says a couple of
7 things. In mediation, as Your Honor knows, there's a lot
8 of formal demands that go back and forth.

9 THE COURT: I understand there was this discussion.

10 MR. WILLEY: Right.

11 THE COURT: It wasn't an actual demand; but, well, we
12 probably could get this done for three to four ---

13 MR. WILLEY: Well, the mediator -- all that means is
14 the mediator didn't deliver the demand. But the
15 plaintiff's lawyer said we could get it done between three
16 and 400,000. They said 200 was it. That's where the
17 mediation broke down. So that was in USAA's report. That
18 was their understanding, as well, from the mediation.

19 And, again, this is about what USAA knew, not what
20 might be going by others. And what they knew and Ms. Moats
21 admitted to me, based on her reading of that report which
22 was sent to her, was that the case could be settled between
23 three and 400 and that because the plaintiff's lawyer was
24 saying that, it was probably -- he was quoting it higher
25 than it -- than it should have been.

1 So those are two aspects, you know, of the case that I
2 think are clear under South Carolina law and the duty --
3 you know, the duty to the insured.

4 And, in fact, now that we know Ms. Moats is here in
5 her capacity as corporate representative for USAA, she
6 admits on Page 142 of her deposition what they should have
7 done to be reasonable to their insured.

8 Starting at Line 19:

9 (A) We are trying to make an appropriate evaluation
10 of the case based on the evidence we have to offer, a fair
11 and reasonable value of the claim which apparently we
12 believe was set at 250.

13 So even under that theory -- of course, violation of
14 an internal policy and what they're supposed to do, can be
15 evidence of negligence. She admitted in her deposition
16 that that's what they should have done, and they did not do
17 it in this case. And so I think on those two points, it's
18 relatively clear.

19 And I should have mentioned this. But on that cause
20 of action, the other damage would be a cost of litigation.
21 So she had almost, from that point, \$50,000 in litigation
22 costs.

23 So consequential damages would also include those
24 litigation costs that she had to go through to get the case
25 ready for trial in the underlying case, which was almost

1 \$50,000 that she had to pay.

2 MR. WHELAN: So I guess I'll -- I guess I'll start
3 with the damages and work backwards.

4 First of all, when counsel talked about damages what I
5 think what I heard him say was the 50 it took her -- that
6 she would settle for 300 to 400, she got a million, and it
7 cost her \$50,000 to get that million. So she hasn't been
8 damaged. She actually profited, by a lot.

9 And he also made the fact that -- he said -- made the
10 statement that, well, USAA can't just make the insured roll
11 the dice and then make them incur these expenses, and then
12 reap the reward of that.

13 Well, Judge Duffy actually spoke to that in Snyder.
14 And he said, it would not make any sense at all for an
15 insurer who thought this case was really worth a million
16 dollars to be at mediation and have a chance to settle it
17 for 350 or 650 or anything.

18 And so if they really knew it was worth a million
19 dollars, of course they would have accepted that offer.
20 Instead, they have to pay an attorney for another year and
21 then they have to pay the million dollars.

22 It doesn't make any sense. And Judge Duffy speaks to
23 this exact issue.

24 On the -- the previous thing he mentioned was this
25 case from Oklahoma that he handed to you. And that's a

1 Oklahoma case from 2000. South Carolina law is the exact
2 opposite of that. He talked about this Oklahoma case
3 saying that you had to offer whatever your reserves were.
4 And Judge Wooten spoke to that in Collins vs. Auto Owners.
5 And, you know, I say South Carolina law. This is -- this
6 is -- the cases we have are federal law. But they're
7 pretty uniform. In Collins vs. Auto Owners, Your Honor, I
8 only have one copy that I'm happy to provide -- hand to
9 you.

10 THE COURT: You can just give me the citation.

11 MR. WHELAN: The cite on that is 759 Fed Sup 2nd 728.
12 And in that case the plaintiff argued basically what the
13 plaintiff is arguing here, that one adjuster valued the
14 case at 150,000 but the offer that was made was 100,000 and
15 the plaintiff argued that was bad faith, they should have
16 offered the 150,000. And Judge Wooten said, no, it's not.
17 And it's discussed towards the end of the -- end of the
18 opinion.

19 So the Oklahoma -- the Oklahoma case, I would ask you
20 to look at South Carolina law. And Mr. Willey, he said,
21 all right, you have this Oklahoma case and then let's talk
22 about South Carolina law. And the South Carolina law he
23 was talking about was a third-party coverage, which is the
24 Tyger River doctrine. The Tyger River doctrine does not
25 apply under these facts.

1 And I believe it was Judge Duffy in the Snyder opinion
2 that said this all sort came from Judge Blatt's Meyers'
3 opinion. And I just ask you to read those three cases;
4 primarily Meyers, Snyder, and Collins. And I have a copy
5 of at least Meyers and Snyder.

6 But, anyway, Judge, as Duffy said, Tyger River does
7 not apply -- Tyger River does not apply to an underinsured
8 motorist situation. It's a completely different theory.
9 Meyers never extended that duty.

10 So Mr. Willey is taking an Oklahoma case that the
11 South Carolina authority is the exact opposite; and then
12 he's taking another theory which is Tyger River, which does
13 not fit the UIM facts.

14 And so I guess that takes me back to where he started,
15 which was with the duty. And he said that --
16 interestingly, he said that duty comes from Snyder. So I
17 think both parties agree that Snyder is an important case.
18 And then he said that there was a fraud on the Court.

19 And he said you can't take a disparate factual
20 position in the same case, which I thought was ironic.
21 Because the person that took a disparate factual position
22 in the same case was Therese Hood. She maintained that her
23 lights were on the whole time, and then at trial she said
24 her lights were off.

25 That's the same case. And what USAA did was

1 completely different cases.

2 He handed you up that answer. That answer was not an
3 answer for USAA. That was an answer for Therese Hood, and
4 the signature block on that was Chris Nickels signing as
5 attorney for Therese Hood.

6 And the idea that an attorney can put something in an
7 answer other than what your client instructs you in an
8 answer is absurd.

9 That was Therese Hood's answer. And it -- and he was
10 bound to assert her position, answer on her behalf. She's
11 the one that said her lights were off. And that simply
12 cannot be bad faith.

13 And then I guess the other thing -- the other thing
14 that he said his duty springs from is the failure to list a
15 -- this witness, Tyler Black, as a consulting expert. And
16 I wanted to just read to Your Honor the letter he referred
17 to that talked about Tyler Black. Just give me a second to
18 find that.

19 [Whereupon, Mr. Whelan reviews documents]

20 MR. WHELAN: So this is a February letter from Jack
21 Daniel to USAA. It is eight pages long, single spaced; and
22 there's a section on consulting engineer.

23 By the way, he also talks about the fact that they
24 inspected this vehicle make and model. And it would be --
25 so Woody Poplin said her high beams were on. And Therese

1 Hood said, no, my automatic lights, my low beams, would be
2 on.

3 And so what Jack did is he went and got the same
4 vehicle and looked to see if when your high beams are on,
5 your low beams would be on or off. And that showed that if
6 your high beams are on on this vehicle, your low beams are
7 on as well.

8 And I'm sorry, Your Honor. I'm sort of confusing
9 myself. But let me back up. Woody Poplin said her high
10 beam light was on and her low beam light was off. What the
11 vehicle inspection found was that on this model vehicle, if
12 your high beams are on then your low beams are on as well.
13 So that was -- that was relevant.

14 But on the consulting engineer, he -- there's three
15 paragraphs in here where he talks about the -- what the
16 engineer did. And Your Honor was right; he didn't do his
17 own inspection, he just looked at Woody Poplin's report and
18 he concluded that the report appeared to be done right.

19 Now, he says here: Mr. Black agreed there are
20 potential credibility issues with the bulb test because of
21 chain of custody and the decision to conduct the bulb test
22 without inviting the defense to observe or participate.

23 And then Mr. Willey talks about how -- I think he said
24 that Jack Daniel said we can't list him because he would
25 had to give concessions. Actually, what it says is it

1 says: In a recent conference call Mr. Black suggested he
2 might be more effective in a consulting role because if he
3 is named as an expert he may ultimately be forced to give
4 certain concessions to plaintiff's counsel. At this point
5 we do not foresee any critical concessions Mr. Black would
6 be forced to give, but calling him as a witness could
7 overcomplicate this case.

8 And so it's their position that it is bad faith for a
9 UIM insurer, acting for its own benefit under the statute,
10 must list every expert it talks to? Anytime there's a
11 consulting expert, they must be identified as a trial
12 witness, according to him.

13 There's no duty. There's no duty. There's no breach.
14 There's no damages. Now, if he has some other duty or some
15 other conduct that he alleges is at issue here, I'll be
16 happy to address it. But what we've heard about right now,
17 there's just simply no duty. There's no way a reasonable
18 jury could determine that what USAA did was unreasonable,
19 even if there was a duty to extend to these facts.

20 And, as Your Honor has pointed out, not only was she
21 not damaged, she made money.

22 And one other thing. I think Mr. Willey sort of
23 referenced emotional damages because Ms. Hood was not
24 believed by USAA in the underlying case. And he said
25 something like for five years she's had to deal with this

1 because they didn't -- they didn't believe her.

2 And I know he's marked the trial transcript as an
3 exhibit. And on Page 599, starting at Line 3, Mr. Willey's
4 -- this is Mr. Willey's closing argument. And he tells the
5 jury: For 1,035 days they have said exactly what Mr.
6 Daniels said to you in their opening statements, the
7 plaintiff caused this wreck. And now the twelve of you
8 know what Mrs. Hood has known for 1,035 days and what I've
9 known for a shorter period, that that's not the truth.

10 And then after he asks for eleven-million dollars in
11 damages, he says -- he uses this to demonstrate the case,
12 the anxiety which you saw and when she took the stand.

13 So to the extent he's saying that she has some damages
14 because she wasn't believed, even if you could get past
15 duty and breach and causation, he already asked the jury to
16 award him for those damages. And they did.

17 THE COURT: Yes, sir? Do you want to respond?

18 MR. WILLEY: Yeah, briefly.

19 Your Honor, a couple of things. The cases that he's
20 asked you to read are federal court district court
21 opinions, which aren't binding any more than the case I
22 cited.

23 But let me just direct Your Honor's attention to a few
24 South Carolina cases, the first being the Tyger River Pine
25 Co. case, the Tadlock Painting case which is 322 SC 498,

1 Howard v. State Farm case which is 316 SC 445.

2 And here's why it's important. Those cases all say
3 the same thing: A bad faith claim may exist even in the
4 absence of any violation of an insurance contract
5 provision, as the benefits due an insured are not limited
6 solely by those expressly set out in the contract. That's
7 the Tadlock case.

8 The Howard case says the elements of a bad faith
9 refusal to pay action are, (1), the existence of a contract
10 of insurance between the parties. Refusal of the insurer
11 to pay benefits due under the contract resulting from the
12 insurer's bad faith or unreasonable action and causing
13 damage to the insured.

14 Consequential damages are here in Ms. Hood's
15 deposition. She talks about those. We've talked about the
16 litigation costs. The only issue, the jury issue in this
17 case, is whether the insurer's actions were unreasonable.
18 That is a classic jury question, whether something is
19 reasonable or unreasonable.

20 The duty in the case is well-prescribed into the law.
21 They admit they have a contractual relationship with here.
22 Therefore, they have a duty of good faith and fair dealing.

23 They admit they refused to pay benefits due under the
24 contract. That's admitted in the case. The only question,
25 then, is whether or not that failure to pay at that

1 particular time -- and, again, we can't look forward to
2 determine reasonableness. Reasonableness is what we know
3 at the time we make the decision and whether or not what
4 they knew at the time they made the decision made their
5 actions in not paying the full 250 unreasonable, or the
6 full policy unreasonable. That's the question in the case.

7 And the duty is quite clear. We talk a lot about
8 duty. There's also internal duty. There's also USAA's
9 duty it sets for itself. For instance, we treat our
10 clients like family. Their values of integrity and
11 honesty, which are on their wall.

12 Ms. Moats admits to me in her deposition that if
13 people -- if two different positions are taken as to facts,
14 one is dishonest.

15 Something USAA did in this case is dishonest. And I
16 don't think that Mr. Whelan is taking a position that Mr.
17 Nickels would have ever signed a pleading that he thought
18 to be false; because, of course, as officers of the Court
19 we have a Rule 11 duty to ensure that when we sign a
20 pleading we believe it to be true. There's a remedy if we
21 don't, and it's called asking to be relieved as counsel.

22 I've had to do that very few times, thankfully. But
23 when that time comes and someone doesn't believe something
24 their client is saying to be true, that's their duty under
25 the law. And so I don't think any of that comes to bear on

1 any of these issues.

2 And, again, when we talked about -- these are all in
3 there; their ethos, what they're supposed to be, honest,
4 integrity, loyalty. And I asked her:

5 (Q) Would you agree with me that saying something
6 that is contrary to the truth is dishonest?

7 (A) Yes.

8 My question is:

9 (Q) If one person says the headlights were on and one
10 person says the headlights were off, you would agree with
11 me that one of those statements is not true? I

12 (A) Yes.

13 After some objection.

14 THE COURT: But you would agree with me that there was
15 conflicting evidence on that issue? Even at the time of
16 mediation there was some conflicting evidence on that
17 issue?

18 MR. WILLEY: Conflicting evidence as to?

19 THE COURT: Whether or not the headlights were on.

20 MR. WILLEY: No. I -- well, I would not agree that
21 the evidence was the same. I would -- and I'll take you
22 through it. So the statement they ---

23 THE COURT: In other words, what I'm interested in is
24 at the time of mediation if there was -- I understand we
25 had Mr. Poplin's opinion that the high beams were on. But

1 I also understand that at that point there was also some
2 conflicting testimony that her headlights were off.

3 MR. WILLEY: Well, I disagree with that. The position
4 that they are taking is on the basis of changed testimony,
5 which when it came to bear they agreed, for example, I
6 could not see her lights at the time of the collision.

7 Now, that individual in the recorded statement did
8 say, I didn't say headlights. But when asked about it, it
9 was: I couldn't see the front of the vehicle at all so I
10 didn't know one way or the other whether they were on, I
11 assumed they weren't on or he would have seen her.

12 Which they weren't allowed to present at trial. And
13 this is why, you know, what happened at trial is irrelevant
14 to the action, because we end up litigating the whole thing
15 over.

16 And, you know, in this case the question is the
17 position that they took -- they set the reserve based on
18 all the information they had. Was that a reasonable
19 position? That's the jury question. I mean, that is the
20 quintessential jury question in a bad faith case, was their
21 action reasonable.

22 And the other three elements are admitted. Now,
23 there's other causes of action in our complaint, too. Mr.
24 Whelan seems to focus in on this one, so that's why I'm
25 focusing on it.

1 You know, but in the negligence action you have duty,
2 breach, causation, and damages. And it seems like we've
3 got those, certainly. When we drill down on the bad faith,
4 it seems as though he wants to argue that their position
5 that they took was reasonable. And I understand that, as a
6 position that they take; but that's a jury question.

7 There's no question as to the duty, which is what I
8 understood we were talking about first. I think the duty
9 is clear. You have a duty of good faith and fair dealing
10 with your insured. You have a duty to be honest with your
11 insured. You have a duty under the contract to your
12 insured. Those are the duties in the case.

13 You know, and they weren't -- they weren't met here,
14 for a variety of reasons that we've -- that we've been
15 through and, Your Honor, further at least it aided in
16 discovery and depositions.

17 They did not even meet -- in a simple negligence
18 action, for example, a violation of company policy is
19 enough to get you to a jury. If you've got a policy to do
20 X and you do Y, our courts have said that's evidence of
21 negligence.

22 Well, in this case they have a policy of honesty. She
23 admits at one point or the other they were dishonest,
24 taking two disparate factual positions, as the corporate
25 representative.

1 And, you know, that is what it is. I mean, I don't
2 know how you get around that. And I understand that Mr.
3 Whelan kind of wants to conflate all of the issues, which
4 is why I think briefing and discovery would have been
5 helpful in this.

6 But it's fairly -- it's fairly simple when you get
7 down to it. There's clearly a duty. There's clearly a
8 breach. The question is what it unreasonable, and that's
9 a -- that's a jury question.

10 THE COURT: Yes, sir?

11 MR. WHELAN: Yes. So just quickly. First, I'm not
12 trying to conflate anything; I'm trying to separate it out
13 and figure out what act they're trying to say violated the
14 duty of good faith.

15 Now, we just heard something new from Mr. Willey this
16 time; and that was honesty and dishonesty. And he quoted
17 Ms. Moats' deposition and said that -- he got his question
18 right, which was would you agree with me that if one person
19 says the high lights were on and another person says the
20 high lights were off that one of those statements is not
21 true. But he got her answer wrong, which was, answer:

22 (A) I don't believe that.

23 Because I believe people tell -- they tell what they
24 truly believe in their mind and that they saw, so I don't
25 believe that's dishonesty at all.

1 MR. WILLEY: Just to defend a little bit. We're
2 reading different questions. I'm looking at Page 145,
3 Question 14. And my question:

4 (Q) If one person says the headlights were on and one
5 person says the headlights were off, would you agree with
6 me that one of those statements is not true?

7 Eighteen, answer:

8 (A) Well, one of them is not true, but ---

9 Nineteen:

10 (A) Right.

11 And then we take a break.

12 MR. WHELAN: Yeah, but that's different. That's not
13 dishonesty. She says one -- I mean -- he was asking her
14 there's one thing that happened in that wreck, right?
15 Either one thing happened or it didn't.

16 THE COURT: Yeah, I mean, that's not going to carry
17 the day.

18 MR. WHELAN: Good.

19 THE COURT: I mean, I understand that, yes, the lights
20 were either on or they were off. But I also understand
21 that just because someone says, oh, yeah, I think the
22 lights were on, they may not necessarily be lying, they may
23 just have perceived it differently.

24 MR. WHELAN: Right. Thank you, Judge.

25 And another thing is, just to protect the record, I'm

1 not saying that Mr. Nickels did anything wrong. He answers
2 a -- answered an answer for his client who said that the
3 lights were off. As her attorney, he -- that's what
4 he's -- or the lights were on. As an attorney, that's how
5 he answered the case.

6 And with respect to this duty. You know, there's this
7 phrase that I think we heard in law school that negligence
8 in the air will not do.

9 Well, bad faith in the air will not do. There has to
10 be a -- some specific act that Your Honor finds that the
11 duty of good faith extends to in this case.

12 And he still hasn't identified it. And I point out
13 that in the Collins case, which I did not hand to Your
14 Honor but which I cited, the Fourth Circuit affirmed and
15 said there was no duty in their question of fact.

16 Here's the quote. The UIM insurer, quote, was not
17 even obligated to make an initial settlement offer; we
18 cannot say it exercised bad faith in failing to make a
19 higher offer.

20 And if you look at the Meyers and the Snyder case,
21 what they say: The Meyers case says that in a case of
22 liability, clear liability and no issue about liability at
23 all, - which this isn't - an insurer may have an obligation
24 to make a settlement offer if it is clear that the damages
25 greatly exceed the bodily injury limits.

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

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

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

12 MR. WHELAN: Sure.

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

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

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

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

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

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

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

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

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

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