

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2017-000902

RECEIVED
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SC Court of Appeals

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

Appellants

v.

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

Respondent.

RECORD ON APPEAL

VOLUME II OF V

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INDEX

ORDERS, JUDGMENTS, DECREES, and DECISIONS

ORDERS UNDER APPEAL

Order on Post-Trial Motions, filed 12-02-16	1
Order on Plaintiffs' Motion Pursuant to Rule 59 and Motion for Supplemental Attorney Fees, filed 3-16-17	24
Order on Plaintiffs' Motion for Supplemental Attorney Fees for December 2016 through March 2017, filed 8-14-17	30

OTHER ORDERS, JUDGMENTS, AND DECISIONS

Form 4 Order Resolving Motion to Dismiss, filed 4-19-13	35
Order on Plaintiffs' Motion to Amend Complaint, filed 5-09-13	37
Form 4 Order noting that Plaintiffs' cause of action for constructive fraud is withdrawn and denying Defendant's Motion for Summary Judgment, filed 10-01-15	41
Stipulation of Dismissal with Prejudice as to Defendant Nationwide Insurance Company, filed 4-21-15	42
Verdicts on Actual Damages, 4-21-16	43
Jury's Answers to Special Interrogatories	45
Verdict on Punitive Damages, 4-22-16	47

PLEADINGS

Summons and Complaint, filed 1-17-13	48
Answer of the Defendant PSC Automotive, ¹ filed 2-27-13	60
Amended Complaint, filed 5-09-13	67
Amended Answer of Defendant PSC Automotive Group to Plaintiffs' Amended Complaint, filed 10-21-15	78
Amended Answer to Plaintiffs' Second Amended Complaint, filed 8-31-16	84
Second Amended Complaint, filed 9-13-16	92

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

TRANSCRIPTS AND ASSOCIATED MATERIALS

ACTUAL DAMAGES PHASE

Charles Ecklund Video Deposition Published to the Jury

Location in trial transcript of Charles Ecklund Video Deposition	
Published to the Jury from 09:52 A.M. until 10:30 A.M April 19, 2016	311
Charles Ecklund – Transcript Excerpts of Video Deposition Published to the Jury	102 ²
Direct Examination by Mr. Moskos	103
Redirect Examination by Mr. Moskos	139

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

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

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

ADESA via Joseph Richard Guyer Video Deposition Transcript

Excerpts Published to the Jury

Location in Trial Transcript of Joe Guyer Video Deposition Published to the Jury from 11:47 AM until 01:12 PM	311
ADESA via Joseph Richard Guyer – Transcript Excerpts of Video Deposition Published to the Jury	140 ³
Direct Examination by Mr. Moskos.....	141
Cross-Examination by Mr. Walker	210
Redirect Examination by Mr. Moskos	215

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

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

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

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

Cross-Examination by Mr. Walker 220

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

Transcript of Record of Trial	223
Opening Statements	
By Mr. Moskos	280
By Mr. Walker	292
Brent Ferrell	
Direct Examination by Mr. Moskos.....	342
Cross-Examination by Mr. Walker	404
Redirect Examination by Mr. Moskos	412
Randy Threatt	
Direct Examination by Mr. Moskos.....	414
Cross-Examination by Mr. Walker	448
Redirect Examination by Mr. Moskos	451
Brian Allen	
Direct Examination by Mr. Moskos.....	474
Cross-Examination by Mr. Walker	514
Redirect Examination by Mr. Moskos	519
Greg Nalewaja	
Direct Examination by Mr. Moskos	521
Cross-Examination by Mr. Walker	554
Redirect Examination by Mr. Moskos	563
Roger Whitley	
Direct Examination by Mr. Moskos.....	582
Cross-Examination by Mr. Walker	624
Redirect Examination by Mr. Moskos	653
Closing Arguments – Actual Damages Phase	
By Mr. Moskos	739
By Mr. Walker	767
Rebuttal by Mr. Moskos.....	782
Jury Charges – Actual Damages Phase.....	823

PUNITIVE DAMAGES PHASE

Transcript of Record of Trial

Greg Nalewaja (recalled for Punitive Damages Phase)	
Direct Examination by Mr. Moskos.....	884
Cross-Examination by Mr. Walker	903
Redirect Examination by Mr. Moskos	907

Closing Arguments – Punitive Damages Phase

By Mr. Moskos 911

By Mr. Walker 923

Jury Charges – Punitive Damages Phase 927

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

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

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

Defendant's Requests To Charge

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

POST-TRIAL PHASE

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

OTHER MATERIALS

PRE-TRIAL

Motion to Dismiss on Behalf of Defendant PSC Automotive Group, served 2-25-13	1181
Plaintiffs' Motion to Amend Complaint, served 5-01-13	1184
Offer of Judgment by Defendant PSC Automotive Group to Plaintiffs, served 1-26-15 (not filed)	1186
Plaintiffs' Offer of Judgment to Defendant PSC Automotive Group, served 2-04-15, filed 2-06-15	1187
Defendant's Motion for Summary Judgment, served 7-10-15	1190
Plaintiffs' Answers to Defendant PSC Automotive Group d/b/a Midlands Honda's Interrogatories	1197
ADESA Sale Contract (Seller) (Pls.' Trial Ex. 55)	1013
Roger W. Whitley deposition condensed transcript excerpt	1204
Arbitration Rules (Pls.' Tr. Ex. 52)	996
Roger W. Whitley deposition condensed transcript excerpt	1205
Plaintiffs' Brief ^A in Opposition to Defendant PSC's Motion for Summary Judgment, served 9-30-15	1206
Ex. 1 Page 1 from Midlands Honda's 159-point Certified Pre-Owned Inspection Invoice (Pls.' Trial Ex. 66)	1024

Ex. 2	3-11-10 Handwritten Telephone Message (Pls.' Trial Ex.70).....	1034
Ex. 3	Arbitration Rules (Pls.' Trial Ex.52)	996
Ex. 4	ADESA Inc. Power of Attorney (Pls.' Trial Ex.46).....	991
Ex. 5	ADESA Sale Contract (Buyer) (Pls.' Trial Ex.56).....	1014
Ex. 6	Damage Disclosure Form (Pls.' Trial Ex.1)	936
Ex. 7	3-11-10 Carfax (Pls.' Trial Ex. 68).....	1029
	Charles Ecklund deposition condensed transcript excerpt.....	1223
	Greg Nalewaja deposition condensed transcript excerpts.....	1226
	ADESA via Joseph Richard Guyer deposition condensed transcript excerpts	1229
	Roger W. Whitley deposition transcript excerpts	1244
	Motion to Dismiss on Behalf of Defendant Columbia Automotive Co., LLC, served 4-15-16.....	1256
	Plaintiffs' Pre-Trial Brief, served 4-18-16	1259

POST-TRIAL

	Defendant's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative a New Trial, or a New Trial Nisi Remittitur, served 5-02-16	1277
	Defendant's Motion to Require Election of Remedies, served 5-02-16	1294
	Defendant's Motion to Enforce North Carolina Punitive Damages Cap, served 5-02-16.....	1297
	Defendant's Motion for Setoff or Recoupment, served 5-02-16	1299
	Plaintiffs' Post-Trial Motions, served 5-02-16	1301
	Plaintiffs' Brief in Support of Treble Damages, served 5-02-16	1303
	Plaintiffs' Brief in Support of Interest under Offer of Judgment, served 5-02- 16.....	1305
Ex. 1	Plaintiff's Offer of Judgment.....	1187
Ex. 2	Costs and Expenses After Offer of Judgment	1308
	Plaintiffs' Brief in Support of Plaintiffs' Request for Prejudgment Interest, served 5-02-16.....	1310
	Plaintiffs' Brief in Support of Plaintiffs' Request for Attorney's Fees, served 5-02- 16.....	1316
	Affidavit of Attorney's Fees of C. Steven Moskos in Support of Plaintiff's Motion for Attorney Fees, served 5-02-16	1333
Ex. 1	Timesheets of C. Steven Moskos for pursuing Plaintiffs' claims against Defendant Columbia Automotive Co. under the NCUTPA from 6-29-2011 through 5-01-2016.....	1343
Ex. 2	C. Steven Moskos' Paralegal's Timesheet	1357

Ex. 3	Timesheets of C. Steven Moskos for pursuing claims against Defendant Nationwide Insurance Co.....	1358
Ex. 4	Order of 7-21-14 in <i>Karesh v. Elite Auto Wholesale, et al.</i>	1361
Ex. 5	Affidavit of Mary Leigh Arnold in Support of Plaintiffs' Request for Attorney Fees.....	1371
Ex. 6	Affidavit of Brian L. Boger in Support of Plaintiffs' Request for Attorney Fees.....	1375
Ex. 7	Plaintiff's Costs and Expenses	1379
Ex. 8	Defendant's Offer of Judgment	1186
	Email from Judge Cothran's law clerk, James R. White, re: election of remedies, 5-18-16.....	1434
	Plaintiffs' Election of Remedies, served 5-23-16	1435
	Plaintiffs' Motion for Reconsideration, served 5-23-16	1438
	Defendant's Response to Plaintiffs' Election of Remedies, served 5-27-16	1440
	Plaintiffs' Brief Opposing Defendant's Motion to Enforce North Carolina's Punitive Damages Cap, served 7-20-16	1443
Ex. 70	3-11-10 Handwritten Telephone Message (Pls.' Trial Ex. 70)	1034
	Plaintiffs' Brief Regarding Defendant's Response to Plaintiffs' Election of Remedies, served 7-20-16	1450
	Plaintiffs' Brief Regarding Election of Remedies, served 7-20-16	1454
	Plaintiffs' Brief Opposing Defendant's Motion for Setoff or Recoupment, served 7-20-16.....	1457
Ex. 11	Nationwide Estimate of Repairs (Pls.' Trial Ex. 11).....	947
	Plaintiffs' Brief Opposing Defendant's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, a New Trial, or a New Trial Nisi Remittitur, served 7-20-16	1464
Ex. 46	ADESA Power of Attorney (Pls.' Trial Ex. 46).....	991
Ex. 50	Dealer Acknowledgement Form (Pls.' Trial Ex. 50).....	993
Ex. 52	Arbitration Rules (Pls.' Trial Ex. 52)	996
Ex. 68	3-11-10 Carfax (Pls.' Trial Ex. 68).....	1029
Ex. 70	3-11-10 Handwritten Telephone Message (Pls.' Trial Ex. 70)	1034
	Excerpts from Directed Verdict Transcript.....	1511
	First Supplemental Affidavit of Attorney Fees of C. Steven Moskos in Support of Plaintiff's Motion for Attorney's Fees, served 7-21-16.....	1529
Ex. 1	Timesheets of C. Steven Moskos – work performed 5-02-16 through 7-20-16	1537
Ex. 2	Expense Receipt	1541

Affidavit of Brooks R. Fudenberg, served 7-21-16	1542
Attach. Timesheets of Brooks R. Fudenberg – work performed 04- 22-2016 through 7-20-2016	1544
Ex. 1 Affidavit of Jason Scott Luck	1549
Defendant’s Brief in Opposition to Plaintiffs’ Motion to Treble Damages, served 7-22-16.....	1552
Defendant’s Brief in Opposition to Plaintiffs’ Motion for Interest Under Offer of Judgment, served 7-22-16	1554
Defendant’s Brief in Response to Plaintiffs’ Motion for Prejudgment Interest, served 7-22-16.....	1559
Defendant’s Brief in Opposition to Plaintiffs’ Motion for Attorney Fees, served 7-22-16.....	1562
App. 1 Complaint in <i>Allen v. Hoover Automotive</i>	1581
Complaint in <i>Kincer et al. v. Midlands Automotive,</i> <i>LLC, d/b/a Carolina Chrysler, Dodge, Jeep, Ram,</i> <i>et al.</i>	1594
Complaint in <i>Henderson v. Summerville Ford-</i> <i>Mercury, Inc., et al.</i>	1610
App. 2 Plaintiffs’ First Interrogatories to Defendant Midlands Honda	1623
Plaintiffs’ First Requests for Production to Defendant Midlands Honda	1635
Plaintiffs’ First Set of Interrogatories to the Defendant Midlands Automotive, LLC, d/b/a Chrysler, Dodge, Jeep, Ram, in <i>Kincer et al. v.</i> <i>Midlands Automotive, LLC, d/b/a Carolina Chrysler,</i> <i>Dodge, Jeep, Ram, et al.</i>	1648
Plaintiffs’ First Request for Production to the Defendant Midlands Automotive, LLC, a/b/a Chrysler, Dodge, Jeep, Ram, in <i>Kincer et al. v.</i> <i>Midlands Automotive, LLC, d/b/a Carolina Chrysler,</i> <i>Dodge, Jeep, Ram, et al.</i>	1657
Plaintiff’s Interrogatories to Defendant Summerville Ford-Mercury, Inc., in <i>Henderson v. Summerville</i> <i>Ford-Mercury, Inc., et al.</i>	1670
Plaintiff’s Request to Produce to Defendant Summerville Ford-Mercury, Inc., in <i>Henderson v.</i> <i>Summerville Ford-Mercury, Inc., et al.</i>	1683
App. 3 Time entries relating to punitive damages	1692
App. 4 Time entries relating to pursuing claims against Co- Defendant	1695
App. 5 Unnecessary travel time	1698

Attach.	Affidavit of H. Clayton Walker, Jr.	1701
Attach.	Affidavit of Robert L. Reibold	1707
Defendant's Memorandum in Further Support of Motion for Motion for Judgment Notwithstanding the Verdict ("JNOV"), or, in the Alternative, a New Trial, or a New Trial Nisi Remittitur JNOV, served 7-22-16.....		1711
Ex. 1	Defendant's Motion in Limine	1716
Ex. 2	Excerpts from Partial Transcript of Trial	1722
Email from Judge Cothran's law clerk, John Furse, regarding post-trial motions, 8-29-16		1731
Email from C. Steven Moskos to Judge Cothran re Midlands-Honda award, 8-29-16		1732
Affidavit of C. Steven Moskos in Support of Plaintiffs' Motion for Attorney Fees, served 8-30-16		1734
Ex. 1	Email from C. Steven Moskos to Robert Reibold, re <i>Henderson v. Summerville Ford-Mercury, Inc., et al.</i> , 3-07-12	1777
Ex. 2	Letter from Brooks R. Fudenberg to Robert Reibold, re <i>Henderson v. Summerville Ford-Mercury, Inc., et al.</i> , 9-30-13	1778
Ex. 3	Order Granting Plaintiff's Motion for Statutory Fees and Costs in <i>Henderson v. Summerville Ford-Mercury, Inc., et al.</i> , filed 10-06-14	1780
Ex. 4	Settlement Demand to Hoover Chrysler Jeep by C. Steven Moskos on behalf of Richard M. Allen, 1-29-16	1788
Ex. 5	Correspondence from H. Clayton Walker, Jr. to C. Steven Moskos re: <i>Kincer et al. v. Midlands Automotive, LLC</i> , 2-23-15	1789
Ex. 6	Time Line of events in the instant case	1791
Ex. 7	Roger W. Whitley deposition transcript excerpt.....	1796
Exs. 8-18	Emails and letter correspondence between counsel re the present case, 12-04-13 through 1-23-15	1800-1811
Ex. 19	Plaintiffs' Offer of Judgment to Defendant CAC, 2-04-15	1812
Ex. 20	Letter from H. Clayton Walker, Jr., to Hon. L. Casey Manning, 4-07-2015	1814
Ex. 21	Email from H. Clayton Walker, Jr. to counsel, 4-07-2015	1815
Ex. 22	Letter from H. Clayton Walker, Jr., to Hon. L. Casey Manning, requesting order of protection, with attachment, 2-26-2014	1816

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

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

Email from Brooks R. Fudenberg to Judge's Clerk transmitting copy of Notice of Appeal, 4-11-17.....	2083
Notice of Appeal, filed 04-13-17	2086
Email from Judge Cothran's law clerk, John Furse, regarding motion for supplemental attorney fees, 6-02-17	2087
Defendant's proposed Order on Plaintiff's Motion for Supplemental Attorneys' Fees for December 2016 Through March 2017, served 6-12-17	2088
Plaintiffs' Memorandum in Opposition to Defendant's proposed Order, served 6-28-17.....	2093
Exs. 1–10(A) Correspondence between counsel for the parties, 4- 20-17 through 6-27-17	2106-2133
Ex. 11 Second Supplemental Affidavit of Brooks R. Fudenberg	2134
Timesheets of Brooks R. Fudenberg – work performed 3-30-17 through 6-28-17	2137
Ex. 12 Third Supplemental Affidavit of C. Steven Moskos.....	2143
Timesheets of C. Steven Moskos – work performed 3-30-17 through 6-28-17	2146
Letter from H. Clayton Walker, Jr., to Judge Cothran, dated 7-25-17.....	2149
Defendant's proposed Order on Plaintiff's Motion for Supplemental Attorneys' Fees for December 2016 Through March 2017, served 8-07-17	2150
Email from Judge Cothran's law clerk, John Furse, re Judge's intent to sign Defendant's proposed Order, 8-08-17.....	2156
Notice of Appeal, served 9-05-17	2158
Certificate of Counsel	2160

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

6 Q. What is a post-repair inspection?

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

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

1 get that information?

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

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

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

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

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

20 Q. And have you testified in any other trials?

21 A. Several yes, sir.

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

24 A. Yes, sir.

25 MR. MOSKOS: Your Honor, at this time I'd move to

1 introduce Mr. Allen as an expert in auto-body repair.

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

3 THE COURT: Okay.

4 BY MR. MOSKOS:

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

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

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

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

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

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

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

25 A. Every car out there is designed, you know they got

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

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

17 A. No, sir. No, sir. You have cosmetic and you have
18 structural. Honda however - I would consider fenders, the
19 door skins, your hood, stuff like that's your cosmetic
20 panels. In behind there is your main structure. And I
21 always try to explain it to people it's about like a house.
22 You ever see a house being built? You've got your
23 foundation which is your frame. You've got your studs on
24 the wall which is your inner structure which really holds
25 the car together. And then you got your sheet rock and

1 sheet rock is your cosmetic. Although when it's screwed on
2 it helps stabilize it it's still it's your cosmetic to hide
3 the structure and it's the same thing much with a car.
4 Here your bumper covers. They're all plastic now. You're
5 door skins. Not the door frame but the door skins. Most
6 of the time your quarter skins, your fenders, things like
7 that that's your cosmetic to dress it up and make it look
8 good and make it aerodynamic and make you want to buy the
9 car. But what's in behind it is your main structure, your
10 safety, and what's made to really protect you.

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

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

25 Q. And why is it important to know what kind of metal

1 is in a 2003 Honda Civic?

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

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

22 A. All your metals are weld - they most spot weld. Well
23 they're all spot welded from the factory what they call a
24 resistance welder. It's a Mig welder and it has two points
25 that come down in between a couple of pieces and it welds

1 them together. And it's very contained whereas what they
2 call Mig welding where you have a gun and you have gas.
3 You put your mask on and you weld across causes a lot of
4 heat. On your structural panels they want you to use
5 resistance welding more than Mig welding because the Mig
6 welding does heat it up more than it needs to be.

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

8 A. No, sir. No, sir.

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

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

19 Q. Why is that?

20 A. It weakens the metal.

21 Q. And does that create a safety issue?

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

1 panel.

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

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

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

23 A. Yes, sir.

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

1 A. Yes, sir.

2 Q. All right.

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

4 THE COURT: Okay..

5 (DIAGRAMS PUBLISHED TO THE JURY.)

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

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

10 A. Okay.

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

13 THE COURT: No problem.

14 MR. MOSKOS: Yeah, come on down.

15 (WITNESS LEAVES WITNESS STAND.)

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

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

20 A. This is the front. This is the rear. This is what's
21 called the A pillar. This is where your front door mounts.
22 That's actually the holes where the front door hinges would
23 mount. Now this is your inner structure. You're not
24 seeing the quarter panels or the doors of the fenders.
25 This is actually the inner structure. There is another

1 skin, a unibody skin that goes up to the top of this. Once
2 again, I consider the skin to be cosmetic. It hides the
3 structure.

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

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

18 The same thing on the quarter panel. This is what's
19 called the quarter panel reenforcement or outer wheel
20 house. This is the inner wheel house that welds to it. It
21 goes in right here at the roof panel. This is your roof
22 rail which is also an advanced or ultra high strength
23 steel. Right here is where your quarter panel around your
24 wheel where the quarter panel welds to it. This is the
25 door edge. And down here is where your back window glass

1 goes. And right here is where your truck lid fits. And on
2 back here where it's open a quarter panel comes on out and
3 the bumper goes across here. This is your actual frame
4 rail. All these panels weld together and form the whole
5 side of that car. And you've got a skin that sits on top
6 there that also welds to it and forms the nice thing you
7 see. When you buy a car you got your car out there. And
8 this is what you don't see.

9 Q. Did you inspect the 2003 Civic?

10 A. Yes I did.

11 Q. That Mr. Whitley has?

12 A. Yes.

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

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

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

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

23 Q. And the opinions and conclusions that you're gonna
24 give together are they based on a reasonable degree of
25 certainty in the automotive field? You're reasonably

1 certain that this is the opinions that you're giving today
2 they are correct?

3 A. Oh, yes, sir.

4 Q. All right. So tell us about your inspection of the
5 2003 Honda Civic.

6 A. Well as with any inspection that when the car is
7 brought back to me I do a visual inspection. I walk around
8 the outside of the vehicle. I look for telltale signs that
9 there's something going on. I look for bad paint, paint
10 that doesn't look good on a vehicle that doesn't - isn't
11 consistent with the factory. I'm looking for the door
12 cracks if they crack; the trunk lid cracks to make sure
13 that everything is uniform as it should be. And especially
14 on a Honda, Toyota, Nissan, vehicles of that nature.
15 Chevrolet's and Fords they've gotten a lot better. It used
16 to, you know, you had a wide crack on one side and a skinny
17 crack on the other. But they should all be uniform. So
18 when you see a door crack that's not quite matching the
19 other side where if you've got a rear door crack and a
20 front door crack and one's extremely wide and one's
21 extremely tight you've got an issue. There's something
22 going on there that should not be happening. And usually
23 when you have a crack that's closed up it's because the
24 inner structures like this have moved. Not necessarily the
25 outer but the inner has moved. You can make the outer look

1 good. You can make the outer go where you want it but if
2 it's still sitting after you put a outer panel on it's
3 still sitting crocked. That means that the inner structure
4 has moved or has something wrong with it.

5 Q. When did you inspect this car?

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

8 Q. Okay.

9 A. --- in respect to the car.

10 Q. So 2015?

11 A. Yes, sir.

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

13 A. No, sir.

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

16 A. No, sir.

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

18 A. At my shop.

19 Q. Tell us what you did.

20 A. Once again I walked around the car and looked for it.
21 Immediately I saw several issues that kind of threw up a
22 red flag as I do in any case it makes me want to dig
23 deeper. And I dig a little deeper I find a little more.
24 So it makes you want to dig a little deeper. And the next
25 thing you know I've got everything out of the car. I got

1 the seats out, the interior trim panels out. I find out
2 everything that's been done to this vehicle that's been
3 repaired which is the case in this. And upon removing the
4 inner trim panels on your back glass down the quarter
5 panels you got - you got trim panels back there; I pop
6 those down.

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

21 (SOMEONE COUGHED LOUD OBSTRUCTING WITNESS TESTIMONY.)

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

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

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

12 Q. Do you have that picture available now?

13 A. I do.

14 (WITNESS RETRIEVED PHOTO FROM WITNESS STAND.)

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

16 A. Yes.

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

19 A. Yes, sir.

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

21 A. You're fine.

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

23 Your Honor, I move to introduce --

24 THE COURT: Any objection?

25 MR. WALKER: No, sir.

1 THE COURT: Okay. Its in without objection.

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

4 MR. MOSKOS: Thank you. Seventy-one.

5 Q. Can you all see that?

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

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

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

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

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

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

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

15 A. You're fine. Actually a sharp edge of the metal
16 protruding out right there. And it's just basically where
17 they went in and they cut it. To me it doesn't look like
18 they cut it with a saw. It looks like they cut it with
19 something called panel cutter which is more for a rough
20 cut. You rough cut it and then you go out here and fine -
21 fine tune it. But this was obviously not, you know, fine
22 tuned. It's literally ripped apart. On this panel right
23 here, or this picture right here, you can see the weld.
24 That's to the outer quarter panel right here. That is your
25 outer quarter panel and that's that inner structure with a

1 good chunk of it missing. And so - And here goes. I've
2 got anywhere from a half inch to three quarters of an inch
3 of structural metal missing and not connected. So these
4 three panels are supposed to work together. Well if I've
5 only got two of 'em working it's just like anything else
6 all the components aren't working together and it's not
7 going to respond the way it's designed to respond if you
8 ever got in a subsequent accident.

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

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

16 A. Yes.

17 Q. How so.

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

19 Q. Sure.

20 A. Once again this is the outside view. This is the
21 same panel right here sold as one unit. You can buy the
22 inner wheel house separate but you can buy this as one
23 unit, six being the right side; thirteen being the left
24 side. This is the back side of the panel. When I'm
25 sitting in a seat and I have the panel removed and I'm

1 looking outside the vehicle, this is what I see. This is -
2 If I'm outside the vehicle and have the quarter removed
3 this is what I see and these are the same panels. These
4 are all structural panels. This is actually a blow up I
5 got from Honda. Just because mine showed the outside I
6 wanted to show the inside. Your B pillar, A pillar, C
7 pillar. Or course your rear body panel, your floor pan,
8 your middle floor pan, your inner rockers.

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

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

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

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

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

19 A. That's correct, when damaged.

20 Q. When damaged. Right.

21 A. Yes.

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

24 A. They have to be put in with them being structural
25 panels and I've got it from Honda, I brought it with me, it

1 says that all structural panels must be put in at factory
2 seam it cannot be sectioned. Outer quarter panels, the
3 piece that covers over this, yes it can be sectioned right
4 along about where they cut it the outer panel can.

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

13 Q. This one?

14 A. Yes. That is what's called your rear damper stiffener
15 that comes down right through here. This is ALL DATA.
16 That's what we use and it tells us what we can and cannot
17 do to this vehicle. It tells me where I can and can't
18 section the outer quarter panel. It tells me exactly how
19 many welds I'm supposed to put on it, around the taillight
20 pocket, the rear gutter up through here. If I want to
21 replace a cut out pocket or not replace it. It has writing
22 with it also that it counts the welds, it tells me what
23 glue to use around the wheel house, how to seal it around
24 the gas pocket and everything. It gives me an exact
25 measurement and where to measure down to cut the outer

1 panel. However, if the damage, when you remove the outer
2 panel, you have damage to the inner structure, it does not
3 give me a section for this inner structure. There is no
4 manufacturer out there that lets you section structural
5 panels. That means that I would have to take the quarter
6 panel on up into the roof panel, up here, which is also
7 allowed and just so I can put the inner structure in which
8 goes further on up.

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

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

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

16 A. Maybe later but not right now.

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

20 (WITNESS RETURNS TO WITNESS STAND.)

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

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

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

1 A. Yes. And there are more.

2 Q. All right, let's talk about some of those pictures.

3 A. Okay.

4 Q. I have - You have supplied me with pictures. How
5 about taking a look at 'em. I think the first four are
6 actually the four you have up there so let me get those out
7 of the way.

8 A. Should I go through - -

9 Q. Well, what I would like for you to do tell us, is -
10 What are some of the more significant pictures at this time
11 that you can talk to us about?

12 A. Well when I first said that I'd do a visual inspection
13 of the - outside the vehicle before I go inside and look at
14 structural stuff, several of the pictures show what I saw
15 on the outside of the vehicle such as this picture is the
16 rocker, the bottom of the rocker panel which can be seen,
17 not on a lift, or anything. It's just the outside of the
18 vehicle. This is where the rocker panel was cut and
19 sectioned.

20 Q. Hold on. Hold on just a second.

21 MR. MOSKOS: Do you have any objection?

22 MR. WALKER: No. May I ask what exhibit that is,
23 ma'am?

24 MADAM COURT REPORTER: Seventy-two, sir.

25 MR. WALKER: Thank you.

1 MADAM COURT REPORTER: Yes, Sir.

2 MR. MOSKOS: I'm gonna hand you the pointer here.

3 Are you gonna have any objection to any of these
4 photographs or do you want me to show them to you?

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

7 MR. MOSKOS: Very good.

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

10 MR. MOSKOS: Okay.

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

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

25 It's - It's just - I've seen a lot of bad repairs and

1 this gets on up there with it.

2 Q. And this is underneath the car?

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

5 Q. All right.

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

9 Q. Right.

10 A. If it helps.

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

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

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

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

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

21 MR. MOSKOS: Thank you.

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

23 There we go.

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

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

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

17 I-CAR which is a training facility across the nation
18 they do have a class on rear body sectioning. I contacted
19 I-CAR and got a response that they do not recognize
20 clipping nor do they recommend against it. They were in
21 response and I-CAR is really good. They train - Like I
22 said, it's training. They train the tech's to industry
23 standards. Not necessarily to vehicle manufacturer
24 recommendations but to industry standards. It's about
25 eight years ago I started seeing a trend in I-CAR classes

1 at the very end of all classes and at the very end of all
2 their training books - -

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

6 THE COURT: That's correct.

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

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

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

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

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

1 Q. Tell us what - When you say floor pan what do you
2 mean by that?

3 A. According to the - Yes. The floor pan is actually -
4 Right here is your rear floor pan. That's where the spare
5 tire sits. It comes on down and right here is where your
6 rear seat sit. That's your floor pan. They actually cut
7 it right - I don't know why they cut it at about eight
8 inches behind that right here so they sectioned that floor
9 pan across and just basically butt welded it together.

10 Q. Where do you mean by butt welded?

11 A. Two pieces of metal instead of over lapping two pieces
12 of metal together and just - they did not weld it - the
13 inner braces or anything. They just basically went across
14 the borrow.

15 Q. Is the floor pan a structural component?

16 A. It's all part of the structure yes, sir.

17 Q. And - Okay. So what's the next photograph that you
18 have there that you want to show us?

19 A. After I got done looking at the outside of the vehicle
20 I immediately went inside and started taking down the trim
21 panels and the rear seats. There are several things we can
22 go through quickly.

23 Q. This one too?

24 A. Yes.

25 MR. MOSKOS: Your Honor, I think we're up to Seventy-

1 seven.

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

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

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

8 MR. WALKER: Thank you, ma'am.

9 BY MR. MOSKOS:

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

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

14 Q. The driver's side?

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

25 And I get close up and show you.

1 Q. This is Seventy-eight.

2 A. That is the weld going across. Now what makes this
3 interesting is they welded it completely solid across with
4 a weld there.

5 Q. Do I have it in the orientation or is it upside down?

6 A. There is the back glass. That's me. This is the -
7 you can actually turn it a little bit.

8 Q. Is this the right orientation?

9 A. Yes, sir. There you go.

10 Q. Okay.

11 A. Okay. You can see that this is the factory seam.
12 They welded it solid across.

13 Q. How is it supposed to be welded?

14 A. There's three spot welds supposed to be right -
15 should be one here, two - I'm sorry, four. One here, two
16 here, and one down here. They welded it solid. Well spot
17 welds are generally a inch and a half apart. Honda is two
18 inches. They want their spot welds two inches apart. And
19 the reason they want their spot welds two inches apart if
20 it gets hit and it collapses between those welds it's a
21 crumple zone. It absorbs energy. Well when one's welded
22 solid like that its not gonna collapse the way it's
23 designed to collapse. So it's what they call stitch
24 welding. Solid welding across is not acceptable.

25 Q. Anyway to tell how this car is gonna operate or

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

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

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

6 MR. MOSKOS: Based on --

7 THE COURT: I sustain that objection.

8 BY MR. MOSKOS:

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

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

20 BY MR. MOSKOS:

21 Q. Have you had any --

22 THE COURT: You know --

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

24 THE COURT: You know he can testify as to his vehicle
25 expertise and what he's seen, you know, in the repair

1 business, but I don't know if he's qualified -

2 BY MR. MOSKOS:

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

6 A. Yes, sir.

7 Q. You do?

8 A. Yes, sir.

9 Q. What kind of training do you have?

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

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

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

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

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

2 MR. WALKER: Correct. And that --

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

5 MR. MOSKOS: Yes, sir.

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

7 MR. MOSKOS: Thank you. Okay.

8 Q. Are we finished with this picture?

9 A. Yes, sir.

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

11 What are we looking at there?

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

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

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

24 A. Yes, sir.

25 Q. Okay. Go ahead.

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

8 Here you go.

9 Q. We'll look at Eighty-one.

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

17 Q. Eighty-two.

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

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

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

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

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

12 Q. And is this the old spot?

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

14 Q. Any other photographs that you want to discuss?

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

17 Q. Is this gonna be the same as this?

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

19 Q. Okay.

20 MR. MOSKOS: I think there's six.

21 MR. WALKER: No objection, Judge.

22 THE COURT: Okay.

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

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

3 MR. WALKER: Thank you.

4 BY MR. MOSKOS:

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

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

16 Q. Why is that?

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

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

24 A. Correct.

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

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

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

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

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

12 What does that mean?

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

1 looked like. It takes practice. That's not - that's not a
2 good weld.

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

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

12 Q. Eighty-seven.

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

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

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

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

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

25 A. Yes, sir.

1 Q. And where is this on the car?

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

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

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

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

17 A. No, sir.

18 Q. All right.

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

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

24 A. The vehicle was heavily damaged. It was repaired
25 with a procedure that's called clipping where you

1 basically join two sections and two different cars. It's
2 repaired incorrectly. It's repaired poorly. It is in my
3 opinion that it will not respond the way it's designed to
4 respond if it's in a subsequent accident thus in my opinion
5 rendering the car unsafe to drive. It's one of the
6 vehicles that I look at and I've looked at several and I've
7 deemed several of them unsafe to drive for the simple fact
8 that you don't know what's gonna happen. And I don't want
9 to be the one to find out. Several times in my inspections
10 I find cars that are --

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

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

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

20 Q. So this vehicle can it be repaired?

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

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

4 A. Yes, sir.

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

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

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

11 CROSS-EXAMINATION

12 BRIAN ALLEN BY MR. WALKER:

13 Q. And I'm sorry, Mr. Allen, we won't talk all that long.
14 Anyway you can find Number Seventy-two?

15 MADAM COURT REPORTER: He's got 'em.

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

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

19 MR. WALKER: Thank you.

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

21 A. Okay.

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

1 A. Yes, sir.

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

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

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

6 A. Yes, sir.

7 Q. Down underneath the door?

8 A. Yes, sir.

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

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

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

14 A. Yes, sir.

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

18 A. Yes, sir.

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

21 A. Yes, sir.

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

24 A. All of 'em had been sprayed with a under coating
25 which is, you know, it's a black rubberized coating but

1 because they weren't properly prepared welding on that the
2 undercoating had started to erode away and that's what you
3 see here.

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

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

8 Q. Undercoating is common in the car business?

9 A. Yes, sir.

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

12 A. Yes, sir.

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

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

18 THE COURT: How about rephrase your question please?

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

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

23 A. Correct.

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

1 individual to own and operate the vehicle?

2 A. No, sir.

3 Q. Would it surprise you if he said it was a fantastic
4 car for him to drive?

5 A. I can't - I can't testify to what he would say.

6 Q. I understand you looked at this car only from the
7 body shop perspective. Right?

8 A. Yes, sir.

9 Q. You didn't look at the engine or any of the mechanical
10 system?

11 A. Yes, sir.

12 Q. Other than the fuel lines and the brake line?

13 A. Correct.

14 Q. So you look at body shop stuff and not mechanical
15 stuff?

16 A. Correct.

17 Q. I understood you give this kind of testimony pretty
18 regular. Right?

19 A. Yes, sir.

20 Q. Mostly in North Carolina or some down here or?

21 A. This is the first time I've been to South Carolina
22 with it, yes, sir.

23 Q. I'm assuming you're getting paid for your time?

24 A. I haven't been paid anything no, sir.

25 Q. So why are you doing it? Well, do you plan to send

1 a bill?

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

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

7 A. No, sir.

8 Q. Do you expect there are financial arrangements?

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

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

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

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

16 A. As far as I know no, sir.

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

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

22 Q. So how many times you met with him?

23 A. Just once.

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

25 A. About four or five.

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

3 THE COURT: Sure.

4 (PAUSE.)

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

7 THE COURT: Okay.

8 REDIRECT EXAMINATION

9 BRIAN ALLEN BY MR. MOSKOS:

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

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

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

19 A. Yes, sir.

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

22 A. No, sir.

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

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

25 Q. Okay. And so they had an opportunity to look at it

1 as long as they wanted?

2 A. Yes, sir.

3 Q. And then they left?

4 A. Yes, sir.

5 MR. MOSKOS: No further questions.

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

7 (WITNESS LEAVES WITNESS STAND.)

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

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

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

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

14 (COURT IN RECESS AT 11:00 AM.)

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

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

18 MR. MOSKOS: I'm sorry?

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

21 MR. MOSKOS: No, sir.

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

24 MR. MOSKOS: Yes, sir.

25 THE COURT: Okay.

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

2 THE BAILIFF: All accounted for, your Honor.

3 THE COURT: Thank you, sir.

4 You may call your next witness.

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

8 Did I say that right?

9 MR. NALEWAJA: Nalewaja, yes.

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

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

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

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

19 GREG NALEWAJA: My name is Greg Nalewaja.

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

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

22 MADAM CLERK: Thank you.

23 DIRECT EXAMINATION

24 GREG NALEWAJA BY MR. MOSKOS:

25 Q. Mr. Nalewaja, how long have you been involved in the

1 car business?

2 A. About twenty years.

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

5 A. That's correct.

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

7 A. Yes.

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

10 A. Yes.

11 Q. And a general sales manager?

12 A. Yes.

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

14 A. Yes.

15 Q. And how many employees do you have?

16 A. A little over a hundred.

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

19 A. Yes.

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

23 A. Yes.

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

1 A. Correct.

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

4 A. Yes.

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

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

9 MR. MOSKOS: Yes, sir.

10 BY MR. MOSKOS:

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

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

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

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

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

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

1 Q. Well, I understand you're talking about an auction.
2 What I'm talking about is a retail customer. If you put it
3 on your lot and try to sell it, and you told people what
4 you had, what you were offering for sale, you wouldn't be
5 able to sell that car, would you?

6 A. Well, I can't answer that question, because first of
7 all, I wasn't employed there at that time. The car came in
8 to them. Randy traded the guy out immediately, within four
9 days sent it to an auction, under a red light, which is
10 where you dispose of problem cars. That's exactly what he
11 did.

12 Q. Mr. Nalewaja, I appreciate you wanting to help
13 Midlands Honda, but if you could answer my question, we
14 could move this along. All right? The question is real
15 simple. If the vehicle -- let's put it this way. If the
16 vehicle was on Midlands Honda's lot in 2008, and Mr.
17 Ecklund came in, and everybody knew the condition of this
18 vehicle, and it was explained to the retail customers,
19 Midlands wouldn't be able to sell that car, would it? To a
20 retail customer, the average person.

21 A. You -- What you're saying is, let me just make sure I
22 understand the question, because that's not what happened.
23 But you're saying if it came in and everybody knew this was
24 a clipped car, we would not retail that car.

25 Q. What I'm -- That's not my question, though. What my

1 question is, is, would you expect to be able to sell that
2 car to a retail customer, knowing about all the problems
3 that you heard about today, would a retail customer, if he
4 learned about all these problems that we've talked about,
5 would you be able to sell it?

6 A. We would not sell it.

7 Q. It wouldn't have any value, would it?

8 A. Well, every vehicle has value. You could sell those
9 cars for parts. That's typically what they do when they
10 sell them through a red-light auction, because they're
11 problem cars.

12 Q. Well, wait a minute. You don't go to auctions and buy
13 cars, do you?

14 A. I do go to auctions. I have been to auctions.

15 Q. Okay. But not too many?

16 A. No, a lot.

17 Q. Okay. But you don't go run a parts store, or you've
18 never run a parts store, or bought cars to part out, or
19 anything like that, have you?

20 A. No. When you are wholesaling cars at a wholesale
21 auction, where wholesale dealers are going to, and you have
22 a car that has structural damage, or is a problem car,
23 electrical damage, or a smashed windshield on a car --

24 Q. Mr. Nalewaja, Mr. Nalewaja.

25 A. I'm trying to answer your question.

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

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

8 Q. Junk store, junkyard.

9 A. No.

10 Q. Anything like that?

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

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

15 A. Correct.

16 Q. Okay.

17 A. We deal with wholesales.

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

20 A. I don't --

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

22 A. I do.

23 Q. All right. Now, when -- Well, let me go back to my
24 question, then. As I understood your testimony, as a
25 retail piece, this 2003 Honda Civic, and let's say in 2010,

1 all right? In 2010, if everybody knew about the problems
2 with this vehicle, the seller and the buyer, a retail
3 customer isn't going to buy that car, right?

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

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

8 A. Okay.

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

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

19 Q. Yes, sir.

20 A. We wouldn't even consider it.

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

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

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

1 question is, if it was sitting on Midlands Honda's lot in
2 2010, and you explained all of the problems with this car
3 to the retail people that were coming in to buy this car,
4 you wouldn't be able to sell it, would you?

5 A. No. And we wouldn't. We wouldn't retail it.

6 Q. All right. And at best, you could take this car and
7 maybe sell it to like, a junkyard, or someplace that would
8 take the car apart and sell it for parts, right?

9 A. No. That's not the way we dispose of it. We would
10 dispose of it through the auction, because that's the way
11 you dispose of cars.

12 Q. Okay. Well, we'll get to that.

13 A. You make a decision ---

14 Q. We'll get to that in just a minute.

15 A. --- on whether it's retailable. Okay.

16 Q. We'll get to that in a minute. Now, you -- Midlands
17 doesn't have any sort of written policies and procedures on
18 how to handle stuff, right? They all just simply rely on
19 the judgment of your managers and sales department?

20 A. And the condition of the car.

21 Q. Now, you're familiar with the file, right? You took
22 over the dealership, and you are the person who is
23 responsible for handling this case?

24 A. Yes, sir, in 2013.

25 Q. Okay. Since 2013, you have been involved in this

1 case?

2 A. I have seen the file.

3 Q. You've seen the file.

4 A. Yes.

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

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

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

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

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

16 THE COURT: All right. Go ahead.

17 BY MR. MOSKOS:

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

20 A. Yes.

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

23 A. That's correct.

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

1 A. Five years.

2 Q. Five years. Had you run any other dealerships up in
3 North Carolina before that?

4 A. Yes, I did.

5 Q. And how long were you there?

6 A. Fifteen years.

7 Q. All right. So, for twenty years you were in North
8 Carolina, selling cars in some capacity?

9 A. Correct.

10 Q. All right. So, you came down here, and you were --
11 because you were the man in charge, you wound up with this
12 file. Did you review the file?

13 A. Yes.

14 Q. And when you went through the file, you found the
15 invoice where Midlands Honda did a certified pre-owned
16 inspection. 159-point inspection. You saw it?

17 A. I believe so.

18 Q. And being at the Honda stores for twenty, twenty-five
19 years, thirty years, you know that the certified pre-owned
20 inspection process is pretty rigorous, right?

21 A. It's a 159-point inspection.

22 Q. Right. And the car goes in the back, where the
23 technician is, and they go around the car and in the car,
24 and look it all over. And they've got a checklist that
25 they've got to find everything, right?

1 A. That's correct.

2 Q. And part of that is making sure that there's a Carfax
3 in the file?

4 A. Yes.

5 Q. And there -- The mechanic, after he's finished going
6 over the car, takes that checklist, and that's supposed to
7 go in the service file, also?

8 A. That's correct.

9 Q. Where is that checklist? Have you found it? You
10 shrug -- you're kind of shrugging your shoulders, and
11 holding your palms.

12 A. It's not in the -- it's not in the file.

13 Q. It wasn't in the file? What happened to it?

14 A. I have no idea. I wasn't there in 2010, or 2003.

15 Q. It's supposed to be in --

16 A. I can't speak for what happened then.

17 Q. It's supposed to be in the service file, right?

18 A. Correct. It's supposed to be in the file.

19 Q. What have you done to try to locate it?

20 A. We've had whoever, our office people, go through the
21 files and look.

22 Q. Did you go through the file?

23 A. I did not.

24 Q. You agree that this particular car is dangerous,
25 right?

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

3 Q. Well, haven't you been to the -- haven't you been to
4 -- doesn't Honda have classes that you all attend? The
5 folks at various dealerships, you all go to weekend
6 classes, and week-long classes, and Honda teaches you all
7 --

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

10 Q. I'm talking about you.

11 A. Me?

12 Q. Yes.

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

15 Q. And it doesn't involve repairing cars?

16 A. No.

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

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

23 Q. Do you consider them highly professional?

24 A. Yes, I do.

25 Q. Well you understand, though, through being at Honda,

1 that Honda has certain specifications on how cars are
2 supposed to be repaired, right?

3 A. Yes.

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

6 A. Yes.

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

9 A. Correct.

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

15 A. I can't speak for that.

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

19 THE COURT: I sustain that.

20 BY MR. MOSKOS:

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

23 A. Correct. Yes.

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

1 A. Yes.

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

5 A. Yes.

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

8 A. No.

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

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

12 Q. You base it on mileage, right?

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

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

16 A. Correct.

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

19 A. Correct. Yeah.

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

22 A. Not necessarily. It could be a green light. I mean,
23 you can sell a car that has a dent through a green light.
24 You can sell a car that has bald tires through a green
25 light. When you sell a car through a red light, you're

1 dealing with a car that is very, very -- it's junk.

2 Q. Okay.

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

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

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

17 Q. All right.

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

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

22 A. Well ---

23 Q. Is that your testimony?

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

25 MR. MOSKOS: Your Honor, --

1 Q. Is your test -- you're doing -- your -- Let me tell
2 you, if you want to explain an answer, you're going to get
3 your opportunity. What I would like is just an answer to
4 my question.

5 A. Sure.

6 Q. Did Mr. Threatt and Mr. Ferrell handle this correctly,
7 according to Midlands Honda? At the auction?

8 A. I can't make a decision for them back in 2010. But
9 based on ---

10 Q. I'm talking about your corporation.

11 A. --- based on the information that they had or what
12 they know, by sending it to a red-light auction was the
13 best way for them to dispose of that car, and under what
14 their decision was.

15 Q. Now, when you were at Indian Trail, you used to sell
16 cars at ADESA, too, right?

17 A. Correct.

18 Q. And you knew, up there, that they had certain terms
19 and conditions, right?

20 A. Yeah. You -- Absolutely. Yes.

21 Q. All right. And you were aware of rule changes on
22 occasion.

23 A. I was not.

24 Q. You never knew about any kind of rules changes at
25 ADESA -- at the ADESA Auto Auction of any kind?

1 A. No. What I'm referring to is, I didn't know. And
2 I'll guarantee you, there's a bunch of dealers that didn't
3 know four months earlier they changed a rule on a red-light
4 sale, saying you have to disclose, according to that graph
5 --

6 Q. Okay. So -- so --

7 A. -- anything --

8 Q. -- so, it's your testimony -- Now, how many -- how
9 many cars did you -- how many red-light sales did you
10 attend prior to 2010?

11 A. Would -- I've never bought a car, ever. We'd never
12 consider buying a car at a red-light sale. That is --
13 there's a ---

14 Q. So, you don't know ---

15 A. --- nobody would.

16 Q. --- what the standard is. You don't know what the
17 standard is? You don't know ---

18 A. What do you mean I don't know what the standard is?

19 Q. --- what happens at the red-light sale.

20 A. What do you mean?

21 Q. You don't know what happens at a red-light sale,
22 because you don't go to them.

23 A. No, I've seen them. I've seen them. I mean,
24 typically, they save red-light cars for the very end of the
25 auction. So, the guys who are there to buy money and buy

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

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

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

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

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

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

25 A. Correct. Yes.

1 Q. And you -- you being Midlands Honda -- knew that, if
2 people, dealers, smaller lots, would go to red-light sales,
3 and buy these cars to put back out on a lot, to sell to
4 retail customers. You had an idea that somebody's doing
5 that, right?

6 A. What happens --

7 Q. No, sir. I'm not asking what happens. I'm asking
8 what you knew --

9 A. Well, I'm trying to tell you what I knew. What I do
10 know is that wholesale licensed dealers go into a wholesale
11 auction under a red light, buying a vehicle that a dealer
12 has sent and chose not to retail and not to sell as a red-
13 light, not to sell as a yellow-light, who sells it as a
14 red-light, those cars are going to go cheap, because there
15 is a major problem with them. And when you buy those cars,
16 you better look at 'em.

17 Q. Okay.

18 A. You better -- And you should arbitrate it if there's
19 an issue. You have every opportunity to do that.

20 Q. Okay.

21 A. We don't buy cars at a red-light. You don't. We --

22 Q. And can I ask you a question?

23 A. Sure.

24 Q. All right. Does Midlands Honda know that other
25 dealers go to red-light sales and purchase vehicles to

1 retail to consumers.

2 A. I know, because I've been to the auction, and I've
3 seen the lane. They usually have what's called an iron
4 lane, where they sell nothing but red-light cars. They
5 don't even mix them in with the other cars, and there are
6 people there bidding on them. I'm assuming they're
7 probably dealers, junk dealers, parts buyers, could be
8 anything.

9 Q. So --

10 A. But that's what they're buying. I've never stood in
11 the lane and bid on them, but they usually run them about a
12 half an hour before the other auctions even run, and they
13 put all those red-light cars, they call them an iron lane
14 and their just red light.

15 Q. So, Midlands Honda knew that cars sold at a red-light
16 sale could be put out for retail sale to consumers?

17 A. No. I -- I can't guarantee that that's what they were
18 doing with their cars. I just know there are people that
19 are bidding on them. I don't know what they're going to do
20 with them. I would -- I would -- If I was them buying that
21 car, I would consider very closely before I retailed
22 anything, because that's why we're not retailing it. We
23 have so --

24 Q. And you don't have any experience in selling cars that
25 come out of a red-light sale, do you?

1 A. Of course not.

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

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

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

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

16 Q. I understand ---

17 A. That's up to them.

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

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

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

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

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

6 A. And the things --

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

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

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

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

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

17 MR. MOSKOS: Yes, sir.

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

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

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

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

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

5 THE COURT: Okay. You can ask the question.

6 BY MR. MOSKOS:

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

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

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

17 Did Midlands Honda sell this car properly in April of
18 2010, when it sold the car at the auction? Yes or no, did
19 it do the right thing?

20 A. Yes.

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

25 A. No.

1 Q. In fact, just the opposite, right?

2 A. Apparently, yes.

3 Q. And you knew that when you were in North Carolina at
4 the other store.

5 A. No.

6 Q. You didn't know that, either?

7 A. I did not know that four months earlier that they had
8 installed that.

9 Q. In fact ---

10 A. A red light --

11 Q. --- in fact, you heard Mr. Guyer the other day say
12 that that matrix -- Okay. You heard the other day Mr.
13 Guyer say that the matrix that talks about the disclosures
14 was in place before 2010, right? You heard that?

15 A. I didn't hear that.

16 Q. Okay. Were you here for his testimony? The videotape
17 of ADESA.

18 A. Yes, I was. But I didn't catch that.

19 Q. Is it Midlands' position that, because it was ignorant
20 of the rules, it gets a pass?

21 A. No.

22 Q. It's still held to the same level of responsibility as
23 everybody else at the dealership, whether you know the
24 rules or not, right?

25 A. Correct.

1 Q. And if the rules say in three places that it has to be
2 disclosed, it's supposed to be disclosed, right?

3 A. Correct.

4 Q. Now, when the car came back from Mr. Ecklund, Midlands
5 should have inspected that car, right?

6 A. I don't know if they did or not.

7 Q. I'm not asking if they did. I'm asking -- I'm asking
8 you if they should have.

9 A. You know, from what I've heard, that they were under
10 the impression that it was a damaged car, and they disposed
11 of it immediately, within four days. That's what they
12 should have done.

13 Q. So, it's your position, or Midlands Honda position,
14 that a car comes in, and it does not have to be inspected
15 to find out the extent of the damage.

16 A. If a car comes in -- If a customer has a problem with
17 a car, we're going to take a look at it. Just like, it
18 sounds like he had it brought in and looked at it, and saw
19 that it was damaged, and sent it away. So, that's exactly
20 what we would do.

21 Q. Shouldn't Midlands Honda have inspected further to
22 find out the extent of the damage?

23 A. No. If it's not a retailable car, there's no need to
24 go further, and they didn't. They didn't make any changes.
25 They just shipped the car off as-is. They didn't conceal

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

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

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

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

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

24 Q. What do you mean -- what do you mean, they didn't --
25 they weren't aware? They weren't aware that this was a

1 clipped and damaged and dangerous car?

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

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

6 A. I have no idea.

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

11 A. Yes.

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

20 A. Yes.

21 Q. Very good.

22 A. Stuff that you would assume.

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

24 A. No, we don't.

25 Q. And North Carolina has a damage disclosure form,

1 right?

2 A. Yes.

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

6 A. Yes.

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

9 A. That's correct.

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

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

14 Q. Concord?

15 A. North Carolina.

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

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

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

24 A. We don't inspect every single car. We -- if a car has
25 an issue, we'll -- if a car is rough, damaged, or you know,

1 we'll park it aside, and we'll ship it off to an auction.

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

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

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

16 A. We disclose them through the auction.

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

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

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

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

25 Q. Okay. So, now, Midlands complies with North Carolina

1 law and the auction rules?

2 A. Yes.

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

7 A. No.

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

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

13 BY MR. MOSKOS:

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

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

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

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

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

24 A. Yes.

25 Q. And it was unfair to misrepresent this Civic at the

1 auction, wasn't it?

2 A. Yes.

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

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

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

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

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

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

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

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

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

25 A. Didn't owe any duty?

1 Q. Yeah, to disclose the damage.

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

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

12 A. Well, according to the rules --

13 Q. --- it did not.

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

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

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

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

24 A. No.

25 Q. And you know in South Carolina, you cannot register an

1 unsafe vehicle for use on the road, right?

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

4 MR. MOSKOS: Okay. All right.

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

7 A. True.

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

11 A. Yes.

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

15 A. Did he --

16 Q. --- the way he did?

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

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

21 A. And I can't speak for him.

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

1 evidence like that, do you?

2 A. No.

3 Q. And you know when you're dealing with the folks at the
4 auction, you have to deal in good faith, right?

5 A. Of course.

6 Q. And that's -- that's what business is based on, people
7 dealing fairly with each other?

8 A. And reputation. Absolutely.

9 Q. And -- but it's Midlands' position that it didn't do
10 anything wrong in dealing with Roger?

11 MR. WALKER: Your Honor -- asked -- asked and answered
12 multiple times.

13 MR. MOSKOS: Okay.

14 Q. And as of last year, there haven't been any changes to
15 the policies and procedures at Midlands Honda as a result
16 in this lawsuit, have there?

17 A. No.

18 MR. MOSKOS: I think I'm done, your Honor. Thank you.

19 THE COURT: Okay.

20 MR. WALKER: Your Honor, it takes me a minute to
21 navigate all that.

22 CROSS-EXAMINATION

23 GREG NALEWAJA BY MR. WALKER:

24 Q. Mr. Nalewaja, we don't have a whole lot of things to
25 talk about. I just want to be sure we're clear on a few

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

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

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

10 A. He is --

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

12 A. He is the guy, yes.

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

16 A. Unfortunately, no. No.

17 Q. You've talked some with Mr. Moskos about the January
18 2010 rules that applied to the sale in April, right?

19 A. Yes.

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

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

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

1 A. No. No.

2 Q. When your deposition was taken, did we have a copy
3 then?

4 A. I don't think so. I don't recall.

5 Q. Did we first get a copy when that Guyer guy got
6 deposed in Charleston?

7 A. Yeah.

8 Q. And I apologize, we're kind of skipping around.

9 A. That's okay.

10 Q. We've all had a pretty long chat.

11 A. No problem.

12 Q. You saw yesterday where we -- what got produced was
13 the pink slip, where Mr. Ecklund called. Do you remember
14 that?

15 A. Yes.

16 Q. Is there any pink slip in any of our records showing
17 that Mr. Whitley and Mr. O'Shields called the store?

18 A. I believe after he bought that car at the red-light
19 auction, an as-is ---

20 Q. Well, I --

21 A. --- I don't think we heard from him at all.

22 Q. Well, we don't have any pink slip?

23 A. We have nothing.

24 Q. And you've looked at the repair records on this
25 vehicle. In March or April, was there any repair record

1 showing any work was done on the car by Midlands?

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

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

13 A. Okay. Yes.

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

16 A. I believe so, yes.

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

19 A. Yes.

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

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

24 Q. If you were a car person standing there, out in the
25 lot, looking at a car like this one in 2010, could you have

1 pulled up Carfax on your phone and got it?

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

7 MR. MOSKOS: Your Honor, I would object.

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

9 MR. MOSKOS: I'm going to object.

10 THE COURT: Hold on a second.

11 THE WITNESS: I'm sorry.

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

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

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

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

25 BY MR. WALKER:

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

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

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

20 A lot of guys bring technicians with them and the
21 technicians will look at the cars and everything before
22 they bid on them in the auction, because you don't have
23 time, when that car's running through the lane, to inspect
24 that car. That's why you're -- you're -- it's suggested to
25 get there early and look those cars over and do your

1 investigation on them. Check your Carfax. Run a car
2 history on it. Know what kind of condition it is. Does it
3 show it's been in an accident? Does it show it's been, you
4 know, odometer changed; is it a grey market car? Check
5 that car out.

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

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

25 And why do people go to red-light lanes? Because they

1 are nice cars. They look good, but they have serious
2 issues. It could be a clipped car. It could be
3 electronic. It could be flood damage. You don't know.
4 But it's there for a reason, and that's why it's cheap and
5 inexpensive. It could be a twenty-thousand-dollar car for
6 ten thousand dollars.

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

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

19 MR. MOSKOS: Your Honor, I would object.

20 A. --- never arbitrated it.

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

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

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

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

23 Because they buy them cheap, but they -- they just
24 stick them out there. So, it's -- that's the buyer-beware
25 with those type of people buying those cars in a red-light

1 lane. And it's -- it's dangerous to -- to buy cars in a
2 red lane. I would never do it. That's why you heard Him.
3 I would never do it, period.

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

13 MR. WALKER: No further questions.

14 REDIRECT EXAMINATION

15 GREG NALEWAGA BY BY MR. MOSKOS:

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

20 A. That is correct, yeah.

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

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

25 Q. I didn't ask for your opinion, sir. I'm asking if you

1 know, in 2010, when this car was sold, if Midlands Honda
2 had a copy of the rules?

3 A. Not to my knowledge.

4 Q. Do you know?

5 A. No.

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

9 A. No.

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

12 A. Yes.

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

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

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

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

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

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

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

1 A. --- then I can't answer the question.

2 Q. Okay.

3 A. But I can tell you how it works now.

4 Q. We're worried about 2010. Okay? And at the time, in
5 2010, it was incumbent upon Mr. Ferrell to know what the
6 auction rules were?

7 A. Correct.

8 Q. And when you got in there in 2013 to the dealership,
9 and you learned that there wasn't a set of rules in the --
10 in the file, you didn't pick up the phone and call the
11 auction, did you, and say, give me a copy of the rules?

12 A. When we learned that there was this writ, we
13 immediately corrected our policy.

14 Q. That's not -- No, sir. I didn't ask if you corrected
15 the policy. You said a little while ago you all never had
16 a copy of the rules. When you got in there and you learned
17 about this case, you didn't pick up the phone and call, did
18 you, and say, hey, ADESA, give me copy of the rules?

19 A. Yeah. I mean, we got a copy of the rules. Once this
20 went down, we were like, well, what are we doing wrong? We
21 got the information immediately. And I think a lot of
22 dealers, from this, got the information.

23 Q. You didn't have the rules until we swapped papers back
24 and forth in this litigation. Isn't that the truth?

25 A. That is correct, yeah.

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

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

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

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

11 Q. You don't know if he called.

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

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

16 A. No, not everything.

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

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

1 Q. I --

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

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

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

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

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

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

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

1 say.

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

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

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

13 A. But that's how we ---

14 Q. --- to see them?

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

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

19 A. No. I don't determine --

20 Q. You just said it.

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

24 Q. You've given them -- -

25 A. We are disposing of the car --

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

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

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

11 A. We have the responsibility --

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

13 THE COURT: It has been??

14 BY MR. MOSKOS:

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

19 A. If you're standing in a red lane? If you're standing
20 in a red lane buying cars, and you haven't pre-inspected
21 it, and you don't inspect it afterwards, and you don't
22 arbitrate it, even when you have a chance to, on a red-lane
23 car? I mean, just because the car's going through the red
24 lanes doesn't mean it's a salvageable junkyard car.
25 There's lots of people that use those on their farms, to

1 haul wood, for different item -- for different things. I
2 mean, it has value. But that's how you dispose of it, and
3 you're telling them, I am releasing all liability, I'm
4 selling it as-is. When you buy something as-is, you better
5 beware, buyer beware. Be -- be careful.

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

12 MR. WALKER: Asked, answered, and admitted.

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

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

19 A. The buyer should, yes.

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

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

25 Q. And you agree that the buyer listening to the

1 announcements intently has a right to rely on what the
2 auctioneer is telling him, right?

3 A. Absolutely. Especially if they're in a red lane.

4 Q. And that is because the person talking to them is
5 speaking for the dealership, and telling the auctioneer
6 what to say at the auction, right? You know that to be the
7 case.

8 A. They are not there repre -- repping the cars all of
9 the time.

10 Q. I understand you're not there. But the person who
11 stands instead of the dealership is the person from the
12 auction, who has the power of attorney to represent the
13 dealership. And they are -- they are supplying the
14 information to the auctioneer on behalf of the dealer,
15 right?

16 A. Yes.

17 Q. And that person who is providing the information for
18 the dealership should have full knowledge of what is being
19 sold, so that the announcement can be made to the bidders?

20 A. Yes. According to the rules.

21 Q. And in order to be fair to those people?

22 A. Yes, according to the rules.

23 Q. And do you think that the bidder should be allowed to
24 rely on the damage -- the information on the Damage
25 Disclosure Form?

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

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

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

7 MR. MOSKOS: Yes, sir.

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

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

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

15 A. No, no.

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

17 A. No.

18 Q. Right?

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

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

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

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

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

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

6 MR. MOSKOS: I don't think so.

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

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

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

15 BY MR. MOSKOS:

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

18 A. Yes, sir.

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

22 A. Yes, sir.

23 Q. All right. So, if you're relying on the paperwork
24 that you received, and you don't either have the car at
25 this point, or you put it off because you were relying on

1 the paperwork, any misrepresentation can cause you to lose
2 those rights. Isn't that true?

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

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

12 A. Yes.

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

14 THE COURT: Okay. You can step down.

15 (WITNESS LEAVES WITNESS STAND.)

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

18 MR. MOSKOS: No, sir.

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

21 A JUROR: Quarter of two, sir?

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

23 When you come back in the jury room, I need you to do
24 something for me. I need you to select a foreperson. I
25 don't know any of you. You've been -- spent the last

1 couple of days together. The foreperson has no greater
2 vote than anyone else. They'll simply preside over the
3 deliberations and sign the verdict form. When you get back
4 after lunch, if you would sit down and decide who is going
5 to be your foreperson I would appreciate it. I'll see you
6 at quarter 'till two. Thank you.

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

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

10 MR. MOSKOS: Just one. Mr. Whitley.

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

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

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

25 When I say that, we can do that after lunch. So, this

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

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

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

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

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

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

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

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

19 THE COURT: Okay.

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

22 THE COURT: Well, I didn't know whether you wanted me
23 to -- I mean, I don't have any problems with charging it in
24 the morning. I was just trying to find out giving the case
25 to the jury tonight, depends on how late. And if -- if we

1 can get through by four or four fifteen, and you all want
2 to take a chance, it suits me to give it to them tonight.

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

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

18 THE COURT: Okay.

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

21 THE COURT: Is that a problem?

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

25 THE COURT: Okay.

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

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

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

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

18 Now, we'll continue to research that, but that's the
19 least -- if you all -- there was a similar situation in
20 that they applied the law and the rule but what the Court
21 of Appeals said, under traditional South Carolina choice of
22 law principles keeping it in state, the -- The Court comes
23 to the conclusion that the issue of punitive damages must
24 be decided under South Carolina substantive law. So, at
25 least that's what that case says. And I guess, as far as I

1 know, at this point, that's what case I have to follow,
2 unless you all can come up with something that changes
3 that.

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

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

11 Anything else before we go to lunch?

12 MR. MOSKOS: No, sir.

13 MR. WALKER: No, sir.

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

16 THE COURT: Wait a minute.

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

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

22 MR. MOSKOS: Yes, sir.

23 THE COURT: I'll see you all.

24 MR. MOSKOS: Okay. Thank you.

25 MR. WALKER: And after we get our last witness, we'll

1 take up the law?

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

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

8 THE COURT: Yeah. Okay.

9 THE COURT: That sounds good. Thank you.

10 MR. MOSKOS: Yes, sir. Thank you.

11 (COURT ON LUNCH RECESS AT 12:34 PM)

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

13 THE COURT: Thank you. You may be seated.

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

16 THE COURT: Okay.

17 (PAUSE.)

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

19 MR. MOSKOS: Yes, sir.

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

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

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

25 MADAM CLERK: Right. Just wait. Okay?

1 MR. WALKER: Would you move that, please?

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

3 MR. WALKER: Okay. That's fair.

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

5 THE BAILIFF: The jurors are seated, your Honor.

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

7 A JUROR: Yes, we did.

8 THE COURT: Okay. Who is that person? Okay.

9 Thank you, ma'am.

10 All right, you may swear in your next witness.

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

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

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

16 DIRECT EXAMINATION

17 ROGER WHITLEY BY MR. MOSKOS:

18 Q. What's your name?

19 A. Roger W. Whitley.

20 Q. Mr. Whitley, can you hear me?

21 A. I can.

22 Q. All right. Are you hard of hearing?

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

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

1 and you can't hear them, would you please raise your hand,
2 so that we can be sure that -- that you hear everything?

3 A. Thank you, sir.

4 Q. Okay. You'll put your hand up and let us know?

5 A. I will.

6 Q. All right. Am I talking loud enough now?

7 A. You are.

8 Q. All right, Roger. Tell us a little bit about
9 yourself.

10 A. Well, I am seventy-six years old. I was born and
11 raised in a small mill village in Albemarle, North
12 Carolina. My father died when I was about sixteen. I went
13 off to college when I was like, twenty years old. I was
14 probably the first kid in my family to go to college. I
15 graduated from Morris Hill College in about 1925, '26. I
16 was married, have three children, three little girls, three
17 fantastic little girls.

18 Q. How old are these little girls?

19 A. Well, one is fifty, one is forty-three, and the other
20 one's about forty-one now, so.

21 Q. So, when you got out of college -- Well, were you
22 working during college?

23 A. I worked at every little job I could find, but nothing
24 -- no permanent employment, no.

25 Q. What was your first major job?

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

3 Q. And what were you doing there?

4 A. What am I doing now?

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

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

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

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

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

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

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

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

25 Q. But you weren't arrested, were you? How did you wind

1 up in the police station?

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

18 Q. Did you enjoy it?

19 A. I --

20 Q. Did you enjoy that?

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

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

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

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

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

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

13 Q. Where did you buy those?

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

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

20 A. There were.

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

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

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

25 MR. WALKER: Your Honor, I think it would be great if

1 he would quit leading the witness, so, I object to the --

2 THE COURT: Let him testify.

3 MR. MOSKOS: Yes, sir.

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

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

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

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

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

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

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

1 people. And I really -- I made money, but that was not the
2 object.

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

5 A. I was.

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

7 A. No.

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

10 A. That's correct.

11 Q. And who is he?

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

17 Q. How big is Shelby?

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

20 Q. Has it grown over the years?

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

24 Q. Now, tell us about the kind of cars that you sell. In
25 2010 -- Well, if you're talking about today, has your --

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

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

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

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

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

16 A. Okay.

17 Q. --- buying this Civic. Okay?

18 A. Uh-huh.

19 Q. Had you ever been to the auction before?

20 A. Many times.

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

23 A. Well, ADESA Auto Auction is a very large building,
24 very large barn-type building, metal building. On one end,
25 they have an area where they clean up cars. They've got

1 eight or nine lanes, where the cars go into the building.
2 There's a large parking lot where the cars are parked.
3 Usually, they sell on Thursday. Sometimes, there will be
4 up to two thousand cars in the parking lot. Maybe they
5 would sell a thousand, twelve hundred, fourteen hundred
6 cars. They -- they work those cars through different
7 lanes, and the lanes would start at different times. You
8 know, like there would be a lane starting at nine o'clock;
9 there would be one starting at ten, one starting at ten
10 thirty, one ten forty-five, and so on.

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

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

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

25 A. Well, they clean it out. They make it look as good as

1 they can and bring it back through the sale, try to make
2 money from it.

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

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

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

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

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

21 A. Sure. Sure.

22 Q. Okay. How about under a red light?

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

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

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

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

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

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

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

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

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

3 Q. Did you fix the brakes?

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

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

7 A. Absolutely not.

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

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

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

21 A. Would you say that again?

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

1 type things?

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

9 Q. When was that?

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

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

16 A. I have an access card, yes.

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

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

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

23 A. The rule --

24 Q. Did your card work?

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

1 on. Yeah.

2 Q. After you got a new paperwork?

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

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

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

9 Q. Why?

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

14 Q. Are there any rules on the wall?

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

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

22 A. Absolutely.

23 Q. What were you looking for when you went?

24 A. Well, I was looking for bargains. I was looking for
25 good small cars. I had somebody who -- a specific little

1 sixteen-year-old girl that was looking for a car to drive
2 to school.

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

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

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

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

16 A. Okay.

17 Q. Tell us what happened.

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

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

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

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

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

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

17 Q. Why not?

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

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

3 A. Well, it was ---

4 Q. --- check it out?

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

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

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

15 Q. So, what did you do?

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

25 MR. WALKER: Your Honor, I will object to hearsay

1 testimony about what other people said.

2 THE COURT: Okay. I'll sustain.

3 MR. MOSKOS: Yes, sir.

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

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

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

12 A. I received -- Is it okay?

13 Q. Well --

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

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

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

21 Q. Okay. Did you receive a minimum price?

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

24 Q. How did you feel about that number?

25 A. Well, I had offered fifty, so.

1 Q. You talking five thousand dollars?

2 A. So, I --

3 Q. You said -- You said you offered fifty. I want to
4 make sure it --

5 A. I offered -- yeah, I offered five thousand dollars.

6 Q. Okay.

7 A. So, I agreed to pay fifty-two hundred dollars for it.

8 Q. All right. So, what are you doing next?

9 A. I go out. The car is parked within a close proximity
10 with a lot of other cars that are squeezed in. I get to
11 the car, and I take it -- I look it over. I got in it, I
12 drove it. The motor ran well. The transmission changed
13 good. Although I knew it had some little glitches, I
14 brought it back, and I agreed to the fifty-two hundred
15 dollars, that I would take it.

16 Q. Did you consider that car a piece of junk at that
17 time?

18 A. Absolutely not.

19 Q. And so, you paid the fifty-two hundred dollars right
20 then?

21 A. I wrote a check.

22 Q. Take a look at that document on top.

23 What is that, Roger?

24 A. It's a check that I wrote to ADESA on 4-2-10.

25 Q. For how much?

1 A. Six thousand, nine hundred and sixty dollars.

2 Q. And is that for just the Honda?

3 A. No. That was for a Honda car, for a box trailer, and
4 for a Ford Taurus.

5 Q. How did the Ford Taurus run?

6 MR. WALKER: Your Honor, I've allowed a lot of talk
7 about other vehicles, but I would be grateful if we'd focus
8 on this car, so, I object on relevance.

9 MR. MOSKOS: Okay. Well ---

10 THE COURT: I --

11 MR. MOSKOS: --- Mr. Walker has had his witnesses talk
12 about how red-light cars were all junk, and I just want the
13 jury to understand what red-light cars really are.

14 THE COURT: But you didn't ask him whether that Taurus
15 was bought under the red light.

16 MR. MOSKOS: Very good. Yes, sir. Your, Honor,
17 you're absolutely right.

18 Q. What -- Mr. Whitley, did you buy the Taurus at a red
19 light?

20 A. I did.

21 Q. And how did it run after that?

22 A. Fine. It was able to perform in the way that I
23 expected it to.

24 Q. Okay. Did you find any wreck damage in that car?

25 A. No.

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

3 MADAM COURT REPORTER: Ninety.

4 MR. MOSKOS: Ninety.

5 THE COURT: What say the Defense?

6 MR. WALKER: No objection.

7 THE COURT: Okay. Without objection.

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

10 MR. MOSKOS: Hand that to her.

11 A. Oh, I'm sorry.

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

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

15 A. Thank you.

16 MADAM COURT REPORTER: There you go, sir.

17 A. Thank you, ma'am.

18 MADAM COURT REPORTER: You're welcome.

19 BY MR. MOSKOS:

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

24 Did you have to pay the auction any money?

25 A. Only the checks.

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

3 A. Oh.

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

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

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

8 A. Fifty-two hundred dollars, yeah.

9 Q. Now, when did you get the receipt?

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

11 Q. When you paid for it?

12 A. I did.

13 Q. And what about the Damage Disclosure Sheet?

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

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

17 A. Yeah.

18 Q. And did you look at both of them?

19 A. I did.

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

22 A. On this -- the Sale Contract?

23 Q. Yes, sir.

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

1 Q. What does it say under announcements?

2 A. There's no announcement.

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

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

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

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

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

17 A. Okay.

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

24 A. I would have retreated right back to the office where
25 I got it. I would have gone right back and said, hey, this

1 is not correct.

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

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

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

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

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

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

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

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

22 Q. Had you had that happen before.

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

1 Q. Did they mention that when this car came across the
2 block?

3 A. Not that I recall.

4 Q. Was that enough for you to want to get out of the
5 deal?

6 A. No.

7 Q. All right. So, did you take the car home that day,
8 April the 2nd?

9 A. I would've, but the car wasn't available.

10 Q. What do you mean, it wasn't available?

11 A. Well, it had been put on a rollback, or some kind of
12 transport, and brought back to Midlands Honda, as I found
13 out about three hours after searching for it.

14 Q. Okay. And let me back up and cover one thing before
15 we move on. Is there any area of the ADESA Auto Auction
16 that has junk cars in it? Is there a particular location
17 there?

18 A. There is a back-row situation where cars that have a
19 variety of problems, and that's when you better beware.
20 You go back there and you pick out what you want; when you
21 buy it, it's yours. There's no arbitration. There's no --
22 no guesswork about it.

23 Q. And do you ever buy from that area of the auction?

24 A. I have.

25 Q. Were you interested in any of those cars at this

1 point?

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

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

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

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

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

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

15 BY MR. MOSKOS:

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

18 A. Hamilton. I'm sorry. Yeah.

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

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

21 Q. And did it ever show up?

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

24 Q. After -- after the auction?

25 A. Yeah. Yeah.

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

3 A. Say that again.

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

6 A. It was transported back to ADESA.

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

8 A. I had to go get it.

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

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

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

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

21 Q. Why?

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

1 Q. Did the title ever show up?

2 A. Twenty-one days later.

3 Q. And after that, what did you do?

4 A. I proceeded to fix the car. I mean, it had a damaged
5 door, and it had some other very small things. And we --
6 we had sold it to this young sixteen-year-old girl.

7 Q. Okay. Well, let's -- let's talk about the repairs
8 first.

9 A. Okay. Well, we did the repairs. We did the repairs
10 to the door.

11 Q. Well, let's take a look at this. You should have a --

12 MR. MOSKOS: Can I get this marked as Ninety-one,
13 please?

14 (WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER NINETY-ONE,
15 REMARKED FOR IDENTIFICATION.)

16 BY MR. MOSKOS:

17 Q. Roger, take a look at what is marked as Ninety-one.

18 What is that?

19 A. It's a bill from Evans -- wait a minute. Yeah, from
20 Evans Body Shop for Five hundred and fifty dollars for
21 repair to the door.

22 Q. I'm sorry. Are you saying Yeltins?

23 A. Yeah. Billy Yeltin's body shop. I have a hard time
24 reading his, his letterhead.

25 Q. Okay.

1 A. Yeltin's Body Shop for Five hundred and fifty dollars.
2 That was for Three hundred and fifty dollars for labor, and
3 Two hundred dollars for parts, was a total of Five hundred
4 and fifty dollars.

5 Q. Did he paint the door, too, or was it a two-tone car?

6 A. The car was -- Well, which half of the car are you
7 talking about?

8 Q. I'm -- No. I'm talking about when he put the door on
9 it. Did he paint the door?

10 A. Painted the door white. The -- the front of the car
11 was gray; the back of the car was white. We painted the
12 whole thing. The whole thing was painted white.

13 Q. The door was painted white?

14 A. Yeah. We painted the door white.

15 Q. This -- this --

16 A. It -- The back door was white.

17 Q. Right. But the car was silver, right? The Honda?

18 A. Yeah. That's -- that is correct. The car was silver,
19 but the back end of it was white. The front part of the
20 car white -- was silver, and the back was white.

21 Q. Well, when you bought it at the auction, could you see
22 two different colors of paint?

23 A. No, it was silver. It was silver.

24 Q. The whole car was silver?

25 A. It was.

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

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

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

5 MR. WALKER: --- object to leading.

6 THE COURT: Okay. Don't lead him.

7 MR. MOSKOS: Yes, sir.

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

9 A. He put a white door on the car.

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

12 A. Then, he painted it silver.

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

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

15 Q. What did you do with it?

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

19 MR. WALKER: No objection.

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

22 BY MR. MOSKOS:

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

24 A. I did.

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

1 the car for?

2 A. I sold it -- Actually Terry Evans sold it for Sixty-
3 eight hundred dollars.

4 Q. Now, who is Terry Evans?

5 A. She works at the garage and she holds a dealer's
6 license.

7 Q. And did she work solely for you?

8 A. No.

9 Q. Who did she work for?

10 A. For her husband, and for me, also.

11 Q. Who is her husband?

12 A. Randy Evans.

13 Q. And where does he work?

14 A. He owns Evans Garage.

15 Q. Where is that?

16 A. It's right in front of where our car business is.

17 Q. Is it y'all are next door?

18 A. Actually, we rent property from him.

19 Q. And occasionally, she'll sell a car for you?

20 A. Right. Uh-huh.

21 Q. And is she a salary employee?

22 A. No.

23 Q. When she sold this, did she receive any money, when
24 she sold this car?

25 A. She received a Two hundred dollar commission.

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

4 MR. WALKER: No objection..

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

7 BY MR. MOSKOS:

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

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

11 Q. Did that go on the car?

12 A. It did.

13 Q. And what kind of part was it?

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

15 Q. How much was that?

16 A. Ten dollars and twenty-seven cents.

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

18 A. Yeah.

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

22 A. I don't think so, no.

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

25 A. Sold -- who I sold it to?

1 Q. Yes, sir.

2 A. Okay. Terry Evans sold it to Ms. Gorman and her
3 daughter, White.

4 Q. Did you communicate to Ms. Gorman and Ms. White you
5 would do anything else about this car, or related to this
6 car?

7 A. Through Terry I agreed to do the timing belt and water
8 pump. Not pay for that material, but at least furnish the
9 labor for it to be done.

10 Q. So, they pay for the part, and you would furnish the
11 labor?

12 A. Right. As I recall, yeah.

13 Q. And when was that work supposed to be done?

14 A. At Evans Garage.

15 Q. No, when was that supposed to be done?

16 A. Well, as soon as possible. It was not a long time
17 before they brought the car in to fix it.

18 Q. And what happened then?

19 A. They put it on the rack. I was at ADESA considering
20 other cars when I got a call concerning the clip of the
21 car.

22 Q. So, what are you thinking at that point?

23 A. It was a sick feeling. A very sick feeling.

24 Q. So, what did you do?

25 A. I told them to immediately call the folks that owned

1 the car. Tell them to bring it back, get their money back.

2 Q. No, who did you tell?

3 A. I told Terry. I told Terry.

4 Q. Terry Evans?

5 A. Evans, yeah.

6 Q. Okay. What did you tell her?

7 A. To call the Whites, and tell them to come and get --
8 to come bring the car, or come bring the title, and get
9 their money back. Or we'd talk to them about getting
10 another car.

11 Q. You had -- Did you have possession of the car at that
12 point? Was --

13 A. We did.

14 Q. What did you do while you were at the auction?

15 A. I went to arbitration.

16 Q. And what happened?

17 A. We looked the car up on -- on their computer.

18 Q. Okay. And did you talk to the people there about the
19 problem you were having with this car, that it was a
20 clipped car?

21 A. I talked to Billy Jarvis, who was the arbitrator.
22 Yeah.

23 Q. What did you tell him?

24 A. I told him the problem I had. That I had a car that
25 had severe damage to it that I had just purchased.

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

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

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

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

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

10 A. I was looking at it.

11 THE COURT: Well --

12 BY MR. MOSKOS:

13 Q. Were you able to go through arbitration?

14 A. No.

15 Q. Why not?

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

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

23 A. I went upstairs.

24 Q. Upstairs? Why did you go upstairs?

25 A. I went upstairs and spoke with Elaine Hamilton about

1 the car.

2 Q. What did you tell her?

3 A. Same thing I told the rest of 'em, the others; that I
4 needed to have somebody contact me about the car.

5 Q. And did you know how to get in touch with the seller,
6 Midlands Honda?

7 A. The only name I could get from them was Brent Ferrell.
8 I was told that he was the manager.

9 Q. Okay. And did -- Were you given any -- any contact
10 information?

11 A. I was.

12 Q. So, after you finished over at ADESA, what did you do?

13 A. About two days later I called Midland Honda.

14 Q. Why did you wait two days?

15 A. I mean, I -- I don't know. It might have been -- I
16 don't know.

17 Q. Okay.

18 A. I mean, there was a lot of frustration during that
19 time, but.

20 Q. So, what happened when you called Midlands Honda?

21 A. I asked if Billy Jarvis -- I mean if Brent Ferrell was
22 the used car manager, and they said yes. I -- I asked if
23 he were there and they put him on the phone.

24 Q. And then, what?

25 A. I asked him if he were Brent Ferrell, and he said yes.

1 Q. And then, what?

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

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

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

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

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

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

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

16 Q. Did you ever hear from him again?

17 A. No, sir.

18 Q. What did you do about Ms. Gorman?

19 A. We gave them their money back.

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

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

24 Q. Did you give them any additional money?

25 A. Say that again?

1 Q. Did you give them any additional money?

2 A. I gave them ---

3 Q. Anything more than their check?

4 A. --- I gave them money for all their transfer fees, and
5 every -- Everything that it had cost them to possess that
6 car I gave them the money back to them.

7 Q. And how much additional money was that?

8 A. It was like, three hundred and forty-five dollars, or
9 something like that.

10 They would have kept the car. I wouldn't let 'em.

11 Q. Now, when I add up the car, the auction fee, the door,
12 the expense you had for Terry, and the relay, that gives me
13 Six thousand, one hundred and forty-five dollars and
14 twenty-seven cents. Does that sound about right?

15 A. That sounds about right.

16 Q. Roger, do me a favor. Take this calculator. You had
17 a sale of Six thousand, eight hundred dollars. You had
18 expenses of Six thousand, one hundred forty-five dollars
19 and twenty-seven cents. What's the difference? Can you --
20 I'm sorry. I didn't do that right. Would you please
21 subtract Six thousand, one hundred and forty-five dollars
22 and twenty-seven cents from Six thousand, eight hundred
23 dollars. I've got it backwards now.

24 A. I'm not doing too good with that.

25 Q. Try this. Six thousand, eight hundred. You got it?

1 A. Yeah.

2 Q. What is the number?

3 A. You do it.

4 Q. Okay. All right.

5 A. I wasn't looking at it.

6 Q. I was -- I'm sorry. I asked you -- I asked it all
7 wrong. All right. Six thousand, eight hundred dollars
8 minus --

9 A. When you're old, you got old eyes.

10 Q. Read that number on the calculator for me.

11 A. Okay.

12 Q. Can you read it?

13 A. Well, I got something here. Okay. Sixty-five, four
14 seventy-three.

15 Q. Say that again?

16 A. Sixty-five, four seventy-three. Sixty-five.

17 Q. Six hundred and fifty-four dollars and seventy-three
18 cents?

19 A. Yeah.

20 Q. Is that the profit that you made on that car?

21 A. Yeah. That's all we could have possibly made, yeah.

22 Q. All right. So, you gave Ms. Gorman back her money.
23 What did you do with the car?

24 A. The car's been from pillar to post. It's in -- it's
25 in my back yard right now.

1 Q. Just sitting there?

2 A. It's -- it's been around different places. It's in my
3 back yard right now.

4 Q. And did you -- did you ever go out and try and sell
5 the car?

6 A. I went out and talked to friends I knew, trying to
7 find out what they thought the car would be worth, should I
8 get stuck with it to the point that I couldn't sell it,
9 couldn't get rid of it. But I didn't try to sell it. I
10 just wanted to know the value.

11 Q. And you have -- When did you learn that the car was
12 unsafe?

13 A. Well, when we -- when we put the car up to put a
14 timing belt and water pump on it, the guys looked at it.
15 We looked at it, I looked at it. It was a chopped-up mess
16 underneath.

17 Q. Okay. And based on your experience in the car
18 business -- Well, could you have sold that car in that
19 condition?

20 A. What?

21 Q. Could you have sold it?

22 A. Oh, absolutely not.

23 Q. Why not?

24 A. Well, even if I could have gotten somebody to buy it,
25 I would not have been responsible for that car. I wouldn't

1 want the responsibility for it.

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

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

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

12 BY MR. MOSKOS:

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

16 A. Five hundred dollars.

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

21 A. Well the car could be -- could have been worth two
22 thousand dollars. But it wouldn't have been worth two
23 thousand dollars to me, in that I don't have the tools or
24 the skills to take it apart, take the motor out, take the
25 transmission out, and take it off piece by piece, and then

1 wait 'til four or five years so I could sell all the parts
2 so it wouldn't.

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

4 A. I absolutely don't, no.

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

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

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

9 A. The junkyard.

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

11 A. Absolutely.

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

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

17 Q. What are you going to do with it?

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

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

21 A. If I can get that much.

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

24 A. Right.

25 Q. And keeping the car worth five hundred bucks, what's

1 the total loss on this car?

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

5 MR. MOSKOS: No further questions, your Honor.

6 CROSS-EXAMINATION

7 ROGER WHITLEY BY MR. WALKER:

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

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

11 Q. Okay. I'll -- When I change topics, I'll try to let
12 you know, so we can follow each other. Okay?

13 First thing I want to talk about is when you bought
14 the car. Okay?

15 A. Okay.

16 Q. As I understand it, you bought it off the block, and
17 the car was out in the lot.

18 A. When I finalized the deal, yeah, the car was out in
19 the lot.

20 Q. You had the opportunity to test-drive it?

21 A. I did.

22 Q. And since it's not on the block, you had all the time
23 you wanted to walk around and look at it, right?

24 A. Well, if you do that, you get run over. But I had
25 time I could walk around it a little bit.

1 Q. Did you have all the time you felt you needed to
2 evaluate and examine the vehicle at the auction before you
3 decided to buy it?

4 A. I had some time. I had some time. It wasn't super-
5 adequate. It never is at the auction. It's all usually
6 push-and-shove, but I had looked at the car, and I was -- I
7 was satisfied I wanted to -- to pursue it further.

8 Q. Well, the car's parked in the lot, sitting there,
9 isn't it?

10 A. Between about four or five other cars, yeah. You
11 couldn't hardly get to it, but I.

12 Q. But you could get to it, and you could look at it, and
13 take all the time you wanted, right?

14 A. I took an adequate amount of time.

15 Q. Now, I understand there was a dent in the rear-
16 passenger door, right?

17 A. Say that again?

18 Q. Wasn't there a dent in the rear-passenger door of that
19 car when you looked at it, at the auction?

20 A. That's right.

21 Q. So, you knew it had run into something.

22 A. I didn't run -- I don't know what had run into it. I
23 didn't know whether a car had backed into it, or -- I don't
24 know. I mean, I didn't know what caused the damage. I
25 knew the damage was there.

1 Q. Well, and that's why I asked you --

2 A. But the door was closed, yeah.

3 Q. But that's why I asked a broad question. Either the
4 car ran into something, or something ran into it and made a
5 dent?

6 A. Uh-huh.

7 Q. Right?

8 A. I -- I -- yes. I ---

9 Q. And you talked --

10 A. --- I would assume that, yes.

11 Q. And you talked earlier about scrapes. There was some
12 other damage on the body of the vehicle. Why?

13 A. I don't recall any. There might a been some cratches,
14 but I don't recall any other damage on the vehicle.

15 Q. Well, you've -- you watched Mr. Ecklund's testimony on
16 the video, right?

17 A. Uh-huh.

18 Q. And remember, he identified some photos ---

19 A. Uh-huh.

20 Q. --- of the vehicle. Right?

21 A. Uh-huh. Right.

22 Q. I'm going to show you Exhibit Twenty. And I'll tell
23 you, he testified, this is a seam in the right-rear quarter
24 panel.

25 A. Okay.

1 Q. Isn't it true that shows white paint and gray paint?

2 A. As far as I can see there, yeah.

3 Q. You heard Mr. Ecklund say that's how it looked when he
4 left it.

5 A. I don't -- I don't recall him saying that. I'm not
6 saying he didn't say it, but.

7 Q. When you looked at the car in the lot at the auction,
8 when you had an adequate amount of time, did you even
9 notice the white paint and the gray paint clearly visible?

10 A. No.

11 Q. When you looked at the car sitting in the lot, was it
12 dirty?

13 A. It wasn't clean.

14 Q. It -- So, it hadn't been cleaned up, or spiffed to ---

15 A. Uh-huh.

16 Q. --- look better at the auction?

17 A. No.

18 Q. Now, this car came in under the red light, correct?

19 A. Like many cars do.

20 Q. I understand that. We've talked for days about ---

21 A. Uh-huh.

22 Q. --- announcements and all that. But you understand
23 there's more risk to a red-light car than there a green-
24 light car, right?

25 A. Far as I know, yes, sir.

1 Q. And subject to all these fifteen pages of rules, its
2 an as-is sale.

3 A. Say that again?

4 Q. Subject to the fifteen pages of the auction rules,
5 this is an as-is sale under a red light.

6 A. I guess. Yeah.

7 Q. That's correct, isn't it? When you looked at the car
8 in the parking lot at the auction, did you use a paint
9 meter to go around the car, and see if it had more body
10 damage?

11 A. I don't operate with that kind of equipment. No.

12 Q. Well, a paint meter is something, I can stick it in my
13 pocket.

14 A. I understand what it is. I -- No.

15 Q. Well, they -- they don't. Isn't that a device you can
16 use to measure the thickness of the paint?

17 A. It's the life's blood of a lot of people who buy cars.
18 It's not mine. I just don't use.

19 Q. But you can go around the car with a paint meter,
20 measure the paint, and get some idea if it's got a lot of
21 body work or a little body work, can't you?

22 A. I guess that could. It's like I said, I do not -- I
23 don't rely on that kind of equipment, so.

24 Q. Didn't do it then, right? On this car?

25 A. No.

1 Q. Did you get a mirror to look underneath it, to see if
2 it had damage to the undercarriage?

3 A. No. No. I relied on the auctioneer and what he had
4 said.

5 Q. I understand that. Now, the place where you operate
6 your car lot in 2010, do you essentially kind of share
7 space with Evans' Garage?

8 A. I do, yeah.

9 Q. So, you've got access to the garage facilities right
10 there, don't you?

11 A. Yeah. Yeah.

12 Q. Did you take this car in and put it on a lift, and
13 take a look at it, to be sure if those announced conditions
14 were accurate or not?

15 A. Well, we had looked at the car just as much as Midland
16 Honda had when it -- before it sent it up there. We had
17 looked at the car just as much as Midland Honda did. If
18 they didn't see it, why would you say I should see it?

19 Q. So, you -- they gave it a visual inspection, and you
20 gave it a visual inspection, right?

21 A. We gave it a visual. I felt like the car was safe,
22 yeah.

23 Q. But you all both gave it a visual inspection, and
24 missed the damage; is that right? You all both -- Midlands
25 Honda and you gave the visual inspection at some point, but

1 didn't both of you miss the damage?

2 A. I didn't, no. Uh-huh.

3 Q. Okay. So, you didn't miss the damage?

4 A. I didn't find the damage. I didn't see the damage.

5 Q. I'm going to hand you Exhibit Fifty-two. These are
6 rules. And this is where we looked at the chart earlier.

7 Okay? And in the upper right-hand corner -- excuse me, the
8 upper left-hand corner of Exhibit Fifty-two is the date
9 January 2010, right?

10 A. Okay.

11 Q. I mean, it's -- that's what's on here, right?

12 A. Uh-huh.

13 Q. When you bought this car out on the lot at the
14 auction, what was your responsibility to examine the
15 vehicle? Under the rules.

16 A. I did everything I was supposed to, under the rules.

17 Q. Well, what's your responsibility? What do the rules
18 say about what you're supposed to do? And if you don't
19 know, that's okay.

20 A. Auction -- you want me to read it to you?

21 Q. Well, why don't we look at paragraph 2(d), as in --
22 excuse me 3(d), as in dog. It says buyers are cautioned to
23 expect inspect lot-sale vehicles very carefully and verify
24 announced conditions before purchasing. Did you very
25 carefully inspect this vehicle and verify that what you

1 heard at the sale was accurate?

2 A. By the time I paid for the vehicle and got back
3 outside, the car disappeared.

4 Q. Well, your check's dated April 2nd, and the auction
5 was April 1st. So, didn't you have plenty of time to look
6 at this car?

7 A. I looked -- I didn't see the car until the day of the
8 auction.

9 Q. Right.

10 A. I saw the car the day of the auction. The car went
11 outside, and I looked at the car there. But it was a
12 cursory -- I just -- You know I drove it and then I had
13 time to look at it a little bit and then I went back in and
14 talked about it. Then, when I turned around to come back
15 and get it, the car was gone. And it didn't come back
16 until after the time frame -- until after my time for
17 arbitration was over with. I didn't have a chance to -- I
18 didn't have a chance to arbitrate it.

19 Q. Even after -- Well, when the car finally got to you
20 from the auction, and you had it right there at your
21 facility with Evans' Garage, what did you do to verify that
22 the conditions announced were accurate, as you are required
23 to do in the rules?

24 A. When I looked at the car and I saw that there were
25 some problems, I went in and talked to Billy Jarvis, who is

1 in charge of the arbitration.

2 Q. I'm asking you what you did yourself to verify that
3 the conditions were accurate, when you had access to Evans'
4 Garage, and lifts, and everything. Isn't it true --

5 A. As far as I could see --

6 Q. Isn't it true you did nothing?

7 A. As far as I could see, and the way this car was
8 presented to me, it was okay. It was okay to Midland Honda
9 when they left with it, so it was -- I don't know how you
10 could expect me to know any more about it than they did.

11 Q. So, you were -- you just stuck your head in the sand,
12 and just did the visual inspection?

13 A. About like Midland did, I guess.

14 Q. That's what you did, right?

15 A. I -- Not necessarily. I'd put out some money that I
16 didn't have to waste. And no, I wanted a good -- I wanted
17 a good car. I didn't expect them to send junk up there.

18 Q. Well, we'll talk about the money. Sure. Okay?

19 A. Okay.

20 Q. Do you feel you very carefully inspected the car
21 before you purchased it?

22 A. I inspected it the very best I could. Just like they
23 inspected it the best they could when they sent it up
24 there, supposedly. They've got better equipment to inspect
25 it with than I have.

1 Q. Before you sold it, did you do anything to verify
2 there wasn't any damage to the undercarriage ---

3 A. I ---

4 Q. --- where somebody run over a stump or whatever?

5 A. --- did not. That was a mistake that we made that we
6 corrected it. As soon as we found out that we made a
7 mistake, we gave the people their money back. That's
8 better than I got from you folks.

9 Q. When you were standing in the lot at the auction, did
10 you pull a Carfax on this vehicle?

11 A. Did I pull the car up?

12 Q. When you were looking at the car in the parking lot at
13 the auction before you bought it, did you pull up a Carfax
14 on a telephone or an Ipad?

15 A. There is no way that I have, or not many people have,
16 of pulling a Carfax. Now if you'll look at the Carfax on
17 it, you wouldn't want to see it, because the Carfax doesn't
18 tell the truth about the car.

19 Q. Well, do you realize there's at least one Carfax in
20 evidence in this case that talks about wreck damage?

21 A. There was one Carfax that showed one wreck. The car
22 had been wrecked three times. Midland Honda apparently
23 hadn't checked that.

24 Q. Well, you didn't check it, either, did you?

25 A. I absolutely did not.

1 Q. So, that's --

2 A. But I don't have the facilities that they have.

3 Q. So, that's something else you and Midlands Honda did
4 in common?

5 A. But -- I don't know about in common, but.

6 Q. I want to shift gears from the purchase and talk about
7 the rules. Okay? The auction rules. Are you with me?

8 A. I'm following you.

9 Q. Okay. I understand you started selling cars at about
10 1990 or 1991, right?

11 A. Somewhere along there.

12 Q. And somewhere along there, you went to ADESA and got
13 signed up and got the rules.

14 A. Uh-huh.

15 Q. Right?

16 A. Right.

17 Q. And isn't it true that, since you're not sure if you
18 ever looked at them again from that time until this segment
19 in 2010?

20 A. After we had our little situation, I went and looked
21 at them thoroughly.

22 Q. Isn't it true that from 1990 and 1991 until 2010, you
23 never looked at -- you're not sure if you ever looked at
24 the rules again?

25 A. That might have been true. 1991. But I've seen 'em

1 since.

2 Q. And you and I started this conversation about
3 paragraph 3(d), as in dog, you didn't realize you had a
4 duty to verify those conditions, did you?

5 A. I don't really know what's on that paper.

6 Q. Got it. And the upper right-hand corner -- excuse me,
7 I keep calling it right -- the upper left-hand corner of
8 these rules, first page, the date on there is January 2010,
9 right?

10 A. I suppose it is.

11 Q. And this sale was April 1 of 2010. Right?

12 A. It was in 2010.

13 Q. So, from January 1 to April 1, that's three months of
14 time, right?

15 A. Okay.

16 Q. And that's the period that these rules would have been
17 in effect.

18 A. Say that again.

19 Q. That's the period of time these rules had been in
20 effect before your purchase.

21 A. Okay.

22 Q. And when you bought the car on April the 1st of 2010,
23 you didn't have a copy of these either, did you?

24 A. I didn't -- Nobody had a copy of those. They don't
25 carry them around over there.

1 Q. Well, that's one more thing that you and Midlands
2 Honda have in common, right?

3 A. But that's something you don't carry around at a sale.

4 Q. Both you and Midlands Honda, on April 1, 2010, did not
5 have a copy of the rules that are Exhibit Fifty-two?

6 A. Probably had one at the office.

7 Q. You had a conversation with your lawyer, shifting
8 gears a little bit, the bill of sale, the receipt you get
9 from the auction, you're familiar with that piece of paper,
10 right?

11 A. I'm familiar with the receipt that I got from the
12 office -- off -- from the auction, yes.

13 Q. And on this Honda, from 2010, there's a box checked
14 that says red light, as-is, correct?

15 A. I know what you're talking about, as far as red light.
16 About half the cars I buy are on red-lights, and they're --
17 they're good automobiles. It has nothing to do with
18 structure of the automobile. We were advised that when we
19 had the session with the guy from ADESA.

20 Q. So, you had --

21 A. The damage to the automobile is completely separate.

22 Q. Well, I just want to be sure I'm clear. On the
23 document itself that you get, the receipt, it simply has
24 the words red light, as-is.

25 A. About everything I buy has got red light on it.

1 Q. And it says as-is, correct?

2 A. Well, it means I can't come back and ask for money
3 back, but it -- in the rule book that we get from ADESA, it
4 says the seller has to notify us if it has more than
5 twenty-five points of damage; and you're supposed to
6 announce it at the sale, which you did not do. It was not
7 announced at the sale that it had damage. It showed clear
8 title. No matter what the red-light sale says.

9 Q. The form you got said as-is, right? That's all I'm
10 asking.

11 A. Well, it was as-is as far as the auction was
12 concerned, but not as-is as far as Midlands Honda is
13 concerned. They can't sell cars like that.

14 Q. Is there a reason you don't want to answer this
15 question, Mr. Whitley? It's real simple.

16 A. But that's my thinking. That's the way I see it.

17 Q. And Mr. Whitley, I -- I'm not feeling well today. I'm
18 a little slow, so I apologize if I kind of hold up here a
19 little bit.

20 A. Well, I apologize to you, also. I don't mean to be
21 disrespectful, but I want us to be honest about this thing,
22 and -- and I haven't run into honesty from Midland Honda.

23 Q. Well, we're going to shift gears a little bit and talk
24 about training. Okay? Your lawyers asked other folks a
25 lot of questions about whether they are highly trained. Do

1 you consider yourself to be a highly-trained used car
2 expert?

3 A. I've had a lot of experience. I'm not an expert at
4 anything, but I've had a lot of experience.

5 Q. And by experience, we're talking about sort of on-the-
6 job training, right?

7 A. Yeah. I've had a little on-the-job training.

8 Q. So, you've learned how to value cars by buying and
9 selling cars?

10 A. I haven't crawled around on the ground to look at 'em,
11 and I haven't seen anybody else doing that.

12 Q. And you haven't taken any classes or formal training
13 in --

14 A. Absolutely not.

15 Q. What about Ms. Evans, your salesperson?

16 A. She'd probably come closer to having experience like
17 that than I would. They have a list.

18 Q. But you don't know -- she hasn't been trained in what
19 she's supposed to say and not to say to customers, has she?

20 A. I haven't -- Well, they had a good business, so she
21 evidently has smarts enough to know what to say to
22 customers and not.

23 Q. Shifting gears a little bit to the vehicle and what
24 you did to it. Your company replaced the door, right?

25 A. We did.

1 Q. Had paint work done, right?

2 A. We painted it. We -- we painted the door.

3 Q. And that was to cover up the body damage from whatever
4 had happened to the vehicle?

5 A. It had a bent door on a gray car. We put a white door
6 on it and repainted it.

7 Q. Repainted the car white?

8 A. Repainted the -- the white door gray.

9 Q. Earlier, I thought I heard you say --

10 A. I might have made a mistake.

11 Q. I understand that.

12 A. The car -- the car was gray. It was chopped in half,
13 and the back half of it is white. The front half has got
14 eighty-four thousand miles on it. I couldn't tell you what
15 the back half has, because I don't know where it came from
16 or anything about it.

17 Q. After you had replaced the door and had the painting
18 done, you couldn't really tell that the door had been
19 dented. That -- that problem was solved, right?

20 A. It was a pretty good job of correcting it.

21 Q. Do you know if that damaged -- the replacement of the
22 door and that paint work got disclosed to the people who
23 bought the car from you?

24 A. Do I know if?

25 Q. When the car got sold to the young lady who was buying

1 it from you, Ms. Evans made that sale, right?

2 A. Right.

3 Q. And you don't know if she even told those people that
4 you replaced the door, do you?

5 A. I don't know what she told them. I never saw the
6 people, I never knew them. All I knew is that we were
7 going to treat 'em fair.

8 Q. I want to shift gears and talk about the underside of
9 the Honda. Okay?

10 A. Okay.

11 Q. You saw the underside of the Honda after Evans' Garage
12 put it up on a lift, right?

13 A. It didn't take them but about three minutes to tell
14 what was there.

15 Q. And when you walked up, it was real obvious, wasn't
16 it?

17 A. I didn't even have to walk up and look at it. They
18 called me and told me about it.

19 Q. So, if you'd made an effort to look under there
20 before, you would have caught this long in the past?

21 A. Well, I'm a pretty good-sized fellow, and it would be
22 hard for me to crawl around under the car. And besides,
23 when I buy a car from a reputable dealer like Midland
24 Honda, I don't expect to have to crawl around on the ground
25 and look under it. I expect them -- They sold me the car

1 with no problems. I expected it to be that way. I didn't
2 think I needed to crawl around on the ground, and find out
3 what was under it.

4 Q. Even though the auction rules require you to verify
5 what got announced?

6 A. All I know is, I've been buying car for twenty-five
7 years, and I've never been asked to crawl under one like
8 that.

9 Q. I want to talk to you about two documents: the Title
10 to the Honda and the Disclosure Statement. Okay?

11 A. Okay.

12 Q. I understand it took twenty-one days for you to get
13 the title, right?

14 A. At least.

15 Q. And it was delivered to you by the auction.

16 A. In the mail.

17 Q. Right?

18 A. Right.

19 Q. And the Disclosure Statement came with it, didn't it?

20 A. The Disclosure Statement I got at the time I bought
21 the car.

22 Q. Well, you heard the auction guy testify earlier this
23 week, right?

24 A. I don't really know what he said, but I'm just telling
25 you, I got it at the time I paid for it. I wasn't going to

1 leave without some evidence that I'd paid for the car.

2 Q. So, this form isn't received until some point after
3 the sale, when the title is transmitted?

4 A. I don't know what that paper says. I know what I
5 walked off with.

6 Q. This is not a paper. This is Mr. Guyer.

7 A. I don't -- I don't mean any disrespect for Mr. Guyer,
8 but I know what I walked off with.

9 Q. Is there --

10 A. I had -- I had a disclosure.

11 Q. Is there some reason why your deal about it handled
12 differently from the thousands of others that get done
13 every week?

14 A. I don't know -- I don't know my -- I don't even know
15 how to answer that question.

16 Q. Well, let me ask it a different way.

17 A. Okay.

18 Q. Isn't it true you paid the money, when you didn't even
19 have the Disclosure Statement, because it came with the
20 Title?

21 A. He gave -- Well, they didn't have the title. The
22 title was in -- was down here, you know, so.

23 Q. Isn't it true the Disclosure Statement came in the
24 mail with the Title just --

25 A. Absolutely not. Absolutely not.

1 Q. So, your deal was handled differently between the
2 thousands of others that the auction does?

3 A. I don't know what happens with thousands of other
4 buyers. There are some, when they leave, they're happy;
5 some are mad. I don't know.

6 Q. The people who bought the vehicle from you, you gave
7 them a Disclosure Statement, right?

8 A. I did.

9 Q. And it also incorrectly said --

10 A. If it was incorrect because what I had gotten from you
11 people was incorrect. That's what was incorrect.

12 Q. So, it got sold again with a disclosure that wasn't
13 accurate?

14 A. I did according to the paperwork, the paper trail, I
15 had to operate.

16 Q. One short topic. I understand you've been in law
17 enforcement for much of your life, right?

18 A. I have.

19 Q. And when I was a long-ago young lawyer, I did a lot of
20 criminal work. You've been in court a lot, haven't you?

21 A. In my older days, I've spent a lot of time in court.

22 Q. So, you're a lot more comfortable in the courtroom
23 than a lot of other people, because you're used to being
24 here?

25 A. Well, as time goes on, you might not be. But anyway.

1 Q. I understand that. We need to talk about the numbers.
2 And, got my cheat sheet. I understand you had the car sold
3 for Six eight hundred dollars?

4 A. Something thereabouts. Right at Sixty-eight hundred.

5 Q. And you paid, with the auction fee added, Five
6 thousand, three hundred and eighty-five dollars for that,
7 right?

8 A. Five thousand, three hundred and eight-five.

9 Q. So, that's your cost. And you're going to have a
10 gross profit off of that, right?

11 A. Right.

12 Q. I got some bad math here. I apologize. I'm gonna
13 have to do this in my head. Always dangerous.

14 A. If you get close to it it'll be good.

15 Q. I'll be close.

16 A. Okay.

17 Q. And I apologize, I looked at the wrong line and I
18 messed up. Well, I did have the right number. And I'll
19 move this so you can see it. I took your sales price,
20 minus your cost, and you've got a gross profit of One
21 thousand, four hundred and fifteen bucks. That sound about
22 right?

23 A. I can't argue with it. I can't say it's right.

24 Q. Okay.

25 A. From this standpoint.

1 Q. Well, and --

2 A. Mr. Moskos had it right there, I think.

3 Q. Well, I under -- I understand that. But this is you
4 and me talking now. Okay?

5 A. That's fine.

6 Q. And I understood you had some costs. You paid --
7 Profit.

8 You guys see this okay?

9 And you had some costs. You had Two hundred dollars
10 commission, right?

11 A. I did.

12 Q. And you had these repairs. That invoice was Five
13 hundred and fifty bucks; is that right?

14 A. Right. Apparently.

15 Q. And those were costs you incurred to make the sale,
16 right? Is that correct?

17 A. That sounds good. Sounds good.

18 Q. So, you got Seven hundred and fifty bucks in costs,
19 and I'm not worried about the ten-dollar switch.

20 A. Okay.

21 Q. So, it'll be close. Okay?

22 A. That's fine.

23 Q. So. I do that math. That leaves you with Six hundred
24 and sixty-five dollars-worth of profit, right?

25 A. That's fine with me.

1 Q. Okay. Now, I understand you gave them Three hundred
2 and forty-five dollars to undo the title stuff.

3 A. I gave their money back for the title.

4 Q. So, that was an extra cost?

5 A. Well, it was.

6 Q. Okay. So, if you take your profit, and then the money
7 you had to add in, that's Eleven hundred bucks.

8 A. And I spent a hundred dollars to get it brought in on
9 a rollback.

10 Q. I'm sorry?

11 A. If you want to split hairs, I spent One hundred
12 dollars to get it home on the rollback, after I chased it
13 about three or four days.

14 Q. Okay. Now. You paid Fifty-two hundred bucks for the
15 car, right? Correct?

16 A. That, plus the buyer fee.

17 Q. Okay. Now, isn't it true that y'all previously told
18 me this car was worth up to Two thousand dollars, salvage
19 value?

20 A. Two thousand dollars if you got somebody to chop it up
21 and get the motor and transmission out of it, yeah. But
22 otherwise, about three or four hundred dollars. I don't
23 have the skills to take that equipment out.

24 Q. Do you remember having to help answer some written
25 questions that your lawyer gave me answers to?

1 A. Might have. I don't recall that particular piece of
2 paper.

3 Q. I -- It's called Answers to Interrogatories. That's
4 your lawyer's signature, right? And looking at answer
5 number nine, doesn't it say that the value is up to Two
6 thousand dollars?

7 A. It is, but I just -- I just explained that Two
8 thousand dollars to you.

9 Q. Well, that explains that answer in writing from your
10 lawyer --

11 A. Well --

12 Q. Hold on. Let me finish.

13 A. Okay.

14 Q. That written answer from your lawyer to me, in
15 writing, it's not explained in there, is it?

16 A. Okay. But I just explained it to you.

17 Q. What's the date?

18 A. October 3, 2013.

19 Q. So, two and a half years later, you want to give me a
20 different answer? Is that --

21 A. I'm just telling you the truth.

22 Q. Okay. Did you not tell me the truth right here, in
23 writing?

24 A. Well, you know, there's always -- there's always a
25 different thinking -- the way of thinking about it. The

1 car's worth Two thousand dollars, and you can have it for
2 Two thousand dollars if you want to take it apart with a
3 screwdriver and a wrench, and the parts. But I don't have
4 the capacity to do that. I'm not -- I don't have the
5 skills for it.

6 Q. Assuming the prior Two thousand dollar figure is
7 accurate, that's Thirty-two hundred dollars difference in
8 value at the time you bought it, assuming that Two thousand
9 dollar figure you gave me in October is accurate. Right?

10 A. If you're asking me -- Are you asking me if the Two
11 thousand dollars is what the car's worth?

12 Q. I'm asking you to assume that the Two thousand dollar
13 figure on the paper is the value, and I'm just asking you
14 if the math is accurate. Fifty-two hundred dollars minus
15 Two thousand dollars is Thirty-two hundred bucks?

16 A. If somebody -- if -- You didn't ask me the question
17 far enough. At Two thousand dollars, yeah, it's worth Two
18 thousand.

19 Q. Right.

20 A. It's not worth Two thousand dollars to me to take it
21 apart and try to sell it. It's just won't bring that much.
22 The man that buys it from me and give Five hundred dollars
23 for it, he could get Two thousand dollars for it, because
24 he's got the skills to take it apart. I don't.

25 Q. Your net profit, plus what you had to pay these people

1 to get back even with them, is Eleven hundred dollars,
2 right?

3 A. Okay.

4 Q. So, if you add up your profit and what you had to pay
5 to get square with those people and the difference in value
6 of the car, ---

7 A. I don't --

8 Q. --- that's Four thousand, three hundred bucks.

9 A. I don't agree that the Two thousand dollars is the
10 value of the car the way it sits.

11 Q. Then, why did you tell me in writing --

12 A. It was an error on my part. Or at least I didn't give
13 you a full answer. But you know and I know that I don't
14 have the skills and you don't have the skills to take it
15 apart.

16 Q. We're almost done. I apologize -- We're almost
17 finished. I apologize for taking so long.

18 A. That's fine. I enjoy talking to you.

19 Q. I understand that after the problem was discovered,
20 you telephoned and spoke to Mr. Ferrell?

21 A. I did.

22 Q. And I understand that was the sole phone call, or
23 letter or email, made to Midlands Honda about this.

24 A. That is absolutely correct. He -- I was absolutely
25 clear to him what I had and what I needed to have done.

1 And I didn't feel like I needed to call him again.

2 Q. And this phone call was made sometime, what, September
3 of 2010?

4 A. I can't give you the date. It was after I discovered
5 all this junk I had in the yard.

6 Q. Sometime in 2010, right?

7 A. Yeah.

8 Q. And I understand you were upset. You've told us that,
9 right?

10 A. I didn't say a whole lot to him. I just said he
11 needed -- I've got the car, the serial number. I bought it
12 from you at auction. Do you recall the car? Yes. I'm
13 Brent Ferrell, yes. You need to come and pick it up, and
14 bring my money back. And I didn't ask for anything beyond
15 the Eight thousand dollars that was involved at that time.

16 Q. And as I understand it, when you --

17 A. I didn't even -- I didn't even ask for Eight thousand
18 dollars.

19 Q. When you didn't get a call back, you never wrote him
20 a letter, right?

21 A. I've been very clear about what I had and what he
22 needed to do, and how he needed to take care of it. No, I
23 didn't write him a letter.

24 Q. Isn't it true you never sent him an email?

25 A. Never sent him a mail.

1 Q. Isn't it true you never called him back?

2 A. Never intended to.

3 Q. And throughout the entire next year, 2011, you never
4 made a phone call, wrote a letter, had a lawyer write a
5 letter, any effort to resolve this with Midlands Honda?

6 A. By the same token, he didn't, either.

7 Q. Throughout 2012, despite all your upset, you didn't
8 write, call, or reach out to Midlands Honda?

9 A. And all the responsibility he had, he didn't do it
10 either.

11 Q. Isn't it true you were simply waiting on everybody's
12 memory to fade, and people to leave these jobs before you
13 brought this lawsuit?

14 A. Sir, I don't make my living doing this. I make my --
15 I make my way by treating people well, and getting good
16 products for them, and trying to help the ladies that don't
17 have a car, who have children. The ladies that have
18 children that need a car to go to school, that's -- that's
19 where I get my pleasure from. It's not the money I put in
20 my pocket. These people knew what they needed to do, and
21 they didn't do it.

22 Q. And you didn't do anything about it for two and a half
23 years?

24 A. Absolutely not.

25 Q. So, you were waiting for these employees to leave us,

1 and people forget everything?

2 A. I didn't care what they did. If they had a good job,
3 they were going to stay there. I wasn't worried about them
4 leaving.

5 Q. I understand that both you and Midlands Honda
6 inspected this vehicle and missed the damage, right?

7 A. Say that again?

8 Q. You inspected the vehicle at the auction and didn't
9 see the damage. At one point, Midlands Honda obviously
10 inspected it, they missed the damage.

11 A. I don't inspect -- expect any more than you would,
12 sir.

13 Q. In April of 2010, Midlands Honda didn't have the new
14 arbitration rules -- auction rules, and you didn't have the
15 new auction rules.

16 A. I had them -- I had what I picked up the last time I
17 visited -- visited the office.

18 Q. That wasn't the applicable 2010 rules, was it?

19 A. You know, for me to sit here and tell you I remember
20 the exact date, you know I can't.

21 Q. And when you sold the car, and when Midlands sold the
22 car, that Disclosure Statement was filled out incorrectly?

23 A. I don't really understand what you mean. The
24 Disclosure Statement was sent to me when I got the title.

25 MR. WALKER: Your Honor, if I can just check in with

1 my client very briefly.

2 (PAUSE AT 03:44 PM.)

3 Q. Did you get -- did you get the Disclosure Statement
4 when you got the car??

5 A. Did I get the Disclosure Statement? Am I supposed to
6 have it here?

7 Q. No, sir. When you -- when the title came in the mail,
8 did the Disclosure Statement --

9 A. The Disclosure Statement was given to me at the time I
10 bought the car.

11 MR. WALKER: Your Honor, I don't have any more
12 questions.

13 THE COURT: Okay.

14 REDIRECT EXAMINATION

15 ROGER WHITELEY BY MR. MOSKOS:

16 Q. Mr. Whitley, Roger.

17 A. Yes, sir.

18 Q. If you're out looking at cars, is the auction still
19 going on?

20 A. It is.

21 Q. And if you're outside looking at cars, can you buy
22 cars at the same time?

23 A. If you're out looking at 'em you'd have a hard time
24 buying, yeah.

25 Q. And you might miss out on what you're trying to buy?

1 A. Unless I have somebody with me, yeah.

2 Q. If the proper announcements had been made by the
3 auction, would you have needed a paint meter?

4 A. Would you say that again?

5 Q. Sure. If -- if the auction had -- if Midlands Honda
6 had told the auction that this was a clipped car, and that
7 had been announced, would you have needed a paint meter?

8 A. No. No. I don't need a paint meter, anyway.

9 Q. And when you bought other cars, did you get the damage
10 disclosure statements at the same time? As the receipt?

11 A. As I recall, I did. I did most of the time, yes.
12 That's one of the most important pieces of paper I can get
13 is the Damage Disclosure.

14 Q. Did you, at any time, do a 159-point inspection
15 comparable to a Honda certified pre-owned inspection?

16 A. I didn't, but I understand Midland Honda did.

17 MR. MOSKOS: No further questions, your Honor.

18 THE COURT: Okay. You can step down.

19 (WITNESS LEAVES WITNESS STAND.)

20 THE COURT: All right. Ladies and gentlemen, we're
21 going to take a break. I remind you, don't discuss the
22 case yet.

23 (JURY EXITS COURTROOM AT 03:47 PM.)

24 THE COURT: Okay. You got any more witnesses?

25 MR. MOSKOS: No, sir.

1 THE COURT: What do y'all --

2 MR. MOSKOS: My suggestion, your Honor, is, my
3 expectation is Mr. Walker has some motions, I have some
4 motions, and that will probably take a fair amount of time.
5 And I don't see how we're going to be able to even start
6 closing without being here 'til, you know, eight or nine, a
7 lot, and I know nobody wants to do that.

8 THE COURT: All right. What's your position?

9 MR. WALKER: Well, I suspect by the time we finish our
10 chat here, it's going to be -- and we haven't even dealt
11 with jury charges. I think starting tonight would be
12 difficult.

13 THE COURT: Okay. So, this means we plan on arguing
14 and charging in the morning?

15 MR. MOSKOS: Yes, sir.

16 THE COURT: You want me to send the jury home?

17 MR. MOSKOS: Yes, sir.

18 THE COURT: Today? And have them come back at nine
19 thirty? Is that -- Okay. All right. Any objection to the
20 bailiff telling them about it, or you want me to get them
21 back in here?

22 MR. WALKER: No, sir.

23 MR. MOSKOS: No objection, your Honor.

24 THE COURT: Okay. If you would just let them know to
25 be back at nine thirty in the morning, that I've got some

1 legal matters, and instead of keeping them back there.

2 THE BAILIFF: Yes, sir.

3 (JURY DISMISSED ON EVENING RECESS AT 03:49 PM.)

4 THE COURT: Before we get into all the legal matters,
5 we'll take a break.

6 MR. REIBOLD: Yes, sir.

7 (COURT IN RECESS AT 03:49 PM.)

8 (COURT BACK IN SESSION AT 03:58 PM.)

9 THE COURT: Okay, I'll be glad to hear from you.

10 MR. MOSKOS: Yes, sir. At this time the Plaintiff
11 moves for a directed verdict and we're making other
12 motions. The first is a motion to strike the defendant's -
13 defense's, affirmative defenses, as they failed to comply
14 with Rule 8. There's a case *RoTate Services Inc. versus*
15 *Encompass Services*, 359 S.C. 467, 597 S.E. 2d, 881, a 2004
16 appellate case, that basically says when you put defenses
17 into your pleadings you have to include facts to back them
18 up.

19 The defendant as you can tell by the complaint has
20 simply made generalized statements without providing any
21 sort of factual basis for the defenses. And I don't know
22 how your Honor wants to handle these. You want me just
23 keep going or do you want to rule on 'em one at a time or?

24 THE COURT: Well, depends on how many there are.
25 Let's keep going I guess.

1 MR. MOSKOS: Yes, sir.

2 MR. REIBOLD: Your Honor, just briefly if I could.

3 Which affirmative defenses, because not all of them I
4 think would fall into that category.

5 MR. MOSKOS: Well then I'll go through them.

6 THE COURT: Okay.

7 MR. MOSKOS: The third defense, and this is in
8 relation to the amended answer to Plaintiff's second
9 amended complaint and I received that today, your Honor,
10 from Mr. Walker.

11 THE COURT: Okay.

12 MR. MOSKOS: The mitigation of damages, they have not
13 alleged in any way how my client has failed to mitigate his
14 damages. I mean was he supposed to go out and buy another
15 car, repair the car? We don't know what the basis for that
16 is.

17 Number - The third defense. Excuse me, the fourth
18 defense a Notice of Application of Foreign Law. They
19 haven't identified where that comes from or why there's
20 even - I guess I need to ask if that's still some sort of
21 defense.

22 MR. REIBOLD: Your Rule 44.1 requires that you notify
23 the other party in the pleadings if you contend the law is
24 applicable. We complied with that rule by notifying you in
25 the pleadings.

1 MR. MOSKOS: Well you got the or the laws of Indiana.

2 So I don't - Nobody's discussed Indiana until right
3 now and I don't understand why that's of any importance.

4 MR. REIBOLD: Rule 44.1 requires that we notify you in
5 the pleadings if we're gonna assert foreign law.

6 MR. MOSKOS: Okay. What Indiana -

7 MR. REIBOLD: You're only to specify -

8 MR. MOSKOS: What Indiana law are we talking about?

9 MR. REIBOLD: We don't contend any - At this point we
10 don't contend of being out of our control speaking - We
11 give up North Carolina from the moment we met in his
12 chambers on Monday morning through now.

13 MR. MOSKOS: Then I would ask that that be stricken
14 from the pleadings. If they're not going to rely on
15 Indiana law it shouldn't be there.

16 MR. REIBOLD: I don't care.

17 THE COURT: Okay.

18 MR. REIBOLD: We're not going to rely on Indiana law.

19 THE COURT: Okay.

20 MR. REIBOLD: That North Carolina law -

21 THE COURT: The understanding is that I was told from
22 the get go that this is North Carolina law.

23 MR. MOSKOS: I understand but before -

24 THE COURT: Do y'all disagree with that?

25 MR. MOSKOS: No, sir. And that's what's - I don't

1 understand. It says Defendant hereby gives notice that
2 some or all of Plaintiff's claims are governed by the laws
3 of North Carolina law or the laws of Indiana. That's their
4 defense.

5 THE COURT: Well we'll strike Indiana. I didn't hear
6 any testimony about Indiana.

7 MR. MOSKOS: Okay. Absolutely. Defense defense.
8 Economic loss rule. They have - They made a motion early
9 on Judge Gee denied that. The economic loss rule deals
10 with contract law and performance of contracts and that
11 kind of thing. Well, but we have been dealing with the
12 fraud claims; the unfair trade practices; that's all pre-
13 contractual stuff. That's all before the sale. That's
14 what got us into the contract, the lies and the
15 misrepresentations that caused my client's damages. So the
16 economic loss rule doesn't apply to this case and we'd ask
17 that it be stricken.

18 THE COURT: Okay. You all want to address that?

19 MR. REIBOLD: Yeah. In fact you're gonna hear why the
20 Economic Loss Rule does apply to this case in our directed
21 verdict motion. I can cut to it right now if you want to
22 but its certainly a live issue denied on Summary Judgment
23 by Judge Gee; has no effect on this proceeding. It's a
24 non-event that's established law irrelevant when Judge Gee
25 did it. And it was a summary judgment not binding.

1 THE COURT: Okay.

2 MR. REIBOLD: The economic loss Rule in North Carolina
3 is stricter than what we have here.

4 MR. MOSKOS: Your Honor, I ask - Are you gonna hear
5 this motion for the Economic Loss Rule now?

6 THE COURT: You want it stricken I thought he was in
7 respond.

8 MR. MOSKOS: My apologies, your Honor.

9 THE COURT: I mean I know you - Instead of - It seem
10 to me to be clearer instead of him going back and deal with
11 'em one at a time so I was just hearing him in response to
12 you wanting it to be stricken.

13 Go ahead, Mr. Reibold.

14 MR. REIBOLD: The economic there are a claim for
15 negligence which is a failure to disclose claim. There's a
16 negligent misrepresentation claim; there's a failure to
17 disclose claim. And in North Carolina they've - in some of
18 the cases they even apply it in loss to UTPA and fraud.
19 I'll tell you why that this does apply. Part of the
20 disclosures that they complained about in this case are the
21 things that are contained in those arbitration rules.

22 This car was sold off a lot. The only reason those
23 arbitration rules apply is because the parties' contract
24 says we're gonna incorporate by reference the terms and
25 conditions of the auction and the auction incorporate by

1 reference the arbitration rules. So the obligation to
2 disclose anything on that appendix is a term of their
3 contract. Otherwise those rules wouldn't apply in this
4 case. And the violation of those rules to the extent
5 they're claiming these technically caused damage is a
6 breach of contract in this case.

7 That is the exact same remedy they're seeking in the
8 negligence claim; that exact same measure of damage they're
9 seeking in the negligent misrepresentation and measure of
10 damages they're seeing in the UTPA claim and the exact same
11 measure of damages they're seeking in the fraud claim with
12 respect to that portion or that alleged non-disclosure.
13 Those are contract remedies; it's a term of the contract
14 between the parties. Their seeking the same measure of
15 damages that's a contract remedy.

16 Economic loss rule would bar any recovery for a claim
17 related to the condition of a product itself and that's all
18 this is. So I think the Economic Loss Rule would apply in
19 this case to the extent they're claiming a non-disclosure
20 pursuant to the Arbitration Rules which were incorporated
21 by reference into the parties contract.

22 MR. MOSKOS: And that's simply not the case here. The
23 problem that they have is that the fraudulent
24 representations that are made before the sale, those are,
25 they have affirmative duties not to misrepresent -

1 represent their cars. That's independent of any
2 contractual rights that arise after the contract is
3 consummated. You've got the damage disclosure Form which
4 is a North Carolina statute. The duty to set forth that
5 it's a reconstructed vehicle; that's outside of any sort of
6 arbitration rules. That's outside of the terms and
7 conditions of the auction rules. At the end of the day
8 North Carolina Common Law says that if you conceal a
9 material aspect of a transaction from the other person who
10 doesn't know you're guilty of fraud just as if you
11 misrepresented and, you know, verbally said this car's
12 never been wrecked because in essence that's what they were
13 doing. They had a duty to disclose because they knew the
14 truth. They did it. They hoped they could get a guy to
15 buy it and he wouldn't pick up on it and that's exactly
16 what happened. Roger didn't pick up on it. They got him.
17 It's a gotcha moment.

18 Now, so you've got three different types of duties
19 they have out there. One is the duty under the terms and
20 conditions. The second is under the North Carolina
21 Statutory Law; the third is North Carolina Common Law. All
22 of those duties arise before you enter into a contract.
23 Keep in mind the terms and conditions are not contracts
24 between the buyer and the seller. The terms and conditions
25 and all the rules are between the auction and the buyer and

1 the auction and the seller. Okay. When you go there you
2 agree to abide by these rules. And the seller had an
3 obligation to set forth this information.

4 As you can see on the exhibit one of the first things
5 it talks about is the ethical - trying to uphold the
6 ethical dealings. And you know at the end of the day the
7 economic loss rule it's a very inventive thing by defense
8 lawyers. They have taken the products liability law that
9 deals with a situation where somebody buys a car from, you
10 know, it winds up like a warranty and the car doesn't
11 perform correctly and instead of going after the warranty
12 rights they go and super fraud. You've lied to me about
13 the Volkswagen getting fifty miles to the gallon when it
14 only gets twelve, I'm gonna sue for fraud.

15 That's when the Economic Loss Rule comes in. All
16 right. It's - If you have contractual remedies available
17 to you then you can't sue - and I may not be saying this
18 right - it's coming out of the product's liability side.
19 And defense lawyers are now trying to use it to apply to
20 all contracts. And in essence what they're asking you to
21 do is to say that fraud no longer exist. Because if you
22 think about it if - Fraud comes about because of
23 misrepresentations that cause people to enter into
24 contracts. And if you say, hey, all of those fraudulent
25 statements that were made before are now wiped out the

1 cause of action of fraud is gone, there is no fraud in
2 South Carolina any more. And that just encourages -
3 encourages lying, cheating and stealing. The exact thing
4 that should be forbidden. And, you know, the policy of
5 both states says that unfair and deceptive acts and
6 practices is unlawful. That's all there is to it.

7 And so, you know, to - It makes absolutely no sense to
8 reduce - Well, at the end of the day you've got - there are
9 so many parts of this that are wrong. I'm having a hard
10 time articulating. First, it doesn't apply because the
11 duties arise outside of the contract. So, that doesn't -
12 that doesn't even apply, the Economic Loss Rule in this
13 situation.

14 If you take Mr. Rodger's position that the contract
15 claim is everything in this case then all of a sudden you
16 have no fraud, you can't sue for negligent
17 misrepresentation, you can't sue for negligence and if he
18 has his way he can't sue for unfair and deceptive acts and
19 practices so the public policy consideration then becomes
20 how do you - How do you keep people from cheating in
21 contracts when all they have to do is give back the money?

22 If I was a criminal and I got caught and I came before
23 you, Judge, and I said here let me just give him back his
24 money let me go, you'd look over those glasses pretty hard
25 when you'd say no, I don't think so, son, you're gonna go

1 to jail. And - You know that's what they're asking for.
2 They've been asking for a pass since this case began.

3 MR. REIBOLD: Our motion is not very close to what
4 he's described. It's a much narrower motion. I am not
5 standing before you saying the Economic Loss Rule bars a
6 claim based upon North Carolina's Damage Disclosure
7 Statute. I'm saying the economic loss rule bars a claim
8 based upon the auction rules. Those are totally separate.
9 If you were to grant my motion you would not be dismissing
10 any claim in its entirety. You would only be dismissing
11 that portion of the claim which is based upon the Auction
12 Rules. This is the Sale Contract of both parties.

13 THE COURT: I've never seen that.

14 MR. REIBOLD: And it says that the vehicle is sold
15 subject to the auction terms and conditions. The
16 disclosure requirements in the auction rules are
17 incorporated into records by reference into this contract
18 to sale between the parties. That portion, the duty to
19 disclose under that Arbitration Matrix that's been
20 displayed in this case, is a contract. So what we're
21 saying is that the Plaintiff can't stand before the jury
22 and say they committed negligence, they committed negligent
23 misrepresentation, unfair trade practices, or fraud based
24 upon that Matrix.

25 If they want to argue, hey, the damages disclosure

1 statute says they had a duty, that's fine. But the
2 arbitration rules part is from a contract and it should not
3 survive. That's our motion on the economic loss.

4 MR. MOSKOS: And just so we're clear, your Honor, I
5 apologize for continuing this, but the contract, the terms
6 and conditions, are ADESA's. That's a contract that they
7 have with individual dealers. It's not like my client went
8 to Midland's Honda and said, hey, let's use these terms and
9 conditions to buy and sell cars. The terms and conditions
10 are those imposed through contract between ADESA and the
11 individual dealers. It's not a contract between the
12 parties. The sales receipt shows - shows the binding
13 contract once the title key part, once the title is
14 delivered and that in this case of course occurred twenty-
15 one days later, so the deal wasn't even consummated at that
16 point.

17 MR. REIBOLD: That's not correct. This sales contract
18 it list Midland's Honda as a seller and it list the buyer
19 as O&W Cars, that's the plaintiff. It has Roger Whitley's
20 signature on this document; it's a form provided by ADESA
21 but it's a contract between the buyer and the seller of the
22 vehicle.

23 THE COURT: Okay. What Exhibit is that cause I've
24 never seen that contract.

25 MR. REIBOLD: It's the same one that says red light

1 as is.

2 MR. MOSKOS: I think its Fifty-six or Fifty-two.

3 THE COURT: Okay.

4 MADAM COURT REPORTER: You talking about the one with
5 the B and S in the corner?

6 MR. MOSKOS: Yes, ma'am.

7 MADAM COURT REPORTER: That is Fifty-six and Fifty-
8 five. S is Fifty-five and B is Fifty-six.

9 MR. WALKER: Do you want me to hand it up, Judge?

10 THE COURT: Yes.

11 (EXHIBITS FIFTY-FIVE AND FIFTY-SIX RECEIVED UP BY THE
12 COURT.)

13 THE COURT: Thank you.

14 MR. WALKER: You're welcome.

15 THE COURT: It appears from the face of it it's a
16 contract between Midland's Honda and O&W Cars.

17 MR. MOSKOS: Right. So the duty to disclose comes
18 before that based on the contract at the time between the
19 buyer and - or excuse me, the seller and ADESA. That's a
20 totally - He's trying to get you to say that there can't be
21 any - It's very creative. You can't - You can use the
22 damage disclosure form, you can do - use North Carolina law
23 but you can't use the Matrix that governs everybody's or
24 supposed to govern about everybody's behavior because it's
25 a separate contract that ultimately gets incorporated into

1 a sale later on after the representations have already been
2 made. They are jumping through a ton of boots and, you
3 know, that dog does not hunt, Judge.

4 MR. REIBOLD: The evidence is crystal clear it was not
5 sold during the auction. It was sold off the auction which
6 is why this contract is necessary and why the duty to
7 disclosure arises from a contract.

8 MR. MOSKOS: Well --

9 MR. REIBOLD: We're not saying they abuse it. In fact
10 it would be a breach of contract and they have a remedy for
11 that disclosure. They just can't pile on everything else
12 when it's a contract term.

13 MR. MOSKOS: But the economic loss rule doesn't apply
14 to these kinds of cases. That's the whole point. It
15 doesn't apply to these cases as - -

16 THE COURT: It says they do in North Carolina.

17 MR. MOSKOS: Well, I disagree, your Honor. If you
18 look at the cases they deal with - a lot of them deal with
19 products liability cases which this is not a products
20 liability case. And the other is where people have failed
21 to perform. They had a contract, the honor contract, they
22 failed to perform and the other person in the contract sued
23 for negligence or misrepresentation.

24 But the fact that they didn't perform not - Well, the
25 duties, they sued on the duties arising out of the

1 contract. That's not necessarily what we're dealing with
2 here. We're dealing with the representations that were
3 made beforehand. And the defendant knew that it had
4 duties, responsibilities to announce certain things. Those
5 were independent duties based on it's contract with ADESA;
6 not it's contract with Mr. Whitley. And they're trying to
7 boot strap in a defense that doesn't exist.

8 I really wish I was more articulate on the law, Judge.
9 But it's a --

10 THE COURT: Me too.

11 MR. MOSKOS: I apologize.

12 THE COURT: No. It would be easy ---

13 MR. REIBOLD: Your Honor, I'll be happy to provide you
14 with cases.

15 THE COURT: --- you know it would be easy dealing with
16 South Carolina law and I'd have a lot better handle on
17 this. And I'm trying to determine the South Carolina law.
18 I'll be glad to look.

19 MR. REIBOLD: Well I don't --

20 THE COURT: I mean I'll probably have to read this
21 over night while you on this issue.

22 MR. MOSKOS: Yes, sir.

23 MR. REIBOLD: I - By tomorrow morning or I can email
24 it to your office. There are cases which apply this in
25 North Carolina outside of liability context and happy to

1 give them to you.

2 THE COURT: Okay.

3 MR. REIBOLD: If you'd like me email them to you.

4 THE COURT: That would be great.

5 MR. REIBOLD: Okay.

6 THE COURT: Okay. I'll take that issue under
7 advisement. What else?

8 MR. MOSKOS: The sixth dealing with arbitration.

9 The arbitration rule --

10 MR. REIBOLD: We've agreed that one would go.

11 THE COURT: Okay. That's gone.

12 MR. MOSKOS: Seven, same thing.

13 MR. REIBOLD: Seven is related to the sixth. That can
14 go.

15 THE COURT: Okay.

16 MR. MOSKOS: Eight, form selection.

17 MR. REIBOLD: This issue --

18 MR. MOSKOS: I mean that's Indiana. Again, we haven't
19 discussed anything about Indiana. They never made a motion
20 to move to Indiana.

21 MR. REIBOLD: This is in the contract but we haven't
22 argued it. That's fine.

23 THE COURT: Okay. Eight goes? Okay.

24 MR. MOSKOS: I believe Number Nine should be out. Mr.
25 Whitley has testified that he did make a demand for his

1 money back and obviously never got it back so we would ask
2 that it be stricken.

3 MR. REIBOLD: Number nine is the North Carolina UCC.

4 It's very comparable to the South Carolina counter
5 part. Loss clearly that they accepted the vehicle as they
6 paid for it and they took it home and they did an act that
7 is incongruent with out ownership. They sold it. So the
8 question is did they properly revoke their acceptance.
9 With South Carolina it has to be in writing. That didn't
10 take place here. North Carolina I couldn't find a case one
11 way or the other on that. But it also has to be done
12 within a reasonable time. And we would argue that you
13 cannot - If you've already sold the property it's too late
14 to revoke your acceptance period because at that point in
15 time you don't have control of the vehicle. It's up to the
16 owner in due course to do with whatever they want with the
17 vehicle. You can't fix the problem between the original
18 parties. If you wait until after you sell the car you've
19 notified somebody too late. At a minimum there's a jury
20 question on whether it was timely given those facts.

21 MR. MOSKOS: Well it's not like he sold it and didn't
22 get it back. He sold it got the car back and he had it in
23 his possession and he said give me my money back. No. You
24 know when I - no response.

25 MR. REIBOLD: He wrote that in this case but that act

1 it might not.

2 MR. MOSKOS: That's what we're dealing with is this
3 occasion.

4 MR. REIBOLD: We believe that if you - He had it on
5 the lot for days, he admits he didn't look, never looked
6 under it before he sold it. It was at least three months
7 before there was a notification. This duration goes to
8 defense.

9 THE COURT: You know it seems to me it's a jury issue
10 as well. I mean I think - The jury paid a lot of attention
11 to that - and I think that is a jury issue. And whether
12 he - I mean you know, he demanded his money back, he made
13 one phone call and never followed through. But I think
14 that's a question of fact.

15 MR. MOSKOS: Yes, sir.

16 THE COURT: I'm gonna let that go to the jury.

17 MR. MOSKOS: Number ten. Well obviously that's a
18 little premature cause we still - because we have a
19 bifurcated case, but it says that this particular section
20 bars an award of punitive damages in this case and that's
21 not the case.

22 THE COURT: What particular section is that?

23 MR. MOSKOS: Well this - They're talking about this
24 1D-15 and I don't have it handy.

25 THE COURT: Where is 1D?

1 MR. REIBOLD: You know I don't have it in hand either.
2 If you can defer that one I will look at it cause it might
3 not be applicable.

4 THE COURT: Okay.

5 MR. REIBOLD: I just can't say right now cause I don't
6 have it.

7 THE COURT: Well, you know the cases we have saying
8 that the South Carolina law is gonna apply on punitive
9 damages and not North Carolina. I mean do y'all have a
10 case that's contrary?

11 MR. MOSKOS: Sure.

12 THE COURT: Do you think North Carolina law --

13 MR. REIBOLD: I do think North Carolina punitive
14 damage is the law that applies under *lexi loci delicti*. If
15 I say that right, I'm never sure if I - without saying that
16 one correctly.

17 THE COURT: But what about this South Carolina Court
18 of Appeals case?

19 MR. REIBOLD: Which one is it?

20 THE COURT: The Lister case.

21 MR. REIBOLD: The Lister case I think actually
22 supports my proposition because the reason they apply South
23 Carolina punitive damages in Lister versus Nations Bank is
24 because the wrong occurred in South Carolina in that case.
25 The harm was suffered in South Carolina in that case. And

1 that's exactly how the rule works. We have - I've got
2 three other cases here. Now granted Lister is as close as
3 you get to South Carolina. And it does squarely address
4 it. But if you look at what happened, they did apply South
5 Carolina punitive damages but they applied that law because
6 that's where the harm was suffered. That's exactly what
7 *lexi loci delicti* says with respect to substance of law.

8 And they cases we're handing up now they're from other
9 jurisdictions but they also cite - restate the principles.
10 For example they're pretty clear that punitive damages is a
11 substantive versus procedural issue and the substantive
12 laws is what the gets the court *lexi loci delicti* and
13 there's two cases specifically in there - -

14 THE COURT: Lister says - I thought Lister said just
15 the opposite. You know procedurally it should not
16 substantive. I'm sorry, I was wrong.

17 MR. REIBOLD So I think it's pretty clear that North
18 Carolina law on punitive damages is gonna control in this
19 case.

20 THE COURT: Okay.

21 MR. REIBOLD: But with respect to this particular
22 defense if you'll just give us a little bit of time I can
23 check on that one and verify that for you.

24 MR. MOSKOS: I think the next one is in the event that
25 - this is eleven and obviously we haven't gotten to that

1 phase yet.

2 THE COURT: Okay.

3 MR. MOSKOS: Number twelve is about caps on punitive
4 damages. And that obviously is going to depend on which
5 way the court goes.

6 THE COURT: Okay.

7 MR. MOSKOS: Comparative negligence. And this is -

8 THE COURT: Let me ask - Let me back up just a minute.

9 On the punitive damages issue, and obviously we're not
10 there yet, but, so if we apply North Carolina punitive
11 damages do - we don't apply the gamble deaths in South
12 Carolina?

13 MR. REIBOLD: That would be my - my guess would - -

14 THE COURT: Does North Carolina have gamble type
15 standards that we do?

16 MR. REIBOLD: That is something I attach myself in
17 finding out today.

18 MR. MOSKOS: Yes, sir, they do. There is another
19 statutory provision in that area that list out the factors.

20 THE COURT: Okay.

21 MR. MOSKOS: I can't quote the citation.

22 THE COURT: I need - Okay, we need those if y'all, you
23 know.

24 MR. MOSKOS: Yes, sir.

25 MR. REIBOLD: That's no problem.

1 MR. MOSKOS: Yes, sir.

2 THE COURT: Okay. I'm sorry, I cut you off. Go
3 ahead.

4 MR. MOSKOS: No, sir, that's fine.

5 THE COURT: No, tell me about number eleven now.

6 MR. MOSKOS: Well eleven and twelve deal with the
7 punitive damages issues.

8 MR. REIBOLD: Under North Carolina law.

9 THE COURT: Okay.

10 MR. MOSKOS: And I'm assuming we're not quite there
11 yet so comparative negligence and contributory negligence.

12 First of all they haven't made any allegations of fact
13 to support those provisions. Second, every witness who got
14 up from the defendant starting with the gentleman Mr.
15 Farrell, Mr. Threatt, Mr. Nalewaja, I apologize I can't get
16 that, they all said Roger did nothing wrong. They've all
17 admitted there was no - nothing he did - he didn't do
18 anything wrong in handling this matter.

19 I ask Mr. Farrell that twice at the beginning and the
20 end. I ask Mr. Threatt that and I ask Mr. Nalewaja today
21 and everyone one of 'em said, nope, Roger didn't do
22 anything wrong. So if the defendant can't produce any
23 evidence that he did anything wrong, those defenses need to
24 go away.

25 MR. REIBOLD: All right, your Honor, with respect to

1 comparative negligence, we'd plead under the alternative
2 but I think we all agreed that North Carolina law applies
3 which would mean comparative negligence would be out.
4 Contributory is what we're dealing with because that's what
5 North Carolina has.

6 THE COURT: Okay.

7 MR. REIBOLD: And the evidence in this case does
8 support the question of contributory negligence in several
9 respects. Many of the witnesses' testified that he should
10 have inspected the car immediately. There is a question of
11 whether he did a sufficient inspection of the car. The
12 rules that were put into evidence tell him that for an off
13 the block sale he should inspect the car very carefully and
14 verify all the auction announcements.

15 The word I heard him use about his inspection was
16 cursory from his own mouth. That's not very carefully.
17 That would support a finding of contributory negligence.
18 Additionally under North Carolina law every motor vehicle
19 dealer who's gonna sell a car to a consumer has a duty to
20 inspect it for safety before they put on the block and sell
21 it - before they put it on the lot and sell it.

22 It's very clear that no inspection for these alleged
23 safety issues was done. They did put it on a block, he did
24 not discover the damage that he says would have been
25 readily apparent to anybody once the car was lifted and he

1 sold it to somebody else. To the extent he's claiming
2 damages based on that sale or anything that happened to him
3 after that sale he's contributorially negligent.

4 MR. MOSKOS: The issue is did he do anything during
5 the sale of this car there was a problem. Not what
6 happened afterwards, not what happened after he got the
7 car. Not what happened when he sold it to somebody else.
8 The question is did he do something to contribute to his
9 harm at the time of dealing with the defendant at the
10 auction.

11 Everybody said no. Simple.

12 MR. REIBOLD: It's not quite that clear.

13 THE COURT: I know but he - You're looking at damages
14 to things that he did after the sale, I., e., that he sold
15 the car and lost that profit. Were if not we'd be dealing
16 with just the amount of money that he paid for it. Right?
17 I mean part of the damages in part of the testimony is he
18 had sold the car without inspecting it, put it in the
19 stream of commerce, then it came back so - you know - he
20 had the car fixed where he could sell it. He had the door
21 fixed, you know, so he - You're putting in damages of all
22 these things that he did after the sale.

23 MR. MOSKOS: Yes, sir. But first of all I would take
24 exception to the fact that you're saying he didn't inspect
25 it. He did inspect it. He went around it, he checked it.

1 THE COURT: He did the exact same thing you're suing
2 the Plaintiff's for.

3 MR. MOSKOS: Well that's not true. That's not true.
4 They have done a one hundred and fifty-nine point
5 inspection on this car when they bought it from Ms. Watkins
6 and not only that the man who bought it comes back with it
7 and says you sold me a clipped car. They had it in their
8 possession for four days. You know they looked at it and
9 then they turn around and sell it to Roger in North
10 Carolina.

11 THE COURT: I understand that and that's why we're
12 here but that goes to damages and so at that point if
13 that's all that was done with it and you are suing for the
14 amount of money he's out and we'd be there. But the fact
15 that he turned around and sold it again, you're trying to
16 get that different money aren't you so doesn't that
17 contributory negligence apply to that money?

18 MR. MOSKOS: No, sir. The contributory negligence is
19 dealing with the wrongful act. That is the - one, failure
20 to disclose through the announcements. The second is the
21 affirmative misrepresentations on the disclosure sheet and
22 on the receipt that shows no announcements. That's what's
23 going on. That's where they have to share some sort of
24 contributory negligence. Relying on them I mean is not a
25 basis - relying on the false representations by Midland's

1 Honda is not a contributory negligence defense. All the
2 other stuff those are damages that arose because they
3 weren't truthful.

4 MR. REIBOLD: Your Honor, --

5 MR. MOSKOS: If anybody can tell me what he did wrong
6 at the time of the sale -

7 THE COURT: He didn't - I mean of course the rules say
8 that he has to inspect the vehicle. And they're just
9 saying that his contributorially negligent that he didn't
10 inspect the vehicle before he bought it or at the time he
11 bought it. Isn't that what the rules say?

12 MR. WALKER: There's a difference between a cursory
13 inspection and a very careful inspection to verify
14 conditions.

15 THE COURT: Right. But now the rules said - -

16 MR. REIBOLD: That's a fact question.

17 MR. WALKER: And that statements based on what came
18 out of his mouth on the stand.

19 MR. MOSKOS: Do I get to argue against two lawyers,
20 Judge?

21 THE COURT: Sure.

22 MR. MOSKOS: I would ask only one. I been beat up
23 enough by one I don't need two.

24 THE COURT: I understand. We'll keep one going.

25 MR. MOSKOS: Thank you, sir.

1 MR. REIBOLD: On contributory - I keep wanting to say
2 comparative cause I'm so used to them - on contributory
3 negligence it's not what contributed to the wrongful act.
4 It's was did the plaintiff breach a legal duty that was a
5 proximate cause of the harm plaintiff seeks? That's the
6 question. This fact issue about whether he inspected the
7 car sufficiently when he bought it had he done he, had he
8 discovered this never would have happened, clearly if we're
9 right about the insufficiency of the inspection it
10 contributed to his damage. There is a question about
11 whether he inspected the car for safety before he sold it
12 and in fact he admits he did it and that he's also seeking
13 damages which resulted from the sale. So on both levels
14 we've got jury issues on this question.

15 THE COURT: Okay. If y'all get me a copy of North
16 Carolina Contributory Negligence law I'll think about it
17 and -- the next -- All right. Now what about back up to
18 number three? Were you through with all the --

19 MR. MOSKOS: Well fifteen. Well as I understand it
20 comparative negligence is out so that's not an issue.

21 Fifteen and Sixteen still deal with punitive damages.
22 After we spoke in chambers last night Mr. Walker added the
23 substantive and procedural due process arguments to his -
24 to his answer. I should have kept my mouth shut but anyway
25 it is what it is.

1 THE COURT: Okay.

2 MR. MOSKOS: So as far as the pleading - pleadings go
3 yes, sir, I am finished with that.

4 THE COURT Okay.

5 MR. MOSKOS: The next issue --

6 THE COURT: Before --

7 MR. MOSKOS: Yes, sir.

8 THE COURT: Just to - You said the third defense and
9 mitigating damages. I didn't get any other response from
10 that I know of so that's not an issue any more? Really the
11 economic law --

12 MR. REIBOLD: You're right we did. Before I started
13 to address it he had moved past it so I think it would be
14 fair to go back and talk about it.

15 THE COURT: Okay.

16 MR. REIBOLD: I think there is evidence that he failed
17 to mitigate his damages and it goes back to what we were
18 just talking about. Had he done a safety inspection which
19 is required by law, he would not have sold the car. He
20 would not have incurred a portion of his damages. I think
21 that supports the mitigation argument as well.

22 MR. MOSKOS: That's not mitigation in North Carolina,
23 your Honor. That is making sure that - the example that I
24 read is that if - Let's just - Mitigation of damages in
25 North Carolina works like this. If you have - If you enter

1 into a contract to sell a hundred bushels of apples for ten
2 dollars to an apple company and months go by your apples
3 come in and you go over there and you say, hey, I got my
4 hundred bushels and they say, well, you know everybody had
5 a whole bunch of apples this year so we don't need yours
6 we're not gonna pay a hundred dollars.

7 The law in North Carolina is you have to go out and
8 try and sell those apples. You can't just simply let them
9 rot and then sue for a thousand dollars. You might have
10 been able to get two hundred and fifty or seven hundred and
11 fifty and then you sue for the difference. The mitigation
12 that he's talking about is more of a contributory
13 negligence or a comparative negligence type thing. He
14 should have done something else to protect himself and I
15 don't think mitigation of damages works in this case.

16 THE COURT: Okay. You want to respond to that?

17 MR. REIBOLD: I don't think it's quite - I mean
18 certainly the example he gave is an example of mitigation
19 of damages no doubt about that.

20 THE COURT: All right.

21 MR. REIBOLD: I don't think its as narrow as he
22 portrays.

23 THE COURT: If y'all got a copy of North Carolina law
24 then I'll be glad to --

25 MR. REIBOLD: Okay. I'll be doing some research

1 tonight sounds like.

2 THE COURT: All right. Now tell me are there any
3 others defenses that we hadn't addressed? I don't know
4 what the third defense is that you brought up. What is the
5 third defense?

6 MR. MOSKOS: The third defense is mitigation of
7 damages.

8 THE COURT: Oh, okay. I'm sorry. Okay. So
9 everything's covered?

10 MR. MOSKOS: As far as that goes.

11 THE COURT: All right.

12 MR. MOSKOS: Now, your Honor, Mr. - I am in awe and
13 amazement at Mr. Walker and his legal acumen and what he
14 has done in this case. It's amazing. Very clever and I've
15 experienced something in this trial that I have never
16 experienced before. A defendant admitting that it made
17 false representations; that it made mistakes. To that end
18 I think I'm entitled to a directed verdict on all causes of
19 action because the defendant has admitted that there were
20 rules, they made a mistake, and at this point the only
21 issue frankly are the damages.

22 So, if you want me to go through each one. I can go
23 through each one of the causes of action but I think at
24 this point Mr. Walker is judicially estopped when he stood
25 up in open court in front of the jury and said, you know,

1 we admit that we didn't do the disclosure, we admit that we
2 made a mistake, we admit that we - Well I think he said
3 broke the contract but we're in violation of the contract.
4 So that's an admission that false representations of
5 important fact were made to my client and they had a duty
6 to disclose the truth they breached that duty and now all
7 we're dealing with is damages.

8 And it's an unfair trade practice misrepresenting the
9 facts of this car. Excuse me.

10 THE COURT: Do you want to respond to that?

11 MR. REIBOLD: I sure do. Something like that I think
12 needs a response. We would agree initially that directed
13 verdict is appropriate in respect to liability on the
14 breach of contract claim. The arbitration rules were
15 incorporated in the contract. It was a disclosure not made
16 as required by the arbitration matrix. That's a breach of
17 contract. So as to liability on that claim we would
18 concede directed verdict is appropriate. We do not believe
19 damages are undisputed at this point and I think Mr. Moskos
20 agrees with that.

21 With respect to the remaining claims however there are
22 a variety of other elements that are still very much an
23 issue. For example, fraud requires contempt. There was -
24 The evidence is we did not intend to do this; this was a
25 mistake and we didn't understand the rules or North

1 Carolina law whatever it may be. Intent is an issue. A
2 directed verdict on fraud is inappropriate. Negligent
3 misrepresentation, first of all I think that's subject to
4 the economic loss rule and you'll see what one of our
5 affirmative defenses is strictly legal in nature affects
6 both the negligence claim and the negligent
7 misrepresentation claim which would make it inappropriate
8 to grant this motion. I can do this now or I can do that
9 when I do my presentation in full, however you would like
10 it.

11 THE COURT: Okay.

12 MR. REIBOLD: But negligent misrepresentation also
13 requires justifiable reliance. We think there's a question
14 about whether reliance is justified between car dealers
15 given the option rules which require a very careful
16 inspection and verification of all announced conditions.
17 Was it reasonable for her to do that rather than do his own
18 inspection? I think that's a jury question. In fact in
19 every case I've ever tried if I've ever tried to argue that
20 reasonable was not a jury question I lost. I lost that
21 argument. I think justifiable reliance are gonna result in
22 negligent misrepresentation we have to go forward. The
23 UTPA claim in North Carolina has a reliance to Article II,
24 both actual and justifiable, and I think that would prevent
25 directed verdict on that claim.

1 Negligence: The negligence claim and the negligent
2 misrepresentation claim are essentially synonymous at this
3 point so I think the same grounds would apply. And so the
4 only directed verdict that's appropriate based on that
5 admission is gonna be the breach of contract claim with
6 respect to liability.

7 I'll also tell you that in my presentation in chief
8 North Carolina law does not recognize a claim for a
9 negligent omission of fact. If you tell something
10 affirmatively and it's wrong you can sue under North
11 Carolina law negligence. If you fail to disclose something
12 negligently in North Carolina you cannot sue. That cause
13 of action is not recognized. That's the affirmative part.
14 I'm just gonna go ahead and tell you its part of our motion
15 for a directed verdict. We'll be moving for directed
16 verdict on negligence and negligent misrepresentation on
17 those grounds as well. But I think all of that include his
18 motions.

19 THE COURT: Okay. On that negligence --

20 MR. REIBOLD: And he has cases on that.

21 THE COURT: But on the negligence omission issue and
22 that was one of the things that was brought up during the
23 trial is a form wasn't omitted; it was checked no. I mean
24 if it had been a situation that they didn't put anything on
25 the form; that they omitted to check those blocks, then you

1 would be right. But at least to what I saw it was an
2 affirmative because they checked no, no, no, no versus just
3 left it blank. Did that not change it?

4 MR. REIBOLD: There's - The dispute about whether that
5 disclosure form was presented directly at the time he
6 bought it or certainly weeks later.

7 THE COURT: Right. That is a dispute and the jury's
8 got to make that determination so it's not - -

9 MR. REIBOLD: But if it was a day later then it cannot
10 have been material. He cannot have relied upon it because
11 he paid the money and took the car before he got the
12 disclosure. So the disclosure form and all that's on -
13 claims on it would be out if the jury concludes that the
14 form came at least after he paid for and received at the
15 beginning.

16 THE COURT: Okay.

17 MR. REIBOLD: So I don't think you can go to directed
18 verdict on that record. I think that's literally a
19 investigative determination that will have to be made
20 before your argument would apply.

21 MR. MOSKOS: I'm sorry. Did you say - I'm sorry, what
22 did you just say? I didn't understand.

23 MR. REIBOLD: I said the jury has to decide whether
24 the disclosure form was made at the time of the sale or
25 weeks later. If it was in fact made weeks later then there

1 can't be a claim at all based on the disclosure form. And
2 arguing that disclosure under misrepresentation disclosure
3 form justifies - directed verdict just doesn't work because
4 the jury has to decide that preliminary fact.

5 THE COURT: Right.

6 MR. MOSKOS: And I would just -

7 THE COURT: How are we gonna - How is the jury gonna
8 decide that fact?

9 MR. REIBOLD: They have to decide who to believe.

10 THE COURT: I understand that. How am I gonna tell
11 them that? I understand because of the testimony how are
12 we ever gonna know whether the jury decided that the
13 disclosure form was done at the time he wrote the check or
14 whether the disclosure form came at the time the title
15 came? How are we gonna know whether the jury falls on
16 that?

17 MR. REIBOLD: Well if it - A special interrogatory?

18 MR. MOSKOS: Well then you're gonna have to get into a
19 whole bunch of other stuff, your Honor, because my - My
20 argument is, you know, the defendant had a duty to make
21 certain representations based on the Matrix and based on
22 the law and it didn't do that. The fact that the
23 auctioneer gets up there and is silent on the issue is a
24 representation that those items do not exist. That's a
25 representation because - because there's no duty to

1 represent things like mechanical problems with the car.

2 There is a duty to say hey, this has unibody damage
3 subject to the disclosure laws and all that. Now, that is
4 the representation when he doesn't say its been wrecked.
5 That's a representation that its not there.

6 THE COURT: When he - In the testimony he didn't know
7 that and it wasn't a conscious misrepresentation. He
8 thought that's what a red light sell was that the car had
9 issues with he and he didn't know the new rules and
10 therefore he didn't do anything. Didn't make no
11 representation, thought the red light was - So isn't that a
12 question of fact the jury's got to decide?

13 MR. MOSKOS: Who are we talking about? Who made those
14 - Who are you saying made those --

15 THE COURT: Mr. Ferrell.

16 MR. MOSKOS: Mr. Ferrell. Yeah, that's what his
17 representations were that he didn't know.

18 THE COURT: And he didn't know but he was supposed to.
19 He assumed and went under a red light and everybody knew
20 there was problems with the car and buyer as is and buy 'em
21 anyway and he had no requirement to make any representation
22 so he didn't make any. I don't know if he was there. No
23 representation was made at the time of the sale. He went
24 and sold it at the time of the auction. It was sold later
25 and at least it appears my recollection of his testimony he

1 didn't check any of those blocks. The girls or somebody in
2 the office must have checked them when they sent the title
3 in.

4 MR. MOSKOS: Under the power of attorney.

5 THE COURT: Right.

6 MR. MOSKOS: Okay. I mean that agency relationship is
7 obviously very crucial. I mean if you had somebody who
8 just - you know another dealer checking it off well we
9 didn't know that dealer did it, you know, then they had
10 some sort of a defense. But they are telling they have
11 given the power of attorney to the auction to make
12 representations. They made the representation that there
13 wasn't any damage to the vehicle.

14 THE COURT: But they didn't - But isn't it a question
15 of fact as to when? They didn't make any representations
16 to the auction company. It's a question of fact as to
17 whether the representation was made at the time of the
18 sale. At least there's testimony that there was no
19 representation made 'till twenty-one days later when the
20 title came. There was no representation made at the time
21 of the sale. And that the form was only checked on the one
22 when he got the title. Now your client testified that he
23 got it. He testified that he got it at the time he wrote
24 the check. And then at one time he said no, I got it when
25 I got the title. He said in the middle of his testimony

1 cause I caught that and two of the jurors caught it and
2 they started laughing. I paid close attention. Now he
3 might have got confused.

4 MR. MOSKOS: I listened to Mr. Walker ask him about
5 five times the same question and I missed it. I didn't
6 hear it.

7 THE COURT: Well he said at one time he thought got
8 it.

9 MR. REIBOLD: I did.

10 THE COURT: But sad he said that. It's a question of
11 fact is when the misrepresentations were made. I mean if
12 they were made - If they were made at the time he wrote the
13 check is one issue. If they were made at the time he got
14 the title is that not an issue?

15 MR. MOSKOS: I agree yes, sir.

16 THE COURT: Okay.

17 MR. REIBOLD: And we'll take up later this issue of
18 whether an omission can be the same thing as
19 misrepresentation. I don't think it can under North
20 Carolina law but we'll deal with that ---

21 THE COURT: Okay.

22 MR. REIBOLD: --- a little bit later.

23 THE COURT: All right, any others? So they've
24 admitted liability on the contract. And I think he's right
25 on fraud and the other issues unless you can tell me - I

1 mean there are other elements.

2 MR. MOSKOS: Oh, you're talking about going forward to
3 the jury?

4 THE COURT: Yes.

5 MR. MOSKOS: Oh, okay, jury issues.

6 THE COURT: I mean these are jury issues that he
7 agrees you're entitled to a directed verdict on the
8 contract issue and they admit liability under the contract.
9 But fraud and negligent misrepresentation they don't.

10 MR. MOSKOS: So, what are we gonna do with the breach
11 of contract claim? Just leave it out? Cause damages are
12 the same all across the board.

13 THE COURT: I'm not. What are y'all gonna do with it?

14 MR. WALKER: They've got to determine damages.

15 MR. MOSKOS: Well yes but --

16 MR. WALKER: They're literally saying two different
17 numbers.

18 MR. MOSKOS: Well right, but my point is you got
19 damages across the board that are gonna be the same. If
20 there are damages under the fraud claim then there are
21 damages -- the same damages are under the breach of
22 contract claim and there's no reason to waste the ink in
23 putting together jury instructions. I know Ryan's gonna be
24 disappointed but, you know, there should be -- we should be
25 able to stipulate that, you know, whatever the damages are

1 they go into the breach of contract claim.

2 THE COURT: Can y'all agree to that?

3 MR. REIBOLD: I'm not sure I understood that last
4 part.

5 THE COURT: I mean ---

6 MR. REIBOLD: I thought I heard - --

7 THE COURT: --- you said the damages are Six Thousand,
8 Four Hundred and Forty-five Dollars. Right?

9 MR. MOSKOS: I --

10 THE COURT: So if the jury comes back - If you win and
11 they come back with Six Thousand, Four Hundred and Forty-
12 five Dollars. Right? They don't know anything else.

13 MR. MOSKOS: Well wait a minute. How are you going to
14 present it to them? I don't understand what you're asking
15 me.

16 THE COURT: I'm not -- I can let them decide but you
17 in your opening statement you said your damages were -
18 whatever they are - Six Thousand, six forty-five.

19 MR. MOSKOS: Yes, sir.

20 THE COURT: And we run some other numbers and he may -
21 he was trying to show the numbers but the bottom line is
22 that's where the damages are versus mi - I guess you could
23 say minus Two Thousand Dollars cause he's still got a Two
24 Thousand Dollar car or Five Hundred Dollars. So the
25 damages could either be Six - I wrote it down - Six

1 whatever your numbers are or his numbers.

2 MR. MOSKOS: Yes, sir.

3 THE COURT: Okay.

4 MR. MOSKOS: I'm not sure I understand. Are you
5 saying that they still need to make a decision on the
6 contract claim?

7 THE COURT: No. The liability is admitted. They just
8 got to make sure there's no damages. Right?

9 MR. MOSKOS: Right.

10 MR. WALKER: Right.

11 MR. MOSKOS: Right. Right.

12 THE COURT: Yeah.

13 MR. MOSKOS: So that would go to the jury. Just the
14 issue of damages to the jury.

15 THE COURT: Right.

16 MR. MOSKOS: Oh, okay. All right. Well however you
17 want to do that. I was trying to make it easier on people.

18 THE COURT: It suites me too. I mean this is a
19 Magistrate Court case you understand. The jurisdiction's
20 under the Six Thousand Dollars.

21 MR. MOSKOS: Until you get to the punitive damage
22 phase.

23 THE COURT: Okay. I understand.

24 MR. REIBOLD: Your Honor, before we had a couple of
25 things in our motion we haven't gotten to.

1 THE COURT: I'm sorry, I didn't mean to cut you off.

2 MR. REIBOLD: I didn't know if you were stretching or
3 if you were fixing to --

4 THE COURT: I was stretching but I wasn't going
5 anywhere.

6 MR. WALKER: You want to switch seats so you can see?

7 MR. REIBOLD: I'm fine.

8 THE COURT: Okay.

9 MR. REIBOLD: Unless you have a problem.

10 THE COURT: No, no, Not at all.

11 MR. WALKER: I just realized you all --

12 MR. MOSKOS: No. I want to make a - I want to be
13 specific on the UTPA claim. The UTPA claim requires an
14 unfair deceptive act or practice or an unfair method of
15 competition in or effecting commerce which approximately
16 cause actual injuries to the plaintiff or to his business
17 and I think at this point it is clear that failing to
18 follow those rules, failing to follow the North Carolina
19 law is unfair and deceptive. I have handed up to the court
20 the case of *Huff versus Autos Limited*. Have I given you
21 that with my jury instruction?

22 THE COURT: Yes. I got it right here.

23 MR. MOSKOS: And I believe that that case clearly
24 shows that its unfair to misrepresent cars in North
25 Carolina. Its obviously effecting commerce. I ask Mr.

1 Farrell if this was a commercial transaction and he said
2 yes. Obviously it's an opportunity to continue to do
3 business or there's lots of businesses just - an
4 independent private sale. And it has approximately caused
5 actual injury to the plaintiff or his business which
6 obviously is the damages part and there's an issue there.
7 So we're asking for at least a directed verdict on
8 liability under the UTPA claim.

9 MR. REIBOLD: Your Honor, he has correctly identified
10 some of the elements of a North Carolina UTPA claim. But
11 in the case law we've given you on North Carolina UTPA even
12 the pattern jury instructions put out by North Carolina
13 itself says actual reliance and justifiable reliance are
14 also elements of a UTPA claim. And we have - I have cases
15 behind it which have the same - have the same or exact same
16 proposition. Those elements are in dispute.

17 THE COURT: Okay.

18 MR. MOSKOS: I have two more.

19 THE COURT: I need to read those cases before I give
20 you an answer.

21 MR. REIBOLD: Yes, sir.

22 THE COURT: Okay.

23 MR. MOSKOS: So you're taking the UTPA argument under
24 advisement?

25 THE COURT: Right. Because you - you gave me the Huff

1 case. He claims that based on the charge that he gave me
2 that it requires actual reliance and justifiable reliance
3 are also elements. And I don't know the factual basis
4 because of whether they're actual or justifiable reliance.

5 MR. REIBOLD: I don't think that came up, your Honor.

6 THE COURT: Okay. Do you have any cases? You just
7 got --

8 MR. REIBOLD: I do believe I have cases. I haven't
9 had time to flip through them but - -

10 THE COURT: Okay. Go ahead. I'm sorry.

11 MR. REIBOLD: I have read cases. They exist and
12 you'll have them.

13 THE COURT: Okay.

14 MR. REIBOLD: We talked about the claims for negligent
15 omission and I'm gonna give you that case law. But I would
16 point out the very fact that North Carolina law does not
17 recognize a claim for negligent omission it's evidence they
18 don't treat a failure to disclose the same way they treat
19 an affirmative misrepresentation. Certainly both can be
20 support for fraud. You conceal something you can be liable
21 for fraud. Affirmative lying you can be liable for fraud
22 but they're not equivalent under North Carolina law. I
23 think that's important and all that on the negligence and
24 and negligent misrepresentation claims to the extent
25 they're alleging a failure to disclose and they are to some

1 extent.

2 THE COURT: Right. Do the documents that have been
3 introduced into evidence they got check marks that no
4 versus they were left blank would be an omission the
5 problem with what's actually been introduced whoever -
6 checked no, no, no, no, you know, and there might not have
7 been anything if they had done that right.

8 MR. REIBOLD: I also would talk about damages and I
9 think I have to mention because of some of the arguments
10 that were just made the issue of agency. Agency is not
11 plead in the complaint. We were not alleged to have been
12 liable for an improper conduct by the auction agent who
13 committed the sole act of negligence. I mean based on our
14 attorney admission agency but that's not a theory that's
15 plead in the complaint. There has been no testimony about
16 what the auction person knew or did. There has to be
17 underlying liability on the part of the auction to make a
18 principle liable. Agency just doesn't fit on these facts.

19 MR. MOSKOS: There's power of attorney admitted into
20 evidence without objection giving the auction the authority
21 to make representations on behalf of the dealership. It's
22 not a simple fact of oh, we hired this guy to go out and do
23 something and he screwed up. This is a fiduciary
24 responsibility. Now if they think that the auction has
25 some liability, I mean the auction clearly disclaims any

1 liability in the terms and conditions because they say, you
2 know, we're just repeating - we're parroting what you tell
3 us so you make sure all of your disclosures and
4 announcements are correct. You know it's just like
5 Midland's Honda is standing right there.

6 THE COURT: I understand that. My understanding from
7 the testimony though there was no testimony that the
8 auctioneer said anything about the car other than it was a
9 red light. He didn't make any disclosures one way or the
10 other. He didn't go through that sheet and say there's
11 been no - he made no disclosure. At least that's what I -
12 and I may be wrong about that - so no disclosures were made
13 when it was sold. It was just sold under a red light. And
14 Mr. Farrell didn't make any because he didn't think he had
15 to. It was sold under a red light. Only that sheet came
16 out right at sometime either when the check was written or
17 when the title was given. And whoever checked those - the
18 things on that sheet, now, and the girl at the auction
19 company checked those. She did not have the authority to
20 check those because --

21 MR. MOSKOS: Oh, absolutely.

22 THE COURT: No, no.

23 MR. MOSKOS: That's what Mr. Guyer testified to. He
24 testified that they would - that they complete those
25 documents when the - when the dealer doesn't - isn't

1 present. They had the authority under the --

2 THE COURT: Do you mean to tell me they can bind the
3 deal when she just arbitrarily checks no and nobody tells
4 her to check it off?

5 MR. MOSKOS: It's not that she arbitrarily - Well the
6 simply answer is yes. If she just went willy nilly yes
7 then maybe Midlands might have something or a dealer might
8 have a claim against the auction for some negligent hiring
9 or something of that nature. But in this case what we have
10 is the power of attorney in the record; there are multiple
11 documents from ADESA saying that the auction is acting in
12 the stead of the dealer when the dealer's not there. The
13 auction has the authority to complete the paperwork based
14 on the information given by the dealer. In this case Mr.
15 Farrell got on the front of them and - whether he didn't
16 say anything or he affirmatively said no there are not
17 announcements is irrelevant. At the bottom - you know, at
18 the end of the day the auction checked off the information
19 based on what was given to them by Midland's Honda under
20 the authority of the terms and conditions.

21 THE COURT: I know. But I heard no testimony about
22 that. I mean cause that's - If Midland Honda tells the
23 auctioneer no, no, no, no, no, she checks the block that's
24 true. But if she - they don't tell her anything cause he's
25 telling me under North Carolina law negligence - omission

1 is not there. If they don't tell 'em anything and she does
2 that on her own without any representation from Midlands
3 that's - they've just omitted telling. Right? So how
4 could she bind them?

5 MR. MOSKOS: Because there is a valid power of
6 attorney that allows the auction to complete the paperwork
7 on behalf of the seller.

8 THE COURT: So, but, but how does she know whether the
9 car had been wrecked without anything and she just
10 arbitrarily checks no.

11 MR. MOSKOS: But she doesn't arbitrarily check no.
12 What happens is you've got the telephone call and this is
13 what Mr. Guyer testified to - not this specific one but
14 generally what happens is the guy calls up and says I'm
15 sending cars - I'm not gonna be at the auction - I'm
16 sending cars and I've got three green lights and two reds.
17 The reds have an engine problem or has been wrecked. You
18 know this is the announcement. Or they don't say anything
19 because there's no requirement under the law that says
20 there's a mechanical issue. Excuse me, there's no
21 requirement under the auction rules such as a mechanical
22 issue to disclose it so they don't have to make an
23 announcement. And the ladies take down the information;
24 they put it into the computer. When the car sells the
25 damage disclosure form is completed based on the

1 information from the dealership. The sales receipt is
2 completed based on the information from the dealership.
3 And you know the lights are checked the announcements if
4 any are put onto the paperwork and the paperwork is given
5 to the buyer.

6 THE COURT: Okay.

7 MR. MOSKOS: That - That's in the record.

8 MR. REIBOLD: Your Honor, with respect as I now
9 understand it is his theory is that Midland's is
10 responsible for the actions of it's agent appointed
11 through the power of attorney. That's not in the complaint
12 but I think that's probably appropriately raised. I'll
13 withdraw our motion on a directed verdict on that ground.

14 THE COURT: All right.

15 MR. REIBOLD: The last thing I would have then is a
16 little bit on damages.

17 THE COURT: Okay.

18 MR. REIBOLD: What you have in this case I think has
19 really been an attempt to double dip.

20 THE COURT: I'm sorry.

21 MR. REIBOLD: A little bit of an attempt to double
22 dip.

23 THE COURT: Okay.

24 MR. REIBOLD: One of the items they're claiming is
25 loss profit. But they're also claiming expenses that would

1 go into your lost profit calculation. You don't get - You
2 can't do that twice. You've got the five hundred and fifty
3 dollars to repair the car door; you've got the two hundred
4 dollars of fees paid to the purchaser - I'm sorry, two
5 hundred dollars in - Yeah, commission to salesman. And you
6 have three hundred and fifty dollars to the customer.
7 Those are already a part of the lost profit calculation.
8 The way - if you're paid lost profits you take what you
9 whatever minus your cost off your lost profit figure. You
10 don't get to go back and add in your cost again. I mean
11 that's a double recovery.

12 MR. MOSKOS: But we didn't do that. We didn't do
13 that. The way the - The way we calculated it on the record
14 you had the car at Fifty-two Hundred, the auction fee and
15 the door, the commission fee, the relay; all right. And so
16 you - we added all that information up which wound up being
17 Six Thousand, One Hundred and Forty-five Dollars and
18 Twenty-seven Cents. From Sixty Eight Hundred it leaves us
19 a profit and - then we had the transfer fee of Three
20 Hundred and Forty-five Dollars. That was outside of the
21 Sixty-eight Hundred Dollars. That was an addition to the
22 Sixty-eight Hundred Dollars. That brings you up to Seven
23 Thousand, One Hundred and Forty-five Dollars. He says he
24 can get Five Hundred Dollars for it; that piece of junk,
25 and that leaves him Six Thousand, Six Hundred and Forty-

1 five Dollars.

2 THE COURT: And so they're claiming to get Two
3 Thousand Dollars for the car so under their theory - I mean
4 if you ultimately made that you can get Six Thousand, Six
5 Hundred and Forty-five Dollars for it?

6 MR. MOSKOS: Well, yes, sir, but my understanding of
7 what Mr. Reibold ---

8 THE COURT: Fifteen Hundred.

9 MR. MOSKOS: --- argument is he's claiming that we ask
10 for Sixty-eight Hundred Dollars took out Fifty-two and then
11 we added - We took the Fifty - Sixty-eight Hundred Dollars
12 and added in the door and the commission and all that.

13 MR. REIBOLD: The confusion is out of the - in the
14 earlier disclosure. This was a different figure and I
15 wasn't here when he drew the chart.

16 THE COURT: Okay.

17 MR. REIBOLD: I think we all right.

18 THE COURT: And I did it another way. The whole
19 process I just added it all up and took the expenses out
20 and I came up to the exact same Sixty-six, Forty-five.

21 MR. REIBOLD: I apologize for the confusion. I think
22 we're right now.

23 THE COURT: Any difference the Five Hundred versus the
24 Two Thousand. That car is worth Two Thousand or whether
25 the car is worth Five Hundred ultimately the jury can make

1 that call.

2 MR. MOSKOS: Yes, sir.

3 THE COURT: Okay.

4 MR. REIBOLD: I think that's it.

5 THE COURT: All right.

6 MR. REIBOLD: If that wasn't enough for you.

7 THE COURT: It's going to be an interesting evening.

8 All right, as fast as you can get me that information.

9 MR. REIBOLD: Just email it to you? What's the
10 address?

11 THE COURT: rcauthranj all the judges got it.
12 Rcauthranj@sccourts.org. And my law clerk is the same
13 thing it's just lc versus j.

14 MR. REIBOLD: That much I remember. I clerked for
15 Judge Kinard when I was right out of law school. I love
16 that job because everyone takes your phone calls.

17 MR. MOSKOS: I'm sorry, Judge, can you tell what
18 exactly your looking for cause I know we been bouncing
19 around.

20 THE COURT: Y'all just was to send me North Carolina
21 law. The problem is you're asking me to try it with North
22 Carolina law. I know absolutely nothing other than as I
23 said earlier what I heard on the news lately . . . but
24 other than that I don't know any North Carolina law.

25 MR. WALKER: And, your Honor, I think either late

1 Monday or early yesterday we had handed up proposed charges
2 and the notebook. The notebook's got the law on the back
3 of the charges.

4 THE COURT: What about those charges? Have you had a
5 chance to look at the charges?

6 MR. MOSKOS: I really have not, your Honor. I started
7 looking at them last night and what I noticed is that their
8 from 2003. I don't know that they are up to date. And
9 when I was looking at some of them it looked like they were
10 real property law cases and obviously we're not dealing
11 with real property.

12 THE COURT: They were talking about titles, but I
13 think they were talking about titles of the car not
14 property. You know I need y'all to let me know to give me
15 something to charge. I mean this is a situation any more
16 you all gonna be doing closing arguments and I got to put a
17 charge together.

18 MR. MOSKOS: Yes, sir. I mean here's - I'm looking
19 under Tab 2 of Defendant's Jury Notebook and the title is
20 Contract Issue, Issue of Common Law Remedy. Direct Damages
21 Buyer's Measure of Recovery for a Seller's Breach of
22 Contract to Convey Real Property. That sounds like a piece
23 of land so I don't know that that -

24 THE COURT: Yeah. That pretty well is.

25 MR. MOSKOS: So I have to go back.

1 THE COURT: All right. If you'll kind of go through
2 them and see what we can glean from both sides to get me
3 something.

4 MR. MOSKOS: Will do, Judge. Thank you.

5 (COURT IN EVENING RECESS AT 05:15 PM.)

6 (COURT BACK IN SESSION THURSDAY, APRIL 21, 20156 AT
7 09:38 AM.)

8 MR. MOSKOS: I have some additional charges and the
9 cases that deal with North Carolina law that I think are
10 hopefully dispositive of a couple of the issues that we
11 have.

12 THE COURT: Okay.

13 MR. MOSKOS: And one of the cases that I had was a
14 *Hardy versus Toler* case. I thought I had three copies so
15 I've given you one and Mr. Reibold one and I can't put my
16 hand on the third one so if I misstate something I
17 apologize.

18 THE COURT: Okay. I have two copies here.

19 MR. MOSKOS: Oh, there you go. I thought I had it.

20 THE COURT: The *Hardy* case you're talking about?

21 MR. MOSKOS: Yes, sir. I just want to make sure I've
22 - I don't think I highlighted one but I just wanted - there
23 we go.

24 THE COURT: And basically what does it say?

25 MR. MOSKOS: This is one of the first cases dealing

1 with the - with automobile fraud in North Carolina and the
2 Unfair Trade Practices Act. This goes back to 1975 and
3 basically there hasn't been any over ruling of the courts
4 to be able to use the UTPA, North Carolina UTPA, based on
5 an economic loss defense. That has carried through to
6 2006. I believe you have - I put in front of you Club Car
7 versus Dow Chemical and that judge went through - He
8 apparently did a --

9 THE COURT: I just read that case.

10 MR. MOSKOS: Yes, sir.

11 THE COURT: And he went through the factors and it
12 basically from reading that the economic loss rule knocks
13 out negligence but everything else stands at least from
14 what I can tell. Do you disagree with that?

15 MR. REIBOLD: Well, your Honor, I don't think there's
16 any doubt that the negligence and negligent
17 misrepresentation claims will be knocked out by that - by
18 that doctrine. Certainly there are times in North Carolina
19 where UTPA and fraud can be - can be barred by that
20 doctrine but this one I'll tell you frankly this is as
21 close to say for sure.

22 THE COURT: Right.

23 MR. MOSKOS: Well, your Honor, like I said I disagree.
24 There are independent duties, and this is really key in the
25 analysis of the economic loss rule, there are other duties

1 outside of the contract which is simply that document, the
2 sales document, that --

3 THE COURT: What - Now that you brought that up, why
4 is there Fifty-five and Fifty-six, why are there two
5 different contracts with different - -

6 MR. MOSKOS: Because if you take a look at the top
7 corner of the left - right hand corner, one says S and one
8 says B. One is seller and one is buyer. They both got the
9 same thing.

10 THE COURT: No they don't. The numbers are different.
11 That's what - the numbers --

12 MR. MOSKOS: Oh, the numbers are different because
13 they have fees that are attached to it from the auction.
14 The sales price should still be the same.

15 THE COURT: Okay.

16 MR. MOSKOS: Is that right? I'm not looking at it.

17 THE COURT: Yeah. Okay. But they're not signed by
18 the seller at all. I mean I assume y'all claims they're
19 valid contracts. Right? Nobody raised that.

20 MR. WALKER: Oh, we took the money.

21 MR. REIBOLD: Yeah.

22 MR. WALKER: So that it's performance.

23 THE COURT: Okay. All right.

24 MR. MOSKOS: They took money however if they haven't
25 entered that particular document then the terms and

1 conditions don't apply. See, what Mr. Reibold's argument
2 is by entering into that document, signing that document,
3 the terms and conditions the rules, okay, and you got to
4 start back. There's a contract with the - between the
5 dealer, between Midland's Honda and ADESA and a separate
6 contract between Mr. Whitley and the auction. Based on
7 that they're supposed to follow certain rules and in those
8 rules are the Matrix. And they are definitely afraid of
9 that Matrix so what they're trying to do is to exclude it
10 under this economic loss rule argument.

11 THE COURT: Well I think the economic - I mean --

12 MR. MOSKOS: Well but here's the issue. Their
13 position is that document incorporates the terms and
14 conditions from these rules. Well, if they haven't signed
15 it then, you know, we don't - maybe there is an issue about
16 whether or not there's - whether that term cause that term
17 was never discussed and that term may not be available to
18 them. And if that's the case then the Matrix definitely
19 comes in because there's an independent duty arising
20 outside of the contract for them to disclose. I don't
21 think it comes in - I don't think the economic loss rule
22 applies anyway but that's the way I understand Mr.
23 Reibold's argument.

24 THE COURT: And if the economic loss rule does apply
25 at least from my looking at the cases and understanding,

1 you know, this is North Carolina cases that I'm having to
2 scramble trying to figure. But at least from the North
3 Carolina cases that I've looked at the economic loss rule
4 bar recovery from negligence. But it doesn't necessarily
5 seem to go to fraud or negligent misrepresentation; it just
6 cuts the negligence out. Which I'm not really sure it's a
7 big issue in this anyway.

8 MR. REIBOLD: Let me address that ---

9 THE COURT: Okay.

10 MR. REIBOLD: --- and his comments to it. First of
11 all they signed the contract. Even if we didn't they're
12 bound by the terms. It's a contract claim.

13 The second is well our argument deals with the
14 Arbitration Matrix and that's the part we're addressing
15 this argument to. We're not saying there can't be a claim
16 based on some other duty. But we don't think they should
17 be able to get up and argue and say to the jury that the
18 Matrix is the basis of any tort - of the negligence tort
19 claims. So we're not trying to have our cake and eat it
20 too. We're not trying to bar the whole thing when there
21 isn't an independent basis. We're just trying to get rid
22 of the one that has a contractual basis.

23 MR. MOSKOS: And they are trying to have their cake
24 and eat it too. They're saying - They're falling on their
25 sword and they're saying oh, we admit it we made a mistake

1 so now we don't want any of this - any of the documentation
2 to come in or be argued to the jury because it's already
3 been admitted. So I don't know ---

4 MR. REIBOLD: We got it later.

5 MR. MOSKOS: --- and it was entered without objection
6 so I don't know how --

7 THE COURT: If its in evidence you can argue it to the
8 jury. I mean that's the rules unless I --

9 MR. REIBOLD: Well it's in evidence related to the
10 contract claim.

11 THE COURT: Right.

12 MR. REIBOLD: And we've admitted breach of contract
13 but it does not provide a basis for the - And I can see
14 you're already read the UTPA fraud I think. I think that's
15 the argument but that's --

16 THE COURT: Well it appears to be from what I read
17 that that's a question for the jury.

18 MR. REIBOLD: But the negligent misrepresentation
19 that's a negligence based claim. I think this does cover
20 negligence misrepresentation. And in these cases - I mean
21 I provided cases to you that did.

22 THE COURT: And - Okay. And maybe it - and based on
23 our research, you know, negligence was barred. Now I
24 didn't get that from negligence misrepresentation and maybe
25 I missed it. You know if you can show me certain and in

1 what case you sent but it says that.

2 MR. REIBOLD: I'll have to check my emails.

3 MR. MOSKOS: Yeah, I did my best last night, Judge.

4 THE COURT: I know.

5 MR. MOSKOS: I got plenty of cases from Mr. Reibold.

6 (PAUSE.)

7 THE COURT: In the Wilson case is one.

8 MR. REIBOLD: I think there was more than one but
9 that's certainly one of them.

10 THE COURT: And in that particular case it appears
11 that they are tied to negligence. And then they discuss
12 negligent misrepresentation and fraud but they didn't apply
13 that. They never say it whether it applies to those at
14 least from my interpretation of that case. They don't give
15 us any direction whether it applies to negligent
16 misrepresentation. Negligent misrepresentation or fraud
17 but they definitely said it applies to negligence so that's
18 why I was bringing out the Supreme Court in North Carolina.

19 MR. REIBOLD: Is that the only one I sent that covered
20 that cause it seems to be clear to me.

21 MR. MOSKOS: I'm sorry, your Honor. I have never been
22 good with names of cases. Can you give me an idea? Is
23 that a construction case or is that - Cause I read a couple
24 of those like a software program case. One was a
25 construction case and --

1 THE COURT: We can go back to the back. Yeah, the new
2 home manufacturer --

3 MR. MOSKOS: Right. And that's where you've got arms
4 length transaction. These folks are sitting down and
5 they're negotiating contracts and remedies and all of that.
6 We don't have that in this case. What you have is I'm
7 selling you this car as is subject to as Mr. Walker said
8 yesterday subject to the terms and conditions. As long as
9 those terms and conditions are applied and are accurate
10 then, you know, as long as I can rely on those
11 representations which Mr. Whitley did then I'll buy the
12 car. He buys the car all of a sudden those terms and
13 conditions - the representations are found out to be false
14 and - I mean it's a classic case of fraud and negligent
15 misrepresentation and negligence cause they have a duty to
16 disclose it.

17 They also have the common law duty. We really haven't
18 talked about that too much but there's a common law duty
19 that where a transferor has superior knowledge about an
20 item and knows about problems in that item; in this case
21 Midland's knew about the clipped car. They have an
22 affirmative duty under the common law to disclose this
23 information prior to - prior to selling the item. As a
24 result that's a duty outside of - that's a duty outside of
25 the contract.

1 MR. REIBOLD: Yeah, but he can argue that. But first
2 of all I think the statement about the duty is incomplete.
3 The cases provided in the jury charges from Tennessee the
4 North Carolina did to my understanding is that if a seller
5 transfers a car or other product to the buyer and has
6 superior knowledge and the - it's something that the buyer
7 cannot be discover in the exercise of their own diligence
8 then there's a duty. But that's neither here nor there.
9 The real question is and what our position is he can't tell
10 the jury that we were negligent either in a representation
11 or other conduct based upon something that's covered in the
12 contract claim. He can say there is a common law duty. He
13 can say the damages disclosure statute. All we're saying
14 is the arbitration Matrix can't be a basis for negligence.
15 We're not trying to chop out the whole claim and that's
16 what he's - that's what he's trying to tell you.

17 MR. MOSKOS: I just - I don't - Like I - I keep saying
18 - I keep repeating myself, Judge. It is what it is.

19 THE COURT: Well at least and there is some question
20 and I'm not really sure ---

21 MR. MOSKOS: And of course the --

22 THE COURT: --- but I don't know if that makes a
23 difference in your whole scheme of things. The answers
24 doesn't necessarily get you there anyway on - Negligence
25 doesn't accomplish anything to you. I mean they've

1 admitted liability the damages are whatever the jury gives
2 'em. Negligence doesn't get you anywhere. It doesn't get
3 you into punitive damages. It doesn't get you there. My
4 reading of the statute just simple negligence doesn't get
5 you to punitive damages.

6 MR. MOSKOS: Well this is - And this was something
7 else that - Oh, I think I sent it to you last night about
8 the gross negligence.

9 THE COURT: Yeah, but - and gross negligence doesn't
10 get you there based on the statute in North Carolina.

11 MR. MOSKOS: Are you talking about the punitive
12 damages statute?

13 THE COURT: Yes, sir. If your gross negligence is not
14 enough.

15 MR. MOSKOS: Give me one second, your Honor.

16 THE COURT: You sent me that last night. And it says
17 --

18 MR. REIBOLD: And, your Honor, just so you know the
19 LRP case that we sent you last night does bar the negligent
20 misrepresentation claim.

21 THE COURT: Okay. Now let me look at that case.

22 MR. MOSKOS: Well, we have - I'll wait. Well, under
23 the punitive damages statute I assume you're talking about
24 (1) (D) (15). Willful wanton conduct ---

25 THE COURT: Right.

1 MR. MOSKOS: --- is what we're talking about and that
2 gets me there.

3 THE COURT: Willful wanton goes to negligence doesn't
4 it? But the statute says that doesn't it?

5 MR. MOSKOS: I apologize, your Honor, I did not get an
6 opportunity to look up exactly how North Carolina defines
7 willful and wanton conduct.

8 THE COURT: Okay. It's - Yeah, willful - But it takes
9 willful and wanton conduct. Willful and wanton conduct
10 means the conscious and intentional disregard and an
11 indifference to the rights and safeties of others which the
12 defendant knows or should know is reasonably likely to
13 result in injury damage or arm. Willful or wanton conduct
14 means more than gross negligence.

15 So the way you get it there is either fraud, malice,
16 or willful and wanton conduct. And malice, we don't have
17 malice in this case cause malice means a personal ill will
18 toward the claimant that aggravated or decided the
19 defendant to perform the act or undertaking that a conduct
20 resulted in harm to the plaintiff.

21 They didn't even know each other.

22 MR. MOSKOS: I understand malice doesn't apply yes,
23 sir.

24 THE COURT: Okay. That case you sent me on negligent
25 misrepresentation had been --

1 MR. REIBOLD: Okay. That's fair.

2 THE COURT: So let's go - Let's talk about the charges
3 real quick. Since - Do I need to charge breach of contract
4 and that we've admitted that? Do I need to go through all
5 the elements of a breach of contract in that situation or
6 not?

7 MR. REIBOLD: Our proposed charges go straight to
8 damages on the contract. We don't have the preliminary
9 stuff.

10 THE COURT: I don't have it. Because the one you sent
11 me goes with damages to breach of contract, general, direct
12 damages breach of contract; intentional damages and breach
13 of contract and damages so which one's?

14 You got this cover sheet you sent me?

15 MR. REIBOLD: Yeah. That's the index. And the charge
16 number one just says here's all the types of damages you
17 can get on breach of contract and the next three explain
18 what each of those categories are.

19 MR. MOSKOS: Excuse me, your Honor, I apologize.
20 Obviously while Mr. Walker and I have been in here Mr.
21 Reibold has been back in his office working on all this
22 stuff. I've gotten two or three sets of jury instructions
23 and I'm trying to make sure, I haven't been able to go over
24 everything just because of lack of time. I just want to
25 make sure which one we're dealing with. The notebook or -

1 MR. REIBOLD: The notebook is just the cases.

2 THE COURT: The notebook is just the cases. This
3 sheet he sent me is what we're dealing with.

4 MR. MOSKOS: All right.

5 THE COURT: So, --

6 MR. REIBOLD: While we're waiting there is a
7 peculiarity about how North Carolina handles their UTPA
8 claims that would affect the jury charges. The question of
9 whether or not certain conduct would violate the statute
10 meaning is it unfair and deceptive, is it oppressive,
11 immoral, does it have the capacity to deceive, that's a
12 question for you. And so the way they do that if you look
13 at our proposed jury charge, and it came straight from the
14 pattern jury charge in North Carolina, what they do is he
15 tells you this is what we think violates the act. You say
16 yes or no. If you say yes then we put that conduct in the
17 jury charge and the jury decides whether that conduct
18 happened. That appears to be the way North Carolina does
19 it because it's clear that the question of whether there's
20 a violation of the statute is only for the judge in North
21 Carolina.

22 MR. MOSKOS: And where is that?

23 THE COURT: And that's - And we've got that and I saw
24 that and it's - that is so strange to me because it seems
25 like I'm commenting on the facts but that's what - and it

1 appears to me he's right. That's what they do in North
2 Carolina.

3 MR. MOSKOS: What - What I'm trying to figure out is
4 what's the authority? Is that a case or is that a statute?
5 I just want to look at it.

6 THE COURT: It's the pattern instructions that y'all
7 gave me that said that's what they do in North Carolina.

8 MR. REIBOLD: And there's a case that we've cited and
9 should be in that binder as well.

10 THE COURT: Right. It's instruction 813.21.

11 Look under 19 in your binder.

12 MR. REIBOLD: Yeah, and I've cited a case under there.
13 It's odd.

14 THE COURT: I know.

15 MR. REIBOLD: That's the way that they seem to do it.

16 THE COURT: I wish I had a told the jury to come back
17 at ten thirty. I hate to send them back out.

18 MR. MOSKOS: I agree with your Honor that to me the
19 judge is commenting on the law or making factual
20 determinations but that's what it says. If you will give
21 me one moment.

22 THE COURT: Okay.

23 MR. REIBOLD: And that affects some of the preliminary
24 jury charges that we would ordinarily have here with UTPA.
25 obviously you wouldn't have in North Carolina. I'm not

1 trying - I just knew that was gonna come up. I wanted to
2 makes sure we were --

3 THE COURT: When I was looking at these charges I was
4 gonna ask y'all about that because that is totally
5 different from what we do.

6 (PAUSE AT 10:05 AM.)

7 THE COURT: As far as negligence is concerned on the
8 chart if the economic law of that case applies and the
9 economic loss rule applies to negligence cause of action
10 but does that also can apply to contributory negligence?

11 MR. REIBOLD: Well, --

12 MR. MOSKOS: It would have to I think.

13 MR. REIBOLD: If negligent - If we can't be negligent
14 for that particular conduct then we can't have a
15 contributory negligence defense for that particular
16 conduct. He is however as he said many times this morning
17 premising certain other allegations against us for which I
18 think contributory negligence would still apply.

19 THE COURT: Now but in the instructions the - one of
20 the things I'm telling the jury per my instructions is if
21 you do not find the defendant negligent you can't find the
22 plaintiff negligent.

23 MR. REIBOLD: Contributory negligence still applies to
24 negligent misrepresentation. That's still a negligence
25 based claim to which a defense of contributory negligence

1 can apply.

2 MR. MOSKOS: I don't think so. Those are - They have
3 different elements.

4 MR. REIBOLD: It's negligence. That's what it says in
5 --

6 MR. MOSKOS: Still that is different elements.

7 THE COURT: Let me see.

8 MR. REIBOLD: Now I don't know that I have briefed
9 that particular point but.

10 THE COURT: All right. Let me see.

11 (PAUSE.)

12 THE COURT: All right, are you ready to go through
13 these charges?

14 MR. MOSKOS: Well I was working on the Unfair Trade
15 Practice issue that we had talked about and I think I have
16 the items.

17 THE COURT: Okay.

18 MR. MOSKOS: Now, we really haven't said today what
19 exactly we're doing so I am assuming - Well, are we just
20 dealing with the jury charges at this stage? Have we
21 finished the directed verdict motion?

22 THE COURT: I thought we had.

23 MR. MOSKOS: Okay, so all we're doing now is the jury
24 charges?

25 MR. REIBOLD: Have you ruled on the negligence?

1 THE COURT: And I think based on the information I
2 have the negligence is off the table so I've granted their
3 motion for negligence.

4 MR. REIBOLD: And if we get to punitive damages there
5 will be a few other things but that's the separate phase?

6 THE COURT: Right.

7 MR. REIBOLD: Okay.

8 THE COURT: Okay. And I understand we can deal with
9 the punitive damages later so.

10 MR. MOSKOS: All right. So on the Unfair Trade
11 Practice part where you have to decide I'm assuming that
12 this is in the form of a or would carry the same standard
13 as a motion and that these need to be viewed in the light
14 most favorable to the plaintiff. And in that case we would
15 start with that the defendant failed to inspect the car
16 prior to offering it for sale in North Carolina to the term
17 of the extent of the damage.

18 You want me to just read 'em off or do you want me to
19 wait? I can copy this and give it to you. Well I can't
20 copy it.

21 THE COURT: Okay.

22 MR. MOSKOS: The defendant failed to disclose on the
23 MVR-181 Mandatory North Carolina Damage Disclosure Form.
24 The reconstructed - that it was a reconstructed vehicle.

25 THE COURT: Okay.

1 MR. MOSKOS: It affirmatively represented on the same
2 form - the Damage Disclosure Statement - that the vehicle
3 had not been damaged more than twenty-five percent of it's
4 value.

5 THE COURT: Okay.

6 MR. MOSKOS: It failed to disclose the frame/unibody
7 damage as required under the Auction Matrix.

8 THE COURT: Okay.

9 MR. MOSKOS: Also under -- They also failed - or it
10 also failed to disclose the reconstructed nature of the car
11 as required under the Auction Matrix.

12 It failed to follow the State mandated disclosure laws
13 as required by the Matrix.

14 It failed to disclose the damage based on the North
15 Carolina Common Law which requires a seller to disclose
16 conditions in an item that would be material to a purchaser
17 but unnoticeable. I believe that's it.

18 THE COURT: Okay.

19 MR. REIBOLD: Some of those I think are fine. I have
20 a few issues with a couple of em.

21 THE COURT: Okay.

22 MR. MOSKOS: The very first one is failure to inspect.
23 That's conduct that occurred here in South Carolina.
24 I don't think North Carolina can - North Carolina law can
25 punish somebody for - it's actually territorial effect of

1 that UTPA stature. I don't think that comes into play in
2 North Carolina.

3 The second one talked about disclosure of all the Non-
4 Disclosure Form and those are fine but the one caveat. We
5 haven't decided and we won't until the jury rules or gives
6 us a verdict whether that damage disclosure statement was
7 given at the time of the sale or sometimes subsequently.
8 And I just don't want the instruction you give to suggest
9 to them that it was given at any particular point in time.

10 THE COURT: Okay, so how - So how do you propose that
11 I do that?

12 MR. REIBOLD: If you conclude that the damage
13 disclosure statement was given at the time of the
14 transaction then. I'm not - Work with me. This is coming
15 up right now I haven't had time to draft --

16 THE COURT: Well I understand that and this trying to
17 word this it is - it so much runs against the grain of what
18 I've always done in South Carolina and not comment on the
19 facts to the jury because I am telling them certain things
20 and they will take that as fact which makes it -- I don't
21 know how North Carolina does this - in trying to make it as
22 mutual as possible when they don't think I'm doing that.

23 MR. WALKER: Well you can just tell 'em that.

24 THE COURT: I guess I'm gonna have to.

25 MR. REIBOLD: And that covers the second and third.

1 The fourth talks about the Auction Matrix. That's an
2 issue in the case.

3 THE COURT: So that second and third?

4 MR. REIBOLD: That's the one where he talks about the
5 damages disclosure statute. We have the same - or the
6 form, I'm sorry. We have the same concern on three as we
7 did on two.

8 The fourth is the Arbitration Matrix. The fifth is
9 the Arbitration Matrix. And so is the sixth. Those are
10 issues in the case. You can proffer that. No problems
11 there. North Carolina Common Law: I'm a little leery of
12 that simply because if we're gonna talk about the Common
13 Law I want to make sure that first of all, your Honor, you
14 probably already been given a charge on that Common Law
15 duty. And I don't want to misstate that. I don't think
16 what we've heard from him is the complete law.

17 THE COURT: But I don't have a charge on the Common
18 Law duty right now.

19 MR. REIBOLD: Okay.

20 THE COURT: I mean it's not in the packet is it?

21 MR. REIBOLD: We didn't give you one. And if there
22 isn't one then that needs to come out in UTPA.

23 MR. MOSKOS: Well, your Honor, in my pretrial brief
24 --

25 MR. REIBOLD: Your Honor, we don't disagree that there

1 is a common law duty. We don't think it's quite as one
2 sided as he's portrayed. But there certainly is a duty to
3 disclose in certain situations.

4 MR. MOSKOS: Your Honor, I quoted in my pretrial
5 brief, and I'd ask the Court to charge - Its on Page 12 - I
6 start talking about fraud - fraud and I list out the
7 elements. And then the next sentence is North Carolina has
8 long recognized that where a material defect is known to
9 the seller and he knows that the buyer is unaware of the
10 defect and that it is not discoverable in the exercise of
11 the buyer's diligent intention or observation the seller
12 has a duty to disclose the existence of the defect to the
13 buyer.

14 MR. REIBOLD: I think that's correct.

15 THE COURT: You say that's - you think that's correct?

16 MR. REIBOLD: I think that's a correct statement of
17 North Carolina law.

18 THE COURT: Okay. Okay.

19 MR. MOSKOS: Your Honor, I would also ask that you
20 charge the next sentence. Yeah. It says in such cases -
21 and you don't have to do the Latin but - in such cases a
22 failure to disclose the truth is as much fraud as
23 affirmative false representation. That's the law in North
24 Carolina and I would ask that that be charged also.

25 MR. REIBOLD: I have one hesitation on that. I

1 certainly agree that fraudulent concealment can support
2 fraud liability in the same way as affirmative
3 representation. That's not in dispute. What I am afraid
4 of is that Mr. Moskos will argue there was - it was an
5 omission; this is somehow affirmative action because North
6 Carolina says they're equivalents and that's - if you trace
7 those cases back that's not what it says. It says they're
8 equal in what it means to get to liability but it doesn't
9 say that a negligent or fraudulent omission is the same
10 thing as an affirmative statement. And as long as we have
11 that understood I don't have no problem with that charge.

12 Do you understand the difference?

13 THE COURT: Yeah, but I'm trying to figure out how I'm
14 gonna put in there where the jury will. What do you think
15 I need - need to say to the jury that makes it fair? I
16 mean I understand this is his brief and this is his
17 interpretation of this case.

18 MR. MOSKOS: That should be the citation - I cited -
19 that comes out of the case. It's probably a direct quote.

20 THE COURT: Okay.

21 MR. REIBOLD: I'm not so much concerned about the
22 language of that statute as I am on an argument that takes
23 it someplace where I know it shouldn't go.

24 THE COURT: I don't know how to deal with that other
25 than he makes an argument and you can object.

1 MR. REIBOLD: How about this then? Failure to
2 disclose the truth can support a fraud claim in the same
3 manner as an affirmative misrepresentation.

4 THE COURT: Do you agree with that?

5 MR. MOSKOS: I'm sorry, say it again. A failure to
6 disclose the truth is?

7 MR. REIBOLD: Can support a fraud claim in the same
8 manner as affirmative representation.

9 MR. MOSKOS: My dilemma, your Honor, is I haven't
10 traced the cases back so I don't know what the - what
11 that's based on. I understand the argument I just don't
12 know --

13 MR. REIBOLD: I only have one copy of each but --

14 THE COURT: As much as they --

15 MR. REIBOLD: Rowan cites *Griffin*. *Griffin* traces
16 back to *Seztler* and *Seztler* basically here they're talking
17 about equivalent means of liability and not equivalency in
18 representations.

19 THE COURT: Well, what you're saying a failure to
20 disclose the truth can support a fraud claim as much as an
21 affirmative misrepresentation.

22 MR. REIBOLD: I think that's a better way to say that.

23 THE COURT: Okay. I'll try to put all of that
24 together. So, any other issues with --

25 MR. REIBOLD: That's it on the suggested

1 specifications of UTPA liability.

2 THE COURT: Okay. Now as far as the charges are
3 concerned that I was given by the defendant do you have any
4 issues with any of these before - not --

5 MR. MOSKOS: To be honest with you, your Honor, I
6 haven't even had an opportunity to look at it. I mean last
7 night I got like five - well six, seven, eight cases they
8 were twenty pages each and trying to figure them out and do
9 the other research that you had requested --

10 THE COURT: I understand. We all had a tough night.

11 MR. WALKER: Your Honor, we gave them out Tuesday
12 morning I think.

13 THE COURT: I know.

14 MR. MOSKOS: Well I been in a little tied up in this
15 courtroom, your Honor. I haven't had another lawyer
16 helping me out.

17 THE COURT: And I understand. And it's been difficult
18 because I hadn't had any prior notice that I'm dealing with
19 North Carolina law that I am totally unfamiliar with ---

20 MR. REIBOLD: This got dumped in your lap.

21 THE COURT: --- and trying to get up to speed. It
22 would have been nice - I will file these if you want - at
23 the end of closing arguments and both sides will take a
24 brief recess and try to review them a little bit again and
25 then before I charge the jury. I've had them sitting back

1 there an hour.

2 MR. REIBOLD: I'm prepared to address his charges but
3 we can wait until --

4 THE COURT: Okay. I mean what - what are y'all gonna
5 tell me? You want to get started with closing arguments
6 and then recess?

7 MR. MOSKOS: I would need about ten minutes because I
8 have something I've got to do in my closing argument and
9 getting it together I was rushing to get over here and had
10 all kinds of --

11 THE COURT: All right. Well let's stop this right now
12 and give you ten minutes. Like I said I got a jury locked
13 up back there means I got to let them go for a while.
14 We'll stop and do closing and then we'll take a break and
15 try to wrap up. All right, we'll be back in ten minutes.

16 (COURT IN RECESS AT 10:26 AM.)

17 (COURT BACK IN SESSION AT 10:42 AM.)

18 THE COURT: Okay. Thank you, you can be seated.

19 Did I give you the verdict form?

20 MR. WALKER: He did.

21 MR. REIBOLD: And this on a whole we don't have a
22 problem with it. We do think given some of the discussions
23 that we've been having that there are two potential special
24 questions we need to have asked.

25 THE COURT: Okay.

1 MR. REIBOLD: And one deals with when was the
2 disclosure form provided. And then the other's going to be
3 on the fraud claim. Is the basis for the fraud claim the -
4 is the basis the non-disclosure form? Those are the two
5 issues that we're gonna need a specific information on.

6 MR. MOSKOS: I'm sorry, what was the second part?

7 MR. REIBOLD: On the fraud claim is the basis of their
8 fraud claim on the disclosure form.

9 MR. MOSKOS: Why is that?

10 MR. REIBOLD: Well that becomes important because if
11 we're going to be held liable for the under agency
12 principle for the auctions checking those boxes on that
13 disclosure form North Carolina law does not permit punitive
14 damages based on vicarious liability. So we need to know
15 that to know whether there is an additional step to the
16 trial in the event there is fraud verdict.

17 MR. MOSKOS: Well, I think I know what he's talking
18 about. There is a section in the punitive damages statute
19 that - but it also says that - let's see.

20 MR. REIBOLD: We sent that to you last night.

21 MR. MOSKOS: Right. It says punitive - after the
22 sentence he's talking about it says punitive damages may be
23 awarded against a person only if that person participated
24 in the conduct constituting the aggravating factor giving
25 rise to the punitive damages, or, if in the case of a

1 corporation the officers, directors or managers of the
2 corporation participated in or condoned the conduct
3 constituting the aggravating factor giving rise to punitive
4 damages. Mr. Farrell, the used car manager; Mr. Threatt
5 the General Manager; Mr. Threatt's signature is on the
6 power of attorney; these gentlemen condoned what - you know
7 whatever the jury finds they participated in it and they
8 condoned the activity. Now, it's for the jury to decide
9 what that - if there is a violation of the law. But as far
10 as that issue goes it's a non-issue because they know.

11 MR. REIBOLD: There's no events they even knew of the
12 disclosure form was made or that they give her any
13 instructions at all about how to fill that form out, or,
14 that she even provided one. They didn't condone or ratify
15 any vehicle. There is no knowledge.

16 THE COURT: All right.

17 MR. REIBOLD: And if he - We went through this
18 yesterday. I understood his claim to be a agency claim.
19 That was what we argued about.

20 MR. MOSKOS: Well, I want them to understand that the
21 auction had the authority. They did have the authority
22 because they had power of attorney. And in Mr. Guyer's
23 deposition he testified - and this is on page 13, line 18
24 through 22 - I ask him, "Mr. Guyer, take a look at Exhibit
25 Forty-five and would you please tell us what that is

1 please?" "This is the power of attorney form that a dealer
2 would fill out in order to do business with ADESA
3 Charlotte." Later I ask him on page 45, line 12 through
4 16, "And why did Ms. Haney sign this? What authority did
5 Ms. -- did she have to sign it?" "We would have had power
6 of attorney from the seller to affix their signature to
7 transfer title."

8 They had the authority to sign any document necessary
9 to transfer title to this car and that's what she did based
10 on the announcements given.

11 THE COURT: I understand that but the issue is not the
12 transfer of title; it's who checked the box isn't it? I
13 mean they had the authority to transfer title and --

14 MR. MOSKOS: Your Honor, excuse me, I apologize. If
15 Mr. Ferrell went to a lowly clerk that had just been hired
16 and said hey, fill this form out and here's what's wrong
17 with it. Nothing. She checks it off. That -- Mr. Reibold
18 would say the dealership can't be held liable for the false
19 disclosures because somebody else checked it off. Here the
20 auction and its all through the documentation the power of
21 attorney. In fact the power of attorney gives them more --
22 they're a fiduciary. They're standing in the stead of
23 Midlands. It's greater than an agency relationship. They
24 had a power of attorney; they could do anything regarding
25 that car that Midland's did and they did that based on the

1 representations. You know they don't just make this stuff
2 up. They do it based on the representations from the
3 dealer otherwise as Mr. Guyer said the other day it doesn't
4 get sold. If he didn't give any announcements; if he
5 didn't tell us about the car we don't sell it; we don't
6 have the authority to sell it.

7 THE COURT: Okay. Well --

8 MR. REIBOLD: Well we never had any direct contact
9 with them. The entire claim is premised on what some
10 people at the auction did. He said they could do it
11 because they are our agent. If that's the primitive
12 liability there is no punitive damages in North Carolina
13 and that's why we think we need special interrogatories.

14 MR. MOSKOS: That - I'm sorry.

15 MR. REIBOLD: And you can address -- I mean if he
16 disputes the issue we can address that later but --

17 THE COURT: I guess what we need to do is while we're
18 doing closing argument print out the verdict form that you
19 think should be there and then we'll argue with that after
20 closing arguments, you know, before I charge.

21 MR. REIBOLD: Okay.

22 THE COURT: Cause the verdict form that I have is the
23 one you sent us.

24 MR. REIBOLD: Yeah.

25 THE COURT: The sheet y'all give me this, that first

1 paragraph we took that out.

2 MR. REIBOLD: It's pretty simple.

3 THE COURT: Send us another one and we'll look at it
4 and we'll argue about it.

5 MR. MOSKOS: The only other thing I can think of in
6 the jury charge is maybe a special interrogatory as to
7 whether there was willful or wanton conduct because of the
8 punitive damage statute.

9 MR. REIBOLD: I thought that we had already decided we
10 don't have - Well, I'm sorry.

11 THE COURT: That's what we charge. Isn't that the
12 charge where we give it to them on punitive damages? We're
13 not giving them punitive damages now so at the time if we
14 get to punitive damages in the second phase of the trial
15 then I will charge them on all that then. Right? I mean
16 that's when I'll charge them on the elements of punitive
17 damages and willful and wanton and all that.

18 MR. MOSKOS: Yes, sir.

19 MR. REIBOLD: I think so.

20 THE COURT: They wouldn't have made that finding now.

21 MR. MOSKOS: That's fine.

22 MR. REIBOLD: Yes, sir.

23 THE COURT: They'll make that finding then.

24 MR. MOSKOS: Yes, sir.

25 THE COURT: Okay. If you'll just email me that.

1 MR. REIBOLD: Yes, sir.

2 THE COURT: That verdict form and then we'll take it
3 up. And having the jury answer that question doesn't
4 necessarily legally tie your hands. We can argue what --

5 MR. MOSKOS: That's fine, your Honor.

6 THE COURT: What it means.

7 MR. REIBOLD: Now I have yours down. Is it lc right
8 after your first name?

9 THE COURT: Yeah. It's rcauthanlc instead of J. J is
10 Judge and lc is law clerk and sc is secondary to that.

11 Okay. Are we ready for the jury?

12 MR. WALKER: Your Honor, if you can simply let me use
13 my computer,

14 MR. REIBOLD: Let me set me up.

15 THE COURT: Okay. So are we ready for the jury now,
16 gentlemen?

17 MR. MOSKOS: Yes, sir.

18 THE COURT: Okay. Get me a jury please.

19 (JURY REENTERS COURTROOM AT 10:52 AM.)

20 THE COURT: Thank you. Ladies and gentlemen, I'm
21 sorry. In hindsight I should have told you to come in an
22 hour later. We had some complicated legal issues in this
23 case cause of a lot of the legal issues in this case deal
24 with North Carolina law. We're in a South Carolina court
25 and I'm a South Carolina judge so we had to deal with

1 certain issues outside of your presence.

2 Now I ask you to pay close attention to the attorneys.
3 They're going to give you their closing arguments and I
4 will charge you on the law that applies and you will have
5 this case to decide.

6 MR. MOSKOS: Thank you, your Honor.

7 (CLOSING ARGUMENT BY MR. MOSKOS AS TO ACTUAL DAMAGES:

8 MR. MOSKOS: Good morning, ladies and gentlemen. As I
9 said at the beginning of this case prior to 1987 North
10 Carolina had a serious problem with people being misled and
11 cheated. They found that members of the public were being
12 misled into believing that cars were not damaged by
13 collision, fire, flood, accident; or other cause, or that
14 the vehicle had not been altered and rebuilt or modified
15 and was causing harm to the people in North Carolina.
16 That's back in '87 so you know it had been going on even
17 before this. So North Carolina - North Carolina - The
18 North Carolina legislature passed a law; passed several
19 laws to deal with this issue.

20 Now, we're going to be talking about those or I guess
21 I'm going to be talking about those shortly. But what I
22 want you to understand is that there are a couple of things
23 we're asking you to do. We want you to take a look at
24 Midland's Honda and we want you to understand that
25 Midland's Honda has at least two duties and

1 responsibilities in this case. It has a duty to inspect
2 the car; inspect the car. They have to do that obviously
3 for self-preservation. You want to make sure you're buying
4 a good car but the more important thing, the reason we're
5 here today, is that they have to protect the public. In
6 South Carolina and in North Carolina there are laws that
7 say you can't put dangerous cars on the road. You know, at
8 silly as that is it's just - It's silly because we have to
9 have it on them, folks. We should have to have them on,
10 folks. It should be common sense. A lot of this stuff -
11 and I'm going to ask you to remember Mr. Walker's words in
12 his opening statement. Use your common sense. If we have
13 a situation - Excuse me, I'm getting track. Car dealer's
14 have a duty to inspect to protect the public. They also
15 have a duty to disclose these damages when they find them
16 in a car.

17 The North Carolina Supreme Court has ruled numerous
18 times that the seller who has information about an item
19 that is not easily discoverable by the buyer has a
20 responsibility to disclose. Why do those cases come out
21 like termite cases where a person sells a house and buys it
22 with termites in it. The same issue is here. If the
23 dealership knows that a car's been wrecked they have to
24 disclose it. It's not if you want to, it's a requirement.

25 And a seller's duty to disclose information concerning

1 a condition arises because they have a superior position to
2 the buyer. Okay. They have information that the buyer
3 does not. Disclosure - And then we have the Golden Rule.
4 Okay. Do unto others as you would have them do unto you.
5 So the disclosure laws are there for legal and moral uses.
6 Dealerships need to take responsibility for their actions.

7 Now we brought this law suit for several reasons.

8 One: Midland's misrepresented the car at the auction by
9 not disclosing that it had been clipped. By not announcing
10 damage it was telling everybody there, hey, this car is not
11 damaged. Remember the Matrix. It says you got to
12 disclose. They didn't do it that means it wasn't damaged.

13 The second is they violated the North Carolina statute
14 dealing with disclosure, the damage disclosure form that
15 you've seen so much of. And they wouldn't give Roger his
16 money back.

17 Now as - as I thought about y'all the other - well
18 last night, it kind of occurred to me y'all are sitting
19 here sort of in a vacuum, you all get told where to go and
20 what to do and nobody really explained a whole lot to you.
21 And you may be sitting there knowing why are we dealing
22 with North Carolina law; why is this case even here? Why
23 am I being bothered with this? The reason is very simple.
24 The law as it has developed says that you have to sue a
25 defendant where the defendant resides.

1 The law also says that if the event happened in
2 another location, another jurisdiction, in this case North
3 Carolina, you'd have to use North Carolina law to decide
4 the case. So that's why we're dealing with the issues that
5 we're dealing with today.

6 Now, verdict. It means to speak the truth and that's
7 what you get to do. You get to listen to the facts and
8 then say what the truth is. Y'all have two jobs when y'all
9 go back into the jury deliberation room. One of your jobs
10 is to answer the questions that the Court is going to I've
11 you. It's called a verdict form. The second is you have a
12 duty to discuss the facts in this case. There's a lot of
13 information, okay. Take a look at it discuss it. If you
14 have a different opinion don't be afraid to express it.
15 That's why we have twelve people we want the difference -
16 the different perspectives.

17 Now, let me give you a couple of things to think about
18 and talk about while you're back there. You've heard the
19 defendant say well Mr. Ecklund never had a problem with his
20 car. It was - And I'm sure Mr. Walker's gonna say it
21 because he's been saying it since the beginning - it's a
22 fantastic car, a wonderful car. Well if somebody brings
23 that up remind them that the issue is not the drive ability
24 of the car. It's the sellability of the car. It drives
25 well, the engine runs, the transmission runs; it's a good

1 marketable car. Right? Until you find out that it's been
2 clipped. The fact that it's a fantastic car or a running
3 car, a good running car, it is a way to sell it and
4 convince other people to buy it before they can find out
5 the truth.

6 Now, you heard the other day the defendant admitted
7 that they had failed to disclose the damage and that was a
8 mistake. Mr. Walker got up and said it in open court.
9 Finally we heard the truth. But if someone brings that up
10 implying that this was all an accident, a mistake, remind
11 them that there was a one hundred and fifty-nine point
12 inspection when this car initially came into the
13 dealership. And not just any walk around type thing like
14 Mr. Farrell says he does. This was done by a certified
15 mechanic performing a Honda certified pre-owned inspection
16 with a check list that has disappeared. They knew what
17 they had. This was not an accident. We're not asking you
18 - just to be clear - we're not asking you to find damages
19 on behalf of Mr. Ecklund. What we're asking you to do is
20 to take into consideration the way the dealership continues
21 to deal with people. That is the way they dealt with Mr.
22 Ecklund. They knew the problem and they didn't disclose
23 it.

24 You've heard the defendant say that it sold the car
25 the way it always does. You just take it out and sell it

1 as an as is junk car that's what they say. And they didn't
2 owe a duty to Mr. Whitley. All of them said it. Mr.
3 Farrell who's got his own lot now with Mr. Threatt and Mr.
4 Nalewaja. If anybody brings that up remind them that they
5 do have duties. In fact they have three duties. One is
6 what we call the common law. That's what comes after
7 court's hear cases and they make decisions. They say this
8 is what the public policy should be and the public policy
9 in North Carolina as it is in South Carolina is that if you
10 know something that is important, as I said before, if you
11 know something that's important to a transaction you have
12 an obligation to tell the other person. You can't hide
13 that information. You can't conceal that information.

14 The second thing is the damage disclosure form. North
15 Carolina requires that the damage be disclosed.
16 Reconstructed damage has to be disclosed. Now I'm sure Mr.
17 Walker will talk about the first four items and that we
18 didn't have any obligation to tell them about the twenty-
19 five percent or under the twenty-five percent rule. But
20 you know, when you make that statement you may not have a
21 duty to tell somebody about something but once you do, it's
22 got to be the truth especially in this type of transaction.

23 And the third is the Auction Matrix. Now that
24 obviously completely contradicts Mr. Farrell's statement
25 that he had no duty to disclose. It's right there on the

1 document all he had to do was tell somebody.

2 Now, Mr. Walker will probably get up and he will say
3 well, we sold this car as is and everybody knows as is is
4 as is and you don't have any rights to come back. Well
5 that's not quite true. That's half the way right. It's
6 subject to the terms and conditions of the auction. The
7 dealership entered into an agreement with the auction to
8 abide by the rules. It's signed a power of attorney
9 allowing the auction to be there for it and do the things
10 that Mr. Farrell would have done had he been there. In
11 fact in this transaction the auction was Midland's Honda.
12 That's what Midland's Honda agreed to in order to sell at
13 the auction. And in doing so they agreed to abide by the
14 terms and conditions. And I know it was laboriously the
15 other day to listen to Mr. Guyer go through it but once you
16 did you started to hear the responsibilities of the seller.

17 So while the car was sold as is, there are rules that
18 go with it, there are conditions. It's not just simply you
19 bought it you're stuck with it. Now they're gonna say
20 Roger should have checked it out. Remind them that Roger
21 listened at the auction. He was standing there at the
22 block, he could see what was going on, he could hear them
23 talking about the car. He was listening intently for an
24 announcement and none came because Mr. Farrell hide the
25 information. He then went outside and checked it out. He

1 looked at it and guess what? If you see a little dent on
2 the side of the car well that may be why it's going through
3 the red light. Maybe the dealership - and he knew this was
4 a franchise dealership. A franchise dealership may not
5 want to have to put that kind of money into this car and do
6 all that work so they're getting rid of it. Not a
7 surprise. The fact that it had a dent that took his
8 attention away from what was underneath and then - And I
9 ask Mr. Farrell, I was sure the defendant was going to say
10 oh, Mr. Whitley should have crawled underneath and looked
11 at this car. And I made sure to ask Mr. Farrell when - if
12 the car's going across the block would you get under it?
13 No, get run over. So he went out and so the car came off
14 the block Roger went outside and looked at it it checked
15 out. It was a good car as far as he was concerned. He
16 drove it everything was fine. So he did an adequate
17 inspection for the time he had because remember, after he
18 bought the car it disappeared, went back to Columbia. And
19 by the time he got it it was several days later.

20 And then he's been told before don't work on a car
21 until you get the title which didn't come for twenty-one
22 days because if you fix that car and we have to take it
23 back cause you can't the title issues worked out, you just
24 gonna have to - you volunteered to make repairs to that
25 car. You're stuck with it. So he's not - he didn't want

1 to loose money so he let it sit until he got the title.

2 Mr. Walker may say or Midland's may say that they do -
3 they do the right things, the right thing by their
4 customers. Mr. Ecklund came back and he complained and we
5 fixed, you know, we fixed the problem. No problem there.

6 If somebody brings that up remind them that they
7 simply got caught that time. There was no way around it.
8 They were in trouble and they bought their way out of it.
9 Okay. Not only did they buy their way out of it, they sold
10 the man another car. They didn't give him his money back.
11 They traded him out; they forced him to buy another car.

12 They may say that it's common knowledge in the car
13 business that cars are sold as - at a red light sale
14 typically have the problem mechanical or otherwise. And
15 that's fine. But remind them that the mechanical problems
16 - that the mechanical problems don't necessarily have to be
17 disclosed. But the wreck damage does. Roger was okay with
18 the mechanical problems. He knew if he bought something
19 that had a mechanical problem he was stuck with it. He was
20 fine with it; he wasn't fine with a clipped car.

21 Now, the defendant may get up and say the defendant -
22 Excuse me, the defendant may get up and say Roger had his
23 own duties. He needed to inspect that car thoroughly and
24 verify everything. Okay. Well that's not the way the
25 auction works and Mr. Walker knows it. As all the men said

1 that testified about the auction they drafted the rule real
2 fast up there. There were people running around cars are
3 coming through every thirty seconds to a couple of minutes,
4 you got to watch out what's going on. There's not a whole
5 lot of time to be sitting around and inspecting. You don't
6 get to do a hundred and fifty point - fifty-nine point
7 inspection while the car's sitting there. And if you're
8 outside looking at the car how can you be buying a car?
9 The auctions not waiting on you so you got to buy the car
10 run it out and buy the next one, buy the next one, buy the
11 next one.

12 And then they don't let you bring a lift in. I mean
13 there's no way to lift it up and you can't get under it.
14 And that's where the issue could be seen. Roger did what
15 he could do to find - to check this car out. But remember
16 and talk about the fact that Midland's had the superior
17 position; they had the duty, they knew what was going on.
18 They had the duty to put that out there and tell Roger.
19 And had they done that we wouldn't be here.

20 One of the things they may talk about is that the new
21 rules just came into effect four months before this sale.
22 What they're saying to you is give us a pass but we didn't
23 know what the rules were. Does that sound right? You
24 don't know what the rules are so you get a pass? Well, the
25 testimony is that the Matrix, and this is from Mr. Guyer,

1 is the Matrix was in effect before January of 2010. The
2 rules are all over the auction; all you got to do is pick
3 'em up. And as we all know ignorance of the law is no
4 excuse. You don't get to say oops.

5 And then there's Mr. Farrell's testimony. He says I
6 go to the auction every week, may skip one week or so, but
7 he goes up there every week. He knows what the rules are.
8 One thing Midland's may talk about is that this was just
9 simply a mistake and could have been squared away had Roger
10 gone to arbitration. Remind the other jurors that had they
11 disclosed this information one, we wouldn't be here cause
12 Roger wouldn't have purchased the car. Number two: The
13 car had disappeared; he wasn't able to inspect it and he
14 lost several days before the car even showed up at his
15 place. And then three, he had - he didn't have a title.
16 He was gonna wait until the title came in to be able to do
17 the work that he felt was necessary, the minor work that he
18 felt was necessary.

19 I don't know that Midland's may get up here and say
20 oh, this is a one time thing no big deal, it was a mistake.
21 Remember what Mr. Nalewaja testified to that this is how
22 you get rid of a problem car. Its not like they had a
23 rouge employee Mr. Threatt and was just throwing cars out
24 there or Mr. Farrell. This the way they do business. This
25 is they way they do business. They take these red - these

1 cars that they don't want to sell and take 'em up to the
2 auction and sell them. And if they're the red light kind
3 of cars that they think they are they don't tell anybody
4 about problems.

5 Well how many cars come through that place that get
6 set up there? You know Mr. Farrell testified that back
7 then they were doing two thousand - over two thousand cars
8 a year, selling two thousand cars a year. Well people
9 usually trade in their cars so - maybe not everybody - but
10 you got a lot of people doing that. A thousand cars maybe.
11 They got a lot of cars running up there. And you know that
12 this is not the only car that's been in an accident.

13 And one thing you will not hear is that this is a good
14 car. Okay. Everybody knows it's a bad car, it's a
15 dangerous car, and it's an unsafe car, and as a result has
16 no value.

17 Now, anyway, let me talk a little bit about some of
18 the legal stuff which y'all get to be subjected to. The
19 first thing is the burden of proof. Burden of proof. A
20 lot of people hear criminal cases in the movies and beyond
21 a reasonable doubt. That's not your burden of proof here.
22 Or actually Mr. Whitley's burden of proof because he is the
23 plaintiff. The court is gonna tell you that he has the
24 burden of proof and what we call the preponderance of the
25 evidence or the greater weight of the evidence. When I was

1 in law school I didn't have any clue what that meant. And
2 what that simply means is if you put all the information in
3 a set of scales and it tips on one side ever so slightly,
4 that is the person who succeeds.

5 I like this way better. Is it more likely than not
6 that Roger is telling the truth? If it is more likely than
7 not that he is telling the truth, then he has met his
8 burden of proof and you must find in his favor. We're not
9 asking for sympathy. We don't want you to feel sorry for
10 him or anything like that.

11 The next thing is - this is not a context for y'all to
12 see who can remember what the judge tells y'all. If you
13 don't remember what the rules are that he is gonna tell
14 you, the jury instructions, knock on the door, say we don't
15 remember or we got a difference of opinion we want to hear
16 the jury instructions again. The judge will bring you back
17 out and y'all get to hear whatever you want to hear.

18 Now there are two parts to a case. One is liability
19 the other is damages. Liability simply means who's at
20 fault. And damages, how bad did somebody get hurt. Okay.
21 There are two types of evidence. There's direct evidence
22 and then there's circumstantial evidence. Direct evidence
23 is pretty clear. That's somebody coming in and testifying,
24 a piece of paper that shows whatever it shows. That's
25 direct testimony. Circumstantial evidence is what you can

1 infer from what you have heard or seen.

2 And a perfect example is if you got ship wrecked on a
3 deserted island and you walked around the island everyday
4 couldn't find a sole. Then one day you're walking and you
5 see a footprint in the sand and you know it's not yours.
6 There's somebody else on the island. You know that; you
7 can figure it out. That's circumstantial evidence. That's
8 just as good as direct evidence.

9 Now, his Honor is gonna give you a number of what we
10 call causes of action. He's gonna talk to you about causes
11 of action and those are the legal claims that we're making.
12 The law requires a person bringing any claim to bring every
13 possible claim that he or she has otherwise it's wiped out.
14 The court is trying to make sure we don't get clogged up
15 with, you know, with five different suits for the same
16 problem. You know you go to court and you loose on one and
17 you bring the next one. We don't want that. You bring it
18 all or you loose it.

19 Now, the claims that are being made are like a recipe.
20 And we'll talk about those in just a minute. There are
21 certain items in there, ingredients, and the court is going
22 to tell you what those ingredients are. And you go down
23 the list, did you find this, did you find that. And if the
24 answer is yes, yes, yes, then you wind up having to
25 determine the damages.

1 Now, one thing that I want y'all to remember is that
2 when you deal with the jury verdict form it will look
3 something like this. Not exactly but something like this.
4 And it may say on this particular count do you find for the
5 plaintiff or the defendant and if so how much for the
6 plaintiff. If you decide that - Let's assume for a second
7 that you decide Mr. Whitley is entitled to money and you
8 decide that the defendant has breached or violated all of
9 these causes of action you then determine damages. If you
10 determine the damages it goes in - the amount of the
11 damages goes in each section. In other words you don't
12 take it and divide it into five or four however many there
13 are. You find out what the actual damages are for each
14 section and you put it in there. One of the reasons is
15 there may be what we call an election of remedies issues
16 for later on. In other words Roger doesn't get - if you
17 put in I think the damages will go over the amount sixty-
18 six forty-five. In the first cause of action sixty-six
19 forty-five; in the second cause of action, third, fourth,
20 et cetera, Roger doesn't get Thirty Thousand, Forty
21 Thousand dollars. He gets Six Thousand Six Hundred and
22 Forty-five. He may have to pay; whichever one he wants,
23 but he doesn't get it five times. Okay.

24 If you go - well, let's divide Sixty-six by five and
25 he gets Eleven Hundred Dollars or Fourteen Hundred Dollars.

1 That's not what you intended because that's about all that
2 he'll get. When you go through these please be sure to
3 think about whether your decision is inconsistent. Okay.
4 Does this can conflict with that cause of action and if you
5 find this and you're in favor of Roger on this particular
6 cause of action do we not find for him -- I'm sorry, let me
7 go back. Let me talk about the causes of action. Let's
8 just go straight to that.

9 There is a breach of contract claim. Defendant says
10 we breached the contract so now you're just gonna deal with
11 damages. That's it for the breach of contract claim. All
12 right. They've admitted that. To me what they're doing is
13 they're saying - they're falling on their sword because
14 that's the easiest thing to do in this case. You've got a
15 breach of contract. Why would they do that? Well, they
16 finally got caught now they have to fess up. And if you
17 think about it there - if you met a person and they said,
18 hey, I got sued for breach of contract, had a dispute. You
19 don't think much of it. But if they said I got sued for
20 fraud you may question them a little bit. They want you
21 simply to find a breach of contract so that they can go
22 around and in essence again mislead people as to what they
23 do in how they conduct their business. It's very simple to
24 say a breach of contract no big deal. But to turn around
25 and say hey, we got caught selling wrecked cars, clipped

1 cars, that could wind up on the street that's a different
2 thing and they don't want that.

3 So when they get up and they talk about oh, just find
4 for the breach of contract, find the damages, determine
5 that and finish, that's what they're trying to do. And
6 they're asking you to aid them in that effort.

7 Now one thing that - one claim that you are going to
8 deal with is called negligent misrepresentation. Negligent
9 misrepresentation and that means a party justifiably relies
10 to his detriment on information prepared without reasonable
11 care by one who owed the relying party a duty of care.
12 Remember we got three duties of care. North Carolina law,
13 the Common law, Statutory law, and the auction rules.
14 Roger went up there listened inspected the car and relied
15 on what they told him. He's not hurt. He's now got this
16 car. It's a big bucket of rust right now. He has nothing.
17 He can't do anything with it except sell it for scrape.
18 And it was on information prepared without reasonable care.

19 So let's talk about that for just a second. What do
20 we have? Mr. Farrell: Nobody wants to remember what
21 happened back there back then and that's real interesting
22 because one of two things happened. Either this kind of
23 stuff happens all the time and it just kind of blends in
24 with all the other times that they had complaints and sold
25 wrecked cars and that's why they don't remember. Or,

1 they're making that up. Because if you think about it if
2 you sold - if you were at this dealership - and I tried to
3 walk them through it - if you were at that dealership and
4 somebody came in and said, hey, you sold me a clipped car,
5 a wrecked car that's dangerous wouldn't that kind of stick
6 out if you were that reputable? You would want to go find
7 out what he's talking about. You would have it inspected.
8 You would make note.

9 Now Mr. Farrell he says, I - I never inspected it. I
10 didn't check it out, no need to. I was told by the
11 manager, the general manager, get rid of it. And that's
12 what he did. Now he knew it was wrecked. He said he knew
13 it was wrecked; that the customer was bringing it back in
14 because it was wrecked. At that point, ladies and
15 gentlemen, there was a duty on the part of Midland's to
16 inspect that car. Now these gentlemen are no independent.
17 They are part of a corporation. The corporation is just a
18 piece of paper. It only operates by it's people. And what
19 one person knows the other knows. The corporation knows.

20 Mr. Threatt knew it was wrecked. We've got his note
21 that shows that he knew it was a clipped car. Mr. Farrell
22 knew it was wrecked and he turned around and told the
23 auction nothing. Just sell it under a red light sell. So
24 either they did inspect it and they knew how bad it was and
25 they didn't disclose it, or, they knew it was wrecked and

1 they didn't bother to find out how bad it is. And I
2 believe Judge Cothran's going to instruct you on what is
3 called willful blindness. You know if I don't look over
4 there I don't know. I see something that might be a
5 problem with it; as long as I stick my head in the sand
6 like an ostrich I don't have to worry about knowing.

7 Plausible liability. That's not lawful in this
8 country. You have a duty to inspect and know what you're
9 selling especially with a car that's driving on the road
10 and can become a dangerous instrumentality very quickly
11 especially if it falls apart as somebody is driving down
12 the road. That would be horrific to see or experience.

13 The next cause of action is a fraud cause of action.
14 Fraud. This is a North Carolina fraud. In North Carolina
15 defines fraud as a false representation, or, a concealment
16 of a material fact reasonably calculated to deceive, made
17 with the intent to deceive, which does in fact deceive
18 resulting in damage to the injured party. So, a false
19 representation or concealment of a material fact. I've
20 talked about that. You got the Damage Disclosure Form.
21 That is an affirmative misrepresentation. You've got no
22 announcements at the auction. To me that's an affirmative
23 representation that the wreck does not exist.

24 On the other hand you may say well that's just a
25 concealment, but it's the same thing as far as North

1 Carolina goes. And as I said Mr. Farrell chose not to
2 inspect it when he came in. And Mr. Threatt was amazing.
3 He says you don't spend money for an inspection when you're
4 going to sell it at a red light sale. You don't do your
5 duty because it's gonna cost a couple of bucks.

6 Reasonably calculated to deceive. Now, you're selling
7 a car at the red light sale and people know the rules you
8 got to disclose. If you don't disclose it maybe they will
9 buy it, miss their arbitration period and then they're
10 stuck with it. You get the money and they're stuck with
11 the problem. You get to pass it on. Was it reasonably
12 calculated to deceive? Yeah. He said it up there, Mr.
13 Farrell of Midland's, without disclosing it. They know
14 North Carolina law requires disclosures. They know that
15 people are relying on what they say.

16 Was it made with the intent to deceive, the fact that
17 he didn't tell, or the announcements were false? Yeah.
18 They knew it was a clipped car and they chose not to look
19 further and find out about a safety issue. They knew it
20 would sell and they could recoup their money. That was
21 their motivation. And you could hear Mr. Threatt the other
22 day, money was a big deal; it is a big deal to him. That's
23 where the supply of cars is. You know you don't - it's not
24 like car dealer's have other options. That's where the
25 supply of used cars are. You want a car that's where

1 you're going and that's . . .

2 Let's talk about the fact of which does in fact
3 deceive. Roger said he was misled. Roger said, look, I
4 wouldn't have - If they had told me the truth I wouldn't
5 have bought this car, I would have walked away from it.
6 Had I seen on the damage disclosure form in the auction
7 receipt I would have just walked away. I would have gone
8 to arbitration got my money back; I would not have dealt
9 with this car resulting in damage to him.

10 And let me go through those real quick. My
11 expectation is Mr. Walker and Midland's Honda are gonna
12 agree with most of this obviously. And you'll see in the
13 paperwork there's the car, there's a fee on the sale
14 contract, the door receipt he had to pay, you know he paid
15 Terry a commission for selling the car and there's the
16 switch. No big deal. And then the profit. He paid them
17 Three Hundred - them being the people who bought the car -
18 Three Hundred and Forty-five Dollars to buy it back.
19 Pretty simple.

20 Here's where Mr. Walker is gonna discuss the problem.
21 All right. Now, think about this. Why do you buy a car?
22 You buy a car to go from point A to point B. That's the
23 way most of us buy a car or a reason we buy a car. When
24 you're back there say, has anybody gone to a regular car
25 dealer paid full price so that they could have a vehicle

1 that they could sell for parts cause that's what he's
2 arguing. The question you all have to determine is, what
3 was the worth of that vehicle on the day that Roger bought
4 it? On the day he bought it what was it worth?

5 Now, at that time Roger says it was worth Five Hundred
6 Dollars. What he wound up with was worth Five Hundred
7 Dollars because to get to Two Thousand you had to take that
8 thing apart. A junk yard might buy it if they had taken it
9 to a salvage auction or something. A junk-yard guy may
10 have bought it and put it in his lot and he may have been
11 able to sell it over a couple of years and make Two
12 Thousand Dollars. Okay. But that's not what Roger was
13 buying. He didn't buy a salvaged car to part out. He
14 bought a retail piece that he could fix and put on the lot.
15 And what he wound up with was about Five Hundred - Five
16 Hundred Dollars worth of scape metal. That's what he wound
17 up with.

18 Now, the next thing that the judge is gonna talk to
19 you about is what we call the Unfair Trade Practices Act.
20 That's a North Carolina statute. We have one here but it's
21 a little bit different. The North Carolina statute says
22 for - you can be liable under the Unfair Trade Practices
23 statute. Here are the ingredients. An unfair deceptive
24 act or practice or an unfair method of competition in or
25 effecting commerce which approximately caused the actual

1 injury to the plaintiff or to his business. All right.
2 And unfair or deceptive act and practice. Not telling
3 about the prior wreck damage affirmatively misrepresenting
4 the wreck damage. That's unfair, that's deceptive.

5 In or effecting commerce. Mr. Farrell said this is a
6 commercial transaction. Everybody's up there at the
7 auction. Its commerce. And number three, which
8 approximately causes actual injury to Roger.

9 Now, the other day I talked to Mr. Farrell and I ask
10 him a lot of questions and frankly he was a lot more
11 forthcoming than I expected, and he said, and I ask him, I
12 said, do you know that you have superior knowledge about
13 the cars that you're selling to your customers? He goes,
14 yeah. Now, keep in mind he's got two types of customers.
15 Midland's has two type of customers. Excuse me. One is
16 you and I the average person who is gonna buy his car.
17 They also have customers up at the auction. They are the
18 bidders. Those guys are buying cars from 'em. And so
19 these guys have superior knowledge. They know where their
20 cars are coming from; they've had an opportunity to inspect
21 them. They know who sold the car to the dealership; they
22 have a lot more information. They have the titles, they
23 know about the odometer and they know whether it's a
24 salvaged vehicle based on the titles ran. A lot of
25 information.

1 And I said, you know, you have to be fair to your
2 customers. Yeah. And you have to be honest and you have
3 to explain things thoroughly to those customers? And he
4 said yeah. And you heard him on the stand. I ask him if
5 he was in a superior position to Roger. And he said yeah.
6 And I ask him if he intended for his customers to rely on
7 representations that he was making. Yeah, surely do. And
8 you expect your customers to believe you? Yeah. And rely
9 on the statements that you make about the cars? Yeah.

10 One of the things that I want to stop here and talk
11 about cause I know it's gonna come up is when Mr. Walker
12 talks about Roger's duties to verify the accuracy of the
13 announcements and things like that. I'm sure he'll read
14 the provision to you, the buyer's duties. The auction is
15 obviously trying to protect itself to some degree. But
16 think about it. Do we go around - if somebody tells us
17 something do we say, wait a minute, I'm gonna automatically
18 not believe you. You told me I could buy this can of beans
19 for a dollar. I want to see the general - I want to see
20 the manager of the store so that I can make sure that this
21 is actually - Do we do that? That doesn't make any sense.
22 You know when we go in and buy clothes do we say wait a
23 minute. You know this says it was made in Taiwan. I want
24 to make sure somebody gets somebody on the phone so that I
25 can make sure that it wasn't made in China or something

1 like that, or South Korea, cause I don't like those people.
2 We don't do that. That's ridiculous.

3 What they're asking you to imagine is that Roger
4 didn't pick up the phone after every sale and call the
5 prior owner and say wait a minute before I buy this car I
6 need to know this information. That's not the way it
7 works. There is no way that it works that way. Roger, I
8 like him a lot, but he is not a technology guy. And he
9 doesn't have that kind of money. He's not like one of
10 these franchise guys, he's not gonna sit up there and
11 invest tons of money in laptops and all of that equipment
12 in a program where you got to pay to get car fax's and that
13 kind of stuff. And you know what? He shouldn't have to.
14 He shouldn't have to because there are representations in
15 place, there are requirements, there are rules in place so
16 that he doesn't have to do all that.

17 I ask Mr. Farrell if it was reasonable for his
18 customers to believe him and he said yes. Now I ask him if
19 he understood that failing to tell the customer about an
20 important aspect of the transaction. He was like lying
21 about it, I don't know, I'm not really sure.

22 Ladies and gentlemen, this is out of pocket money.
23 That's what we're talking about. There's nothing on here -
24 I know sometimes people hear about pain and suffering or
25 emotional distress. There's none of that here. This is

1 just straight cash out of pocket. All right. And at the
2 end of the day when we finish Roger has a piece of metal
3 worth about Five Hundred bucks that needs to be shredded
4 and that's exactly what's gonna happen. His total damages
5 are Six Thousand, Six Hundred and Forty-five Dollars.

6 Now one of the things that y'all get to do is y'all
7 get to be the judge of the facts. That means y'all get to
8 judge people. That's tough. That can be very difficult.
9 But you get to look at credibility. Whose believable?
10 When they talked were they looking at you, were they moving
11 around in their seat a whole lot, or were they defensive a
12 whole lot? Those kinds of things. And what we heard from
13 the stand is that these guys at Midland misled Mr. Ecklund.
14 They didn't tell him about the prior wreck damage. They
15 misled Roger; they didn't tell him about the prior wreck
16 damage. And now they're in here trying to mislead you into
17 helping them continue their activity. As I said, if you
18 find in their favor only under the breach of contract
19 claim, they get to walk out of here and say, oh, it's just
20 a matter of dispute no big deal. That's what they want.
21 But you also send a message to them it's okay, it's okay to
22 do this to send cars to North Carolina and lie about it.

23 Now they had been sending them to South Carolina that
24 doesn't have a disclosure law so they were doing that here
25 in our state. But we're not asking you to punish them for

1 that; we're not asking you to make them pay anything for
2 that. We just want you to understand when you're
3 evaluating credibility, what you heard and what it actually
4 means, and you be the judge of the testimony.

5 Now, very quickly. Midland's Honda knew it had to
6 disclose. It knew the duty, you know, these are licensed
7 dealers. They know what the laws are; they know what their
8 responsibilities are. They didn't tell because they
9 wouldn't have been able to recoup their money. Okay. They
10 needed to get their money back out of this car. They
11 didn't want to just take it to a salvage yard because they
12 would get Five Hundred Dollars for it. They wanted
13 initially Seventy-two Hundred Dollars for this car but
14 agreed to take Fifty-two.

15 They put - They want you to put the burden - the
16 burden on the business, on the people who know the least
17 about the car when the burden is actually theirs. And it's
18 sort of a game of gotcha for these guys. If they can get
19 it through the auction and you buy it and you go on and you
20 don't catch it for a few days it's your problem not mine.

21 If they do catch it and you take it back and give them
22 back their money wait a couple of weeks and run it through
23 again, see if you can do it, see if you can get it through.
24 And one thing that was really telling was how different
25 these guys are to their actions. Totally indifferent.

1 This is the way we do it. I don't know what happens to
2 those cars and I don't care. They all know this is where
3 people get their supply of cars. They all know that. But
4 we don't care, we don't know, no big deal..

5 So, ladies and gentlemen, what you have before you is
6 a choice. The choice is yours. You can find in favor of
7 Midland's Honda and say it's business as usual, roll the
8 dice take your chance, don't disclose, and your conduct
9 will be rewarded because you will get away with it. On the
10 other hand you can find for Roger for Six Thousand, Six
11 Hundred and Forty-five Dollars and send the message to the
12 dealership, hey, you need to change your practices. This
13 isn't right. We don't appreciate it and we're not gonna
14 tolerate it. Follow the rules be fair, be aware that your
15 actions have consequences and look out for the people that
16 you're dealing with.

17 Ladies and gentlemen, there are a ton of documents and
18 the burden is on us to prove our case. That's why we have
19 a whole bunch of documents and they didn't put in any. We
20 have to prove to you that Roger was hurt and they
21 misrepresented this car. You have tons of photographs take
22 a look, you'll see. You heard Mr. Allen talk about how bad
23 this really was. Take a look at the Matrix. It deals with
24 as is cars. A failure to talk about these they took away
25 Roger's right to walk away. And they took away his

1 arbitration rights because he wasn't aware of what was
2 going on. But here's the list, it's very clear.

3 Then you have this. If they had just simply had it
4 filled out properly we wouldn't be here. Roger wouldn't
5 have bought the car and we would be done. And don't forget
6 this Matrix too. The seat cover was cut. Both of 'em were
7 cut. That had to be disclosed anyway. At the end of the
8 day, ladies and gentlemen, Roger's lost Six Thousand, Six
9 Hundred and Forty-five Dollars. When you go back and you
10 work on this verdict form you will need to go through each
11 one separately and you will need to get to - I'm just
12 trying to pick one - find for the plaintiff cause that's -
13 that's who Roger is in this matter the plaintiff, you check
14 next to his box or on his line and then you write the
15 number Six Thousand, Six Hundred and Forty-five Dollars.
16 Very straight forward, very simple. And you do that for
17 each claim individually. Thank you.

18 MR. WALKER: May I?

19 THE COURT: Sure.

20 CLOSING ARGUMENT BY MR. WALKER AS TO ACTUAL DAMAGES:

21 MR. WALKER: I'm glad to be at this stage. I been
22 sick all week and if I have been a little slow please do
23 not hold it against my client. We're here because of two
24 things. One is this Disclosure Statement which he never
25 saw until twenty-one days after he bought this car, and

1 we'll talk about that. But if he didn't have it when he
2 bought the car there is no way he relied on it, and we'll
3 talk about it. He said on the witness stand he admitted
4 that. He told you different stories and we'll talk about
5 that later. That's the first thing we hear about.

6 The other reason my people are here is three months
7 after the auction rules changed they just didn't know it.
8 And we'll talk about it in detail but you've heard we
9 didn't have them and they didn't have them. Neither one of
10 these people really knew all about the rules when this sale
11 happened. Those are the two big things we're gonna talk
12 about.

13 The first thing I want to touch on is just who sneaked
14 in to deceive. And you've heard a lot of implication that
15 we're just bad people. And there are two things that make
16 it real clear - one's specific to this sale and one's
17 specific to the claim - we're not. I told you in the
18 beginning one thing I didn't want you to forget when this
19 car went to the sale we didn't bang out the door that Mr.
20 Ecklund said had bad damage on it. There's that - We got
21 this damage on the back of the car. There are really a few
22 things y'all got to look at to figure out what's going on
23 here.

24 And this is this fender. This is the wheel well on
25 the passenger side of the car at the back. And there is

1 the grey paint and there's a white strip. I mean it's
2 clear as a bell something's going on with this car. All
3 you got to do is look at it. We didn't fix it. The car
4 wasn't even clean. It hadn't even been washed. We didn't
5 nothing to hide the condition of the car. There's no piece
6 of evidence in this case makes it real clear we're not
7 sneaky and it's - This phone note. This is the note that
8 Randy Threatt got from Mr. Ecklund saying this car is a bad
9 car, it's been cut in half. This, you know, this is not
10 pretty. It was in the file. The reason they got it
11 Midland's Honda they didn't take this bad note and throw it
12 in the trash; they kept it. And then when this law suit
13 came up they kept it. If we were deceitful ---

14 (ATTORNEY WALKER WADDED PAPER.)

15 MR. WALKER: --- be gone. You'd never know about it
16 and that they wouldn't get it. So my client's are not
17 deceitful people. We don't hide evidence. We don't
18 misplace things on purpose. That simple.

19 Now, when this case started I told you it was really
20 important to look for things that you don't get; you don't
21 see. And you got ninety something exhibits, okay. Where's
22 the phone record proving that these people in Shelby, North
23 Carolina ever called me? Ever. You know they ask Mr.
24 Farrell where's the proof that he didn't get this phone
25 call? I mean there's no way to answer that question. But

1 whether they called us on a cell phone or a land line there
2 is a bill if they did it. You got ninety something
3 exhibits but you don't have any proof they ever really
4 called. Not there. So you need to think about that.

5 The other thing is they figured this out in 2010 it's
6 a bad car and it's 2013 before we get sued. And I
7 expected to get some explanation from Mr. Whitley about why
8 and I didn't. So I said isn't it because you really wanted
9 to wait until everybody forgot everything? And I still
10 didn't get an answer. So we're not the people playing
11 games here and you need to think about that.

12 Now, one last thing about the over all approach to the
13 case and then I'm gonna talk about the facts and kind of do
14 it chronologically. Y'all's job is to be the referee.
15 Y'all's job is not to be emotionally swayed one way or the
16 other. Your job is to be fair and impartial and I'm sure
17 the judge is gonna tell you that. Every judge tells a jury
18 that. So you know the fact that you may not like car
19 people. That really doesn't - kind of cuts both ways here
20 because we're both in the car business. He's been in it
21 for twenty years. But your job is to be fair. The easiest
22 way I find to explain that I played competitive tennis for
23 a while and I ended up being partnered with a guy in a
24 wheelchair and he's a lawyer in town and his name is Bob
25 Macella. But I really admire him. We've gone out and

1 whipped in doubles and he could run. But if I'm refereeing
2 a match where he's playing I just can't let my personal
3 feelings get in the way. I got to call it straight. So
4 you're job here is just to call it straight.

5 Now, I want to talk about the facts and we'll start
6 back in 2008 when this car came to the service department.
7 We bought it from a lady and no question we had it in the
8 service department and this guy name Terry Smith looked at
9 it. How the heck he missed it I don't have a clue. But I
10 got no evidence, I got nothing, because the guy died in
11 2011 and we didn't even know this claim was out there. So
12 I got no evidence to give you and no way to explain it.
13 But this case is really about what happened in 2010.

14 Now, you saw the note and not question we got this
15 phone call from Mr. Ecklund. This is a clipped car. I
16 told y'all when the case started it's been years and the
17 guys who were there don't remember a whole lot and you saw
18 that they didn't. I got what I got there. One thing we
19 did know we had a note from Mr. Ecklund and no question it
20 says this is a car there are two cars fit together I think
21 is what the note said so we knew. Mr. Threatt knew and Mr.
22 Farrell says Mr. Threatt tells me this car's been in a bad
23 accident take it and sell it under the red light at the
24 auction. And just like most folks who have a job and your
25 boss tells you to do something you do it. And

1 unfortunately for him and for us being here Mr. Threatt
2 didn't say oh by the way this is a clipped car and two cars
3 put together. Mr. Farrell simply didn't know. And that's
4 the evidence we got and it's not perfect because the
5 passage of time is what it is.

6 Now, about inspections and what happened to the car at
7 our place there's no question, you know, we figured out and
8 knew from that phone message this is two cars put together.
9 So, its told go to the red light. And Mr. Threatt actually
10 probably the best guy to explain it, ever since I been a
11 kid red means danger. And the red light sale, while it's
12 got all those rules attached to it, is an as is, buyer
13 beware type of environment. This is not consumer's buying
14 cars. This is limited to professionals. You have to be a
15 car person to go there. You have to sign in and go through
16 all this over all. Regular folks like everybody in this
17 courtroom I guess except Mr. Nalewaja can't do it, can't do
18 it. There are two parties I guess. So this is a unique
19 place and it's not where somebody like me can go.

20 Now, I understand these cars they're not all gonna
21 have body damage but there's gonna be a problem of some
22 sort. Mr. Ecklund called it a fantastic car but obviously
23 it's got problems. The things that go through the red
24 light, you heard the guy from the auction go this is where
25 cars go that have problems. The - probably the most

1 telling thing for me the two guys who sat up here and say
2 we have a lot on Two Notch Road but we sell used cars and I
3 think they said it was Auto Pros; it's between Fontaine and
4 Columbia Mall. They won't buy a red light car too risky.
5 And you got guys in Columbia, South Carolina selling used
6 cars on Two Notch Road who won't buy there. That's a
7 pretty clear screaming sign to me you need to be really
8 careful. It's a dangerous place to go buy a car.

9 Now, the auction rules. They're fifteen pages single
10 spaced. There's a lot of stuff in there. It's Exhibit
11 Fifty-two. But right there clear as day on the top of the
12 first page in the left hand corner January 2010. Got a new
13 set of rules. And the rules are there where they weren't
14 and they weren't at Midland's Honda and they weren't at the
15 Plaintiff's place. Nobody had those in 2010. I told you
16 before the important thing is what you don't see. There is
17 no letter, no email, no nothing from the auction
18 transmitting those rules to Midland's Honda or to them. I
19 don't know how they got 'em out. They didn't send 'em to
20 us. And obviously you heard those two guys in short pants
21 sitting up there going we didn't know about it. Didn't
22 have the rules. And that's one of the reasons we're here
23 didn't have the rules.

24 And we weren't the only ones who didn't have the
25 rules. They didn't have 'em either. But it's fifteen

1 pages of technical mumbo jumbo but there's not question
2 those were their rules. And that's why we come in here
3 and said, you know, if those are the rules we missed it -
4 we missed them, we messed up. You were told by the other
5 lawyer near the end of his chat with y'all that we're
6 trying to miss lead you. I'll tell you that's personally
7 upsetting to me. I don't mislead people. I was telling
8 our bailiff over here, we were talking earlier, I had the
9 misfortune of getting divorced. And I met another women -
10 one woman that is my fiance. But she wouldn't even
11 consider dating me because of what I do because she thinks
12 people who are trial lawyers - She's a transaction lawyer -
13 but she doesn't like people who do what we do. And I told
14 her I do it different, I just tell the truth. So the
15 reason we're here saying breach of contract, we did. We
16 were in here yesterday and the other lawyer's going, you
17 know, he's surprised he's never had a lawyer admit they
18 messed up or their client messed up. Well, I'm different.
19 So we're not trying to mislead anybody. We're here to
20 admit what we did but we are gonna deny what we didn't do.
21 Real simple.

22 Now, this car goes up for sale under the red light;
23 goes through the lane and its sitting on the lot. And, you
24 know, it's admitted that it's out in the lot and it's got
25 cars on all sides and I think he said it was so close it

1 was hard to get around in there. Well, the cars not going
2 anywhere. He's got all the time in the world to look at
3 it. And, you know there's something called a paint meter.
4 You can stick it in your pocket and you just go around and
5 touch it and it'll tell you how thick the paint is. And if
6 the thickness's are different you know something's going on
7 with the car. We've all seen all these pictures and all
8 the body work on this car. All you got to do is go around
9 this thing; I think it's pretty clear something's funny. I
10 show you that picture Exhibit Twenty where you got grey
11 paint and white paint. Something's funny. You want to
12 look under a car it's real simple. You do not need to lay
13 on your back or get dollies or lifts. It's called a
14 mirror. It's real simple and they makes mirrors about yea
15 big and the put 'em on a stick and you want to look under
16 the car you just stand there and look. Why do you think
17 they do - I've seen - This is from years ago. I mean you
18 come across the border from Mexico they don't put your car
19 on a lift to see if you got drugs under there. They take a
20 mirror and walk alongside of your car. It's easy to look
21 under your car. Easy. Doesn't cost money. It's a mirror
22 on a stick. So he had all the time in the world; all he
23 had to do was look. And this is a red light car got all
24 this other damage on it and all kind of reasons he should
25 have simply taken some time to look.

1 Most importantly what do the rules say? The rules say
2 if it's a lot sale, which that's where we are, he is
3 required to very carefully inspect it and verify that what
4 was said in that auction when it came through was true.
5 And that's his duty under the rules. Not mine. That's
6 his.

7 And I - I mean I think y'all noticed he didn't know
8 what his duty was and I had to point out where it was in
9 the rules. So just like us he didn't know his duty under
10 the rules; we didn't know our duty under the rules. They
11 are just like us on that point. And again I'm not feeling
12 well and I'm not functioning so I apologize.

13 One more thing I need to mention, once again something
14 you didn't see. They didn't run a car fax and you can get
15 'em on phones and Ipads and all that kind of stuff and we
16 got all these warning signs. They not only didn't look at
17 it before they bought it; they never pulled one, never. So
18 they're fussing at us like we stuck our head in the ground,
19 they did the very same thing. All you got to do is pull a
20 car fax and you can see prior accidents and when you see
21 something that puts you on notice there's a problem.

22 We need to talk about the disclosure. That's Exhibit
23 One. It's been yakked about and yakked about and yakked
24 about. The problem is for them it wasn't really delivered
25 until the title was delivered twenty-one days later. And

1 there's two pieces of evidence on that. One is the auction
2 guy. What was his testimony? Well you got the disclosure
3 form when he received the receipt? That is I believe
4 Exhibit Fifty-four. Answer: Big fat no. Would it come
5 later? It would have come when he got the title. It would
6 be attached to the title.

7 Now their the ones who told you this is a big auction.
8 They put on all these pictures. The auction sells
9 thousands of cars at a time. The auction's got a process.
10 That's their process and I don't think they're gonna bury
11 their process for a guy walking in to buy two cars. That
12 doesn't make sense. And I kept picking at him a little bit
13 on the stand about his story that he went in there and they
14 just gave it to him. Because I knew this, I knew this
15 wasn't right. And late in his testimony on an answer he
16 just kind of blurted out that the disclosure form came with
17 the title. And not all of you caught it. I didn't catch
18 it right away cause I was trying to get over there and look
19 at something. But a couple of 'em caught it. And it
20 happened. So he's told you two different things about when
21 he got that. And I think that ought to unsettle you a
22 little bit and you need to think about that when you're
23 weighing where the truth is and how to deal with the burden
24 of proof.

25 But one of the key concepts you got to deal with in

1 this case is the right to rely on things and you heard some
2 of that from the other lawyer. But you can't rely on
3 something you don't have and hadn't seen when he bought the
4 car. It's that simple.

5 Now, reliance. The breach of contract claim on that
6 verdict form is right up front. We admit it. We'll talk
7 about the number to put on there in a minute. But every
8 other claim to prove it they have to satisfy; they have the
9 right to rely on everything. And there's lots of reasons
10 they didn't. This is a red light sale of a car that's got
11 bad - according to Mr. Ecklund - bad body damage. You can
12 see two different colored paint clearly in this photograph.
13 And he says he did a cursory inspection. The rules say you
14 need to be very carefully inspected and verify. They gonna
15 verify there's no frame damage if you don't lift it up and
16 look at it. They not only didn't look under there with a
17 mirror in the lot, they had the car. They never lifted it
18 up to look for weeks and they should have. They had a duty
19 to.

20 Now, they could have gotten a car fax, used the paint
21 meter - And I know I'm repeating myself - and they just
22 didn't do it. So if they don't have the right to rely on
23 all of this for all these reasons, this is a simple breach
24 of contract case, you need to tell 'em what we owe 'em, and
25 then we're done.

1 Now, another element specific to this fraud case is we
2 had to have the intent, the intent to mislead somebody.
3 And you saw those guys say we thought the rules was as is
4 means as is and that's what you do with cars. We're not
5 trying to trick people. We thought that's what your - what
6 its there for. And Mr. Farrell says I was told it was a
7 wrecked car and sell it under the red light which he did.
8 So as far as he knew that's just what he was supposed to
9 do. There's no intent there to mislead anybody.

10 Now, we need to talk about damages. I did it sort of
11 in a way it made sense to me. They had the car sold.
12 That's how much they paid the auction. This is their gross
13 profit. They had to pay the sales person and paid to make
14 some repairs. A customer wanted her - I guess they fixed
15 the door. That was their profit. Then they had to pay
16 some money to undo the title with those folks, so, what
17 they paid out and then their profit's Eleven Hundred bucks.
18 This is what he paid for the car. You heard him say they'd
19 sent us this written statement that the car was worth to
20 them. The value is Two Thousand Dollars. You heard his
21 lawyer say he said in his deposition Two Thousand Dollars
22 so I kept the Two Thousand Dollars. It's been told to me
23 twice. So that's a Thirty-two Hundred Dollar loss on a car
24 plus your profit and expense. That's what I been told is
25 Forty-three Hundred bucks. So to make 'em whole from the

1 breach of contract they put the difference in the car, pay
2 their cost, pay their profit, I owe 'em Forty-three Hundred
3 bucks on a breach of contract case. That's - That's my
4 view of the damages and how I got there. And it isn't
5 intended to make 'em whole.

6 And, again, I'll freely concede I'm keeping the Two
7 Thousand Dollars because it's been told to me twice over a
8 period from late '13 so two and a half years. So that's
9 why I'm relying on the Two Thousand Dollars not the Five
10 Hundred.

11 Now, the burden of proof is important. All the claims
12 in this case, all the elements they have to prove, the
13 burden's on them. There is no burden on me to prove any of
14 the elements of the case. It's all on them. And you find
15 they haven't proved that it was justifiable for them to
16 rely on what happened at the auction, even though it's a
17 red light sale and a badly damaged car that's showing two
18 colors of paint and they didn't really do anything but a
19 cursory inspection for weeks, then once you award the
20 breach of contract damages they don't have the right to
21 rely in every other claim its for the defendant and you're
22 done, you're finished with the case. If they don't have
23 the right to rely they can't prove any other element of
24 their claims and you're done and we go home.

25 One more thing I want to talk about and maybe more

1 than one. Actually more than one. I think I told you when
2 the case stated you can't decide a case based on the number
3 of witnesses, number of exhibits, and it's never been truer
4 than here, I didn't put in any exhibits and he called all
5 my witnesses, so that's not how you decide a case. You
6 decide a case on the facts.

7 Now, this is really kind of unique in my experience.

8 I'll see if this will sit up here.

9 (ATTORNEY WALKER ADJUSTING EASEL.)

10 MR. WALKER: I -- We inspected the car in 2008
11 apparently missed this damage. They did the very same
12 thing we did. They inspected the car they missed it.
13 We're here because of two things one of which is we didn't
14 know the rules. Well, they didn't know the rules either.
15 They didn't have a copy of 'em. You heard me talking to
16 Mr. Whitley about what his duties were. He didn't know the
17 rules. Neither one of us had a copy of the rules. Now, I
18 think we both broke the rules. He has a duty to do this
19 very careful inspection to verify everything and a cursory
20 walk around the car is not it.

21 You know we're taking our medicine for breaking the
22 rules and I think that ought to go both ways. We - This
23 disclosure form, you know, it was signed by - filled out
24 and signed by some lady at the auction. I don't think they
25 had it until weeks afterwards but we both sent out

1 disclosures that were wrong and they sold the car. They
2 filled it out and said, you know, everything was cosher.
3 So everything we're getting shot at for both sides in this
4 case have done.

5 Now, I've done my best even though I'm not feeling
6 well to convey the truth to y'all. This - The verdict form
7 its your's to fill out. The breach of contract claim it's
8 extra short cause we admit we did it. So that is simply a
9 fill in the amount. But everything after this you're gonna
10 have to find they had a right to stick their head in the
11 ground and walk around the car and do a cursory inspection
12 and ignore all the warning signs. And they have to not
13 just rely but justifiably rely to recover on anything else.
14 And I think it's pretty clear they didn't do a careful
15 inspection, didn't have a right to rely, and for that
16 reason we owe 'em for a breach of contract and that's it.
17 Thank you for your time, ladies and gentlemen, it's been
18 difficult, take a long time, and sorry we been here so
19 long.

20 Thank you, Judge.

21 THE COURT: Yes, sir.

22 CLOSING ARGUMENT BY MR. MOSKOS AS TO ACTUAL DAMAGES

23 MR. MOSKOS: Ladies and gentlemen, I'm gonna try to be
24 brief. I know I told y'all before and it was probably very
25 boring. I stayed up late last night trying to work on some

1 legal matters to this case and I'm a little tired so I
2 apologize if I'm putting any of y'all to sleep.

3 Now let me see if I can go through this really
4 quickly. You know the other day Mr. Walker when he was
5 talking to Roger he kept after him and Roger kept denying
6 and kept denying when he received the damage disclosure
7 form. Mr. Walker could have pulled out his deposition and
8 questioned him but in his deposition Roger told him when he
9 got --

10 MR. WALKER: Your Honor, I'll object to that. That's
11 not in evidence.

12 MR. MOSKOS: Yes, sir.

13 THE COURT: I - I sustain that objection.

14 MR. MOSKOS: Yes, sir.

15 But Roger is a bit hard of hearing. He listened to
16 the question and he answered the question and he answered
17 it again. I think I know - I think I know what he's
18 talking about. But then he was ask the same question again
19 and again and he continued to remain steadfast that he got
20 it at the time he bought the car. He buys and he's got a
21 sales receipt and he gets the disclosure at the same time.

22 You know the part about banging out the door, the
23 defendant didn't bang out the door. That means we weren't
24 trying to hide anything. Well you know if you got a red
25 light sale and you need to get rid of this car you just

1 leave it in that condition and everybody thinks that's the
2 reason it's at the auction. That helps perpetuate the
3 fraud by leaving that there because now you say well oh
4 that's the problem, that's the reason right there. I don't
5 need to go with a mirror. Nobody testified that they ever
6 used the mirror. Mr. Threatt and Mr. Farrell never did.

7 And so, you know, the fact that the damage was there
8 actually helps support Roger's claim that he relied on what
9 he saw and the announcements. The announcements, don't
10 forget that. Mr. Walker wants you to totally forget that
11 they had the obligation to tell the auctioneer what was
12 going on with that car and they didn't do it. All they had
13 to do was tell 'em and that would have been it.

14 Nobody ever testified that the rear door was open.
15 That's the thing. This is a rear door I believe it's on
16 the passenger side. Nobody talked about going over to the
17 door and opening it up. Okay. That was never done. Roger
18 got in the car at the auction and got in and drove it and
19 put it back. That door was never opened. And no reason to
20 suspect that there was any damage over there.

21 And the logical connection between Gee, we didn't
22 throw away a note and we didn't lie at the auction is juts
23 not there. Just because they didn't throw it away, yeah,
24 they could have, I don't know why they didn't. Maybe
25 somebody copied it and sent it before they really realized

1 what they had done? Maybe a secretary simply copied it and
2 sent it out. I don't know. But you know that talks about
3 something else Mr. Walker mentioned. Nobody investigated
4 this. They weren't worried about this. You know Mr.
5 Walker wants you to assume that there is some clandestine
6 method behind what Roger does; that he sat back on his
7 rights and waited until the last minute and then when
8 everybody had left and everybody's memory had faded he
9 filed this law suit so that he could come in and score a
10 bunch of money. That's the implication. But guess what?
11 After the law suit's filed in 2013 nobody on their side of
12 the fence ever picked up a phone and said, Brent, we got
13 this law suit, what can you tell us about it? What's going
14 on? Nobody picked up the phone and called Mr. Threatt and
15 said, hey, what's going on? They waited until - They
16 didn't talk to 'em until I wanted to talk to 'em.

17 Mr. Nalewaja he didn't do anything in the case either
18 and he's in charge of it. They didn't care, they didn't
19 expect to be here, they totally ignored it cause they
20 didn't care. They thought they were gonna get away with
21 it. And it wasn't until they had to face you that they
22 finally came forward and said yeah, it's out there.
23 Because if they had come back to Mr. Whitley when he called
24 up in 2010 and say, hey, give me my money back, we wouldn't
25 be here. Why didn't they do that? He never mentioned

1 that. Why didn't they pay him his money back?

2 What is interesting is the CPO check list. Where is
3 that? They never mentioned that. It's gone, it's in the
4 papers somewhere, we don't know what happened to that.

5 You know these guys have a lot invested. This goes to
6 credibility. These guys have a lot invested in this case.
7 One: Mr. Farrell and Mr. Threatt they got caught and now
8 they have to protect themselves. This is just self
9 preservation. They gonna come in here say what needs to be
10 said to protect themselves. The dealership obviously wants
11 to continue it's practice so they're gonna try to do
12 whatever they can to be able to continue acting this way.
13 And one way you do that is you say all these cars are junk
14 cars like the engines don't run, you know, five minutes
15 later the transmission's gonna fall out, the brakes don't
16 work. That's not the kind of cars that go across this
17 auction. You heard what Roger said. Yeah, they got some
18 dings and maybe, you know, high mileage. Some of 'em will
19 have, you know engine sludge or transmission problems and
20 you got to pay attention and you got to listen. That's why
21 they have the announcements. But they're not all junk.
22 That's another part of the lie. And he doesn't buy there
23 and he doesn't buy from the guys that buy a car, you know,
24 take it home wash it and maybe throw a little paint on it
25 and run 'em back through. He doesn't deal with those kind

1 of guys. These are - They're not brand new cars but
2 they're not junk either.

3 And who does Roger buy these cars for? He buys them
4 for his friends and family. He's gonna pay attention.
5 Shelby is a small town. He doesn't want to get a bad
6 reputation and, you know, it'll go through that community
7 fast.

8 Now, he says Roger didn't have the rules; we didn't
9 have the rules, you know, we're both at fault. Well that's
10 not true. They didn't have the rules or because Roger
11 didn't have, you know, a copy sitting in his hand doesn't
12 necessarily mean that you get to cheat people. That's not
13 what that means. I understand what he's trying to do with
14 this little statement here about verifying the announced
15 conditions. The problem is how do you verify a negative.
16 If somebody tells you something doesn't exist or lead you
17 to believe that, why would you go around trying to verify
18 that? Think about how many things you would have to do
19 everyday to verify some - when somebody is telling you or
20 not telling you than what you believe? It's really - I
21 don't know how you do it. I don't know how to explain it.
22 It's just you can't verify a negative like that like he's
23 asking you to do.

24 One of the things he's asking you to do, the logical
25 relationship is something like this. Well I'll skip over

1 that. Now one of the things Mr. Walker talked about is the
2 damage disclosure form and when that showed up. Roger
3 testified he got it when he got the sales receipt. On the
4 other hand Mr. Walker want you to believe that it came with
5 the title. I understand what Mr. Guyer said but think
6 about this. When Roger said the title - the deals not done
7 until the title shows up. The deals not done until the
8 title shows up. So even if it did come in with the title
9 its still fraudulent representation. And he could have
10 gone back and tried to get his money back. But because it
11 is everything does say no, no, no, no, no, there wouldn't
12 be any reason to go back until of course its too late when
13 you find out about it. Which brings this up.

14 Mr. Walker wants you to believe that he and Midland's
15 are on the same parr. And that is of course not true. And
16 here is why? He says we inspected it and we missed it.
17 Well that's Brent Farrell but you know what? You got a
18 hundred and fifty-nine point inspection done by a Honda
19 certified mechanic to make it a Honda certified pre-owned
20 car. The next time you see a commercial for a certified
21 pre-owned car think who's inspecting that car. Gee, is he
22 missing something here?

23 MR. WALKER: Your Honor, he's not allowed to ask the
24 jury to think about how they would react here. That's the
25 Golden Rule.

1 THE COURT: I sustain that objection.

2 MR. MOSKOS: Yes, sir. All right.

3 So, you got a hundred and fifty-nine point inspection
4 that they did; Roger did not do. Don't know the rules.
5 Well you know what? Roger wasn't selling the car; they
6 were. They had the duty to do it correctly. And they want
7 you to believe that not having the rules is breaking the
8 rules. That's not - That's not right. And hinted by him
9 not doing some grand inspection like they did he gets
10 nothing. Its his fault the whole burden's on him. Who had
11 the information? They did but it's gonna - They're gonna
12 place everything on him to check this car out.

13 The last thing that Mr. Walker talked about was that
14 both of 'em sold the car without disclosing the damage.
15 Roger relied on what they told him. He simply passed along
16 their information. And when he found out that he was wrong
17 he wouldn't give the car back. Not only that he paid 'em
18 back not only what they were due but more money to keep
19 them satisfied. When Roger ask for his money, his Fifty-
20 two Hundred Dollar back, they ignored him and we're here
21 today. Thank you, ladies and gentlemen, I appreciate your
22 patience.

23 THE COURT: Okay, Ladies and gentlemen, the Clerks'
24 office has ordered you all lunch. I got to take up some
25 more legal matters before I can charge you on the law so

1 I'm gonna send you to the jury room. Hopefully she will
2 have you a lunch back there in a few minutes. Then I'll
3 bring you out and charge you on the law and give you this
4 case to decide. But at this point you can't discuss it
5 yet. All right. Hopefully lunch will be there in just a
6 few minutes.

7 (JURY EXITS COURT ON LUNCH RECESS AT 12:31 PM.)

8 THE COURT: All right. Do y'all want to take a five
9 minute break and come back and deal with the charges.

10 MR. REIBOLD: That's okay with me.

11 MR. MOSKOS: Yes, sir.

12 THE COURT: Okay. I'll give my court reporter a break
13 and we'll quit and we'll come back.

14 (COURT IN RECESS AT 12:31 PM.)

15 (COURT BACK IN SESSION AT 12:37 PM.)

16 THE COURT: I guess the big issue is about the
17 charges. You got any objection to those charges?

18 MR. MOSKOS: I haven't a chance to go through 'em.

19 THE COURT: Okay. I'll give you a few minutes then.

20 I mean I looked through 'em and they look reasonable.

21 MR. MOSKOS: Well you said negligence is out. Right?

22 THE COURT: Yeah. I think the negligence is out.

23 Everything else seems to be in. And I was gonna add on the
24 fraud part that section that you wanted into what they had
25 presented from your brief that we agreed on earlier.

1 MR. MOSKOS: And I appreciate that, your Honor. I
2 would ask if we could go through the request to charge that
3 I'd given you. I think I've eight or nine. And then I had
4 an additional --

5 THE COURT: Well, and most of yours seem to be covered
6 under theirs.

7 MR. MOSKOS: And I don't know.

8 THE COURT: And unless they want to tell me it seems
9 to me everything you wanted was covered under theirs plus I
10 add that fraud issue. With the exception maybe the

11 MR. WALKER: Your Honor, I hope you don't mind me
12 cutting through here.

13 THE COURT: No, not at all.

14 MR. REIBOLD: We have a few concerns about the
15 proposed charges or about their proposed charges.

16 THE COURT: And I'll give you a few minutes to go over
17 theirs. And I think most of its covered under what they've
18 requested.

19 MR. REIBOLD: We haven't had a chance to see that yet
20 cause we emailed that to you.

21 THE COURT: Okay.

22 MR. MOSKOS: Your Honor, just out of curiosity - Well,
23 it's not just out of curiosity, Mr. Walker when he was
24 talking to the jury said that they didn't have the burden
25 of proof for anything. And I don't know if he's

1 withdrawing all of his defenses but --

2 MR. WALKER: I said any element of the claim. I was
3 very careful not to say -

4 MR. MOSKOS: Well the impression that came across was
5 they don't have the burden of proof on anything and I want
6 to make sure that your Honor's gonna tell the jury that
7 there is - the reason that come up - this comes up is the
8 request to charge number thirteen which deals with
9 contributory negligence and they have the burden of proving
10 contributory negligence I assume by the preponderance of
11 the evidence. And I want to make sure that the jury gets
12 charge that the defendant does have the burden of proof in
13 defenses.

14 MR. REIBOLD: No objection to saying the defense has
15 the burden of proof on this issue.

16 THE COURT: Okay. I thought that was -

17 MR. REIBOLD: Yeah, it's actually in number fifteen.

18 THE COURT: I thought it was already in.

19 MR. REIBOLD: Yeah, your right, your Honor, it is in
20 number fifteen we say that.

21 MR. MOSKOS: I just hadn't gotten that far.

22 THE COURT: And I thought I read that in there.

23 MR. MOSKOS: I would think that would need to - Wait a
24 minute. Number fifteen?

25 THE COURT: Yeah. The burden of proof is on - the

1 second paragraph, third paragraph - on this issue the
2 burden of proof is on the defendant. This means that the
3 defendant must prove by a greater weight of the evidence
4 that the plaintiff's were negligent and that such
5 negligence was the proximate cause of plaintiff. It's in
6 there.

7 MR. MOSKOS: The dilemma that I have is that it's so
8 far in the back. I mean you start talking about
9 defendant's request to charge contributory negligence and
10 then there's no mention of the burden, you know, for two
11 instructions --

12 THE COURT: I know that's the last they hear. You say
13 it's in the back and I understand - I understand but I
14 can't help its in the back it's just usually the things
15 that are in the back are the things they remember. You
16 know the first part of it they don't remember. It's
17 usually the last thing I say. I understand I just don't
18 know. Its in there it covers everything. I don't know.

19 MR. MOSKOS: Well first of all I don't think the
20 contributory negligence comes in because we're dealing with
21 negligent mis- we don't have negligence any more. We're
22 dealing with negligent misrepresentations.

23 THE COURT: And in looking at negligent
24 misrepresentation it's still - I looked at that and it
25 seemed to me that if we're gonna charge negligent

1 misrepresentation contributory negligence applies to that

2 ---

3 MR. MOSKOS: And --

4 THE COURT: --- because the negligent
5 misrepresentation was the Matrix. And your - and there's
6 evidence in this that your guy didn't follow the rules
7 either.

8 MR. REIBOLD: Correct.

9 MR. MOSKOS: Is your Honor gonna put in the - I
10 thought I - I don't know. Maybe I sent it to your Honor
11 last night. I had a - there was a - some information I
12 wanted to put in dealing with the gross negligence and the
13 fact - Oh, the *Dealus versus Hulsing Enterprises* case.

14 Did y'all get that?

15 THE COURT: Yeah.

16 MR. MOSKOS: And what I was asking the court to put
17 into - put in was a provision from there and I don't know
18 if it made it into your charge.

19 THE COURT: And ask how a plaintiff's ordinary
20 contributory negligence not a bar for the recover age of
21 the defendant's gross negligence or willful wanton conduct
22 is the proximate cause of the injury. That's what you
23 wanted in there?

24 MR. MOSKOS: Yes, sir.

25 THE COURT: What's your position on that?

1 MR. REIBOLD: I don't have an objection since we don't
2 define gross negligence any where. Or willful wanton
3 conduct cause that has to seek a meaning in North Carolina
4 law. I think it's a request of the law but I think if
5 you're gonna add that in the other stuff has to go with it.

6 THE COURT: You mean we have to define gross
7 negligence and willful wanton conduct and I have to agree
8 with that? I mean --

9 MR. MOSKOS: I agree too.

10 THE COURT: That means we just got to add that but
11 somebody's got to get it to me. Willful wanton conduct is
12 defined in the punitive damage statute. Is that what you
13 want me to - is that the definition?

14 MR. MOSKOS: And I don't know the answer to that.

15 THE COURT: That's the only definition I've got at
16 this point unless y'all got some other. Now I'll try to
17 find the definition to gross negligence under North
18 Carolina law. I'll put my law clerk on it but if y'all
19 have one that would be great.

20 MR. MOSKOS: Yes, sir.

21 MR. REIBOLD: I'm ready to address his I just didn't
22 know if he was finished.

23 THE COURT: I wasn't gonna charge any of his other
24 than what he just said.

25 MR. REIBOLD: Oh, okay.

1 THE COURT: I was under the impression that yours
2 covered everything in his except these exceptions that he's
3 just brining up and I was gonna add those to that. Now if
4 that's not true y'all let me know.

5 MR. REIBOLD: I'm fine --

6 THE COURT: Okay.

7 MR. MOSKOS: I do object to number fourteen, your
8 Honor. Defense to request charge number fourteen.

9 THE COURT: Okay. Let me look at that.

10 Well you don't think that's the law?

11 MR. MOSKOS: Well it's the law but not in this case.

12 I would assume it's the law. I haven't had a chance
13 to research it but what this is actually dealing with is
14 the transaction between Mr. Whitley and Ms. Gorman; not his
15 interaction with the dealership - with the auction and
16 Midland's Honda. The way this is couched plaintiff's were
17 required to inspect any vehicle for defects which might
18 make it a menace to those who might use the vehicle or come
19 in contact with the vehicle if they undertook to repair or
20 recondition the vehicle. Well, I think what they've been
21 arguing so far is the inspection at the auction. They
22 weren't doing anything to repair or recondition the vehicle
23 at the auction. This is when a used car dealer or a car
24 dealer sells a car to a consumer and the consumer finds out
25 about it and comes back and says hey, you know, you sold me

1 a piece of junk. And this is on the original dealer; in
2 other words, Midland's Honda in this case. Moreover dealer
3 such as plaintiff's are charged with knowledge of any
4 defects which are open and discoverable in the exercise of
5 due care.

6 I mean what he's doing is he's unfairly singling out
7 my client. I mean, you know, something that might be
8 fairer would be moreover dealer such as the parties but to
9 single out my client is - is - like I said he's trying to
10 bring in an instruction that is more for a consumer dealing
11 with a dealership. Down the line - It's a down the stream
12 argument or charge. If Ms. Gorman - In other words if Ms.
13 Gorman came in here and said I'm suing Mr. Whitley because
14 I got cheated, yeah, this - and Mr. Whitley had
15 reconditioned it and repaired it and what have you, yeah,
16 this would apply but it doesn't apply here.

17 MR. REIBOLD: Your Honor, these are the duties, the
18 legal duties we believe were imposed on the plaintiff's
19 which support the contributory negligence charge. There's
20 two parts to this charge. The first one is just the
21 general duty to carry or what he owes to protect himself.
22 I can't imagine there's a quibble with that general duty.

23 The second one absolutely does apply and that's
24 because our contributory negligence contention is two fold.
25 Yes, you did not do a proper inspection at the auction.

1 But also, before you sold this car to somebody else, North
2 Carolina law required you to do this other inspection. Had
3 you done that you would have avoided some of the damages
4 that you claim. You contributed to your own harm by not
5 doing this inspection.

6 MR. MOSKOS: Which inspection?

7 MR. REIBOLD: The inspection you do before you sell a
8 car.

9 THE COURT: Before he sold it. Because you ask for
10 damages after he sold it. You're asking for damages that
11 he incurred after he sold the car to her because he wants
12 to be reincouped for his profit as well as the expenses and
13 so that applies there. He had a duty - Not only did he
14 have a duty to inspect it at the auction under the rules,
15 he had a duty to follow North Carolina law before he sold
16 it to the sixteen-year-old girl and so it seems to me
17 that's proper.

18 MR. MOSKOS: Yes, sir.

19 MR. REIBOLD: And I have no problem with saying such
20 as the parties and such as the plaintiffs. We're not
21 trying to be unfair.

22 THE COURT: What? It doesn't make any sense if you
23 put parties everywhere.

24 MR. REIBOLD: Well I drafted it for plaintiff's
25 because its supposed to be the plaintiff's duties. I

1 understand it but I'm just trying to point it out. We're
2 not trying to single anybody out. I think its proper as
3 its written but -- and frankly we're not a North Carolina
4 motor vehicle dealer so I'm not sure it would apply to us.

5 THE COURT: Yeah.

6 MR. REIBOLD: But I think it's just best to leave it
7 the way it is.

8 THE COURT: Okay.

9 MR. MOSKOS: The next one number fifteen, well wait a
10 minute.

11 THE COURT: Of course the problem with fifteen is --

12 MR. REIBOLD: This is essentially verbatim of the
13 pattern jury instruction.

14 THE COURT: I know but the problem is negligence is
15 off the board. This follows negligence and not negligent
16 misrepresentation.

17 MR. MOSKOS: Right. That was my concern.

18 THE COURT: Negligent - Because negligence has been
19 pulled --

20 MR. REIBOLD: Well your right. Now that we - if we
21 want to say if you do not determine that the defendant made
22 a negligent misrepresentation I'm fine with that change.
23 But you're right, this was drafted when both plaintiff's
24 were in the case.

25 THE COURT: All right.

1 MR. REIBOLD: And should be modified to reflect the
2 ruling's you've made.

3 MR. MOSKOS: But I don't know that - I don't know that
4 this is applicable to negligent misrepresentation. It may
5 be but - and if it's a negligence and if it's in relation
6 to negligence then it needs to go too.

7 MR. REIBOLD: I thought we had already crossed that
8 bridge.

9 THE COURT: Let's see. You're asking if you do not
10 determine that the defendant was negligent there's no need
11 to consider whether the plaintiff was negligent. Well
12 negligence is gone.

13 MR. REIBOLD: I agree this has to be modified to say
14 if you - if you'll answer this question only if you've
15 already determined if the defendant is guilty of negligent
16 misrepresentation. I mean that modification would need to
17 be made to make it less confusing.

18 THE COURT: And then the second sentence in that
19 paragraph if you do not determine the defendant made a
20 negligent misrepresentation there is no need for you to
21 consider whether the plaintiff was negligent.

22 MR. REIBOLD: Yeah. It's just essentially find and
23 replace negligence with negligent misrepresentation
24 throughout the charge.

25 THE COURT: But that only - It not only replaces the

1 defendant's negligent misrepresentation not the
2 plaintiff's. Right? Everywhere --

3 MR. REIBOLD: You're right, you're right. The
4 defendant's - We're not saying the defendant's made a
5 negligent misrepresentation. We're saying they failed to
6 inspect and contributed to their own negligence.

7 THE COURT: So everywhere it says defendant was
8 negligent you say the defendant's negligent
9 misrepresentation?

10 MR. REIBOLD: I believe that's -

11 THE COURT: And everywhere it says the plaintiff's
12 negligent you need to put the negligence in there is what
13 you claim?

14 MR. REIBOLD: I think that's correct.

15 THE COURT: So it would say the defendant was guilty
16 of negligent misrepresentation --

17 MR. REIBOLD: Or made a negligent --

18 THE COURT: Huh?

19 MR. REIBOLD: I'm not sure I like the word guilty but
20 made a negligent misrepresentation.

21 THE COURT: Okay.

22 MR. REIBOLD: Anything else?

23 MR. MOSKOS: Yes, sir. Number seventeen.

24 THE COURT: Okay.

25 MR. MOSKOS: It's duplicative of sixteen. Sixteen

1 deals with reliance under the fifth element I guess. The
2 plaintiff's reliance upon the false representation or
3 concealment which reasonable - the plaintiff's reliance
4 would be reasonable if, and then it goes on. The next one
5 seems to put a higher duty on my client.

6 MR. REIBOLD: Number seventeen certainly goes into
7 more detail about the reliance element but that's a correct
8 statement of North Carolina law and the facts support it.

9 MR. MOSKOS: Well I haven't seen it so I don't know
10 the context with --

11 THE COURT: That's State versus --

12 MR. REIBOLD: It's at head note nine which would be on
13 the fourth page of the opinion, top of the page.

14 MR. REIBOLD: I'm getting hungry.

15 THE COURT: Has the jury's lunch showed up?

16 THE BAILIFF: I don't think it has. Let me check.

17 It's on the way, your Honor. It isn't here yet but
18 it's on the way.

19 THE COURT: Okay. Im gonna charge twenty-five.

20 MR. REIBOLD: You're skipping ahead? Oh, okay.

21 THE COURT: How is that an issue in this case?

22 MR. REIBOLD: Well we talked about it yesterday in
23 arguments. The --

24 THE COURT: I know but that deals with contract.
25 Right?

1 MR. REIBOLD: I think the provision that says barred
2 from any remedy applies to any remedy.

3 MR. MOSKOS: Is that - Did you give that today?

4 MR. REIBOLD: These last three are the ones we gave
5 this morning, yes.

6 THE COURT: Yeah.

7 MR. MOSKOS: So let me track those down.

8 THE COURT: And it seems to me fourteen is the law
9 from what I can tell. But if this deals with the
10 acceptance. Is this dealing with - is this contract law?

11 MR. REIBOLD: It's --

12 THE COURT: Or UCC?

13 MR. REIBOLD: It's UCC.

14 THE COURT: Okay. I got it.

15 MR. REIBOLD: Cause this is a sale of goods.

16 MR. REIBOLD: Now the charges - I gave you the
17 statutes almost verbatim from the statute.

18 MR. MOSKOS: Your Honor, this deals with a contract
19 claim. We're not dealing with a contract claim. I'm not
20 even sure how this relates to the case.

21 MR. REIBOLD: And the answer to that question is that
22 the UCC provides that if you accept and don't notify the
23 seller of the defect within a reasonable time, or,
24 thereafter properly revoke your acceptance, you are barred
25 from any remedy. It doesn't say contract remedies, --

1 commercial program; it says any remedy. We think that's a
2 defense to essentially every claim if the facts support it.
3 And the facts are - it's certainly a factual question about
4 whether this will satisfy his case.

5 THE COURT: All right. And having said that then how
6 does -- what information is this gonna benefit the jury?
7 How are we gonna know that? I mean if that's not on the
8 verdict form how are we - what difference is it gonna make?

9 MR. REIBOLD: Well I think the jury can consider it in
10 deciding whether they're going to find for the plaintiff on
11 any of the claims other than the one we've conceded.

12 MR. MOSKOS: Now you're talking about rejection and
13 maybe even revocation of acceptance and all of that gets
14 into the contract claim. I mean we're getting way far
15 afield.

16 THE COURT: Does that get into the contract claim? I
17 mean y'all conceded liability in the contract claim.

18 MR. REIBOLD: So we're not trying to undo that but all
19 of these other remedies - Like I said, the statute itself
20 says the words barred from any remedy.

21 THE COURT: All right. So they're bared from any
22 remember on the contract claim.

23 MR. REIBOLD: We could have taken that position but
24 --

25 THE COURT: And the fact that you didn't how could we

1 put it in now?

2 MR. MOSKOS: Wouldn't they be estopped from --

3 MR. REIBOLD: We're estopped from saying it bars us
4 from the contract remedy, certainly. But why would our
5 limited admission on that claim cover everything?

6 THE COURT: And assuming you're right, how does the
7 jury --

8 MR. REIBOLD: I mean the problem is you can't rule on
9 it as a matter of law because they have to decide whether
10 acceptance was made in a reasonable time or whether there
11 was actually a telephone call that constitutes revocation.

12 THE COURT: I understand that. But how are we gonna
13 know they did that? How is it gonna be on the jury form?

14 MR. REIBOLD: I think it just shows up in their -
15 their decision to render a verdict in favor of a particular
16 party.

17 THE COURT: How are we gonna explain that to 'em? I
18 mean if I read this as you - -

19 MR. REIBOLD: Well the answer would - the explanation
20 would be jury if you conclude that these events happened
21 then you're verdict must be for defendant on the other
22 place.

23 MR. MOSKOS: The problem is this is so intertwined
24 with claims that have not been made. We didn't ask for
25 revocation of acceptance. We didn't make a 608 Claim. And

1 yet here it's talking about acceptance of the goods
2 precludes a buyer from rejecting the good. And if
3 acceptance is made with knowledge of a nonconformity cannot
4 be revoked that's a totally different claim.

5 MR. REIBOLD: Our argument is that yes they did not
6 ask for revocation. And so they've accepted the goods and
7 their barred from other remedies.

8 MR. MOSKOS: No. No, no, no, no, no, no. No. Okay.

9 MR. REIBOLD: Yes.

10 MR. MOSKOS: Here's - No, no. Here's the problem.
11 The law requires us to sue for the difference in the value
12 of what we got and what we should have gotten. They don't
13 get the property back and we're out Five Hundred bucks. We
14 have to retain the item, in other words, accept the item.
15 You don't - What he's asking is makes it a circular
16 argument. If we retain the items to be able to sue for
17 fraud and get the difference in the value of the property
18 and our consequential damages, then we're barred because
19 the UCC says you kept the item. If we give it back - Well
20 I don't even know because we haven't even thought about
21 giving it back.

22 MR. REIBOLD: Your Honor, that's just not happened.

23 And first of all the argument is incorrect. What the
24 law requires is that you notify the seller of the breach;
25 once you do that you have another right under the UCC to

1 retain the goods while the dispute is pending. It's a
2 separate code section. The dilemma he's talking about
3 simply does not exist. So in this case they didn't just
4 keep the car, they sold it to someone else. They clearly
5 did an act of ownership; that's acceptance as a matter of
6 law. We think they accepted it prior to that time but when
7 they did that they accepted the vehicle.

8 MR. MOSKOS: We didn't find out about the fraud until
9 after the car was sold. That doesn't mean we accepted the
10 car in the condition of a clipped car. We had no knowledge
11 of that and that's evident. There was no testimony that he
12 knew anything about it until that lady brought it in. And
13 then we did notify them to buy it back and Mr. Ferrell -
14 This is - this is a red herring designed to confuse the
15 jury and it is going to - they will not understand what is
16 happening and it's going to confuse them and throw them off
17 and they're gonna come to a bad result based on a bad
18 charge. I would ask that any of this stuff dealing with
19 the UCC be excluded.

20 THE COURT: Okay.

21 MR. REIBOLD: If you look at charge number twenty-
22 five, Items A and B of the situations that he's talking
23 about, we didn't know about it and therefore we can't be
24 charged with acceptance. But Item C which are all equal
25 alternatives under the statute says when the buyer does any

1 act inconsistent with seller's ownership, and that is
2 clearly established, there is an acceptance in this case.
3 In fact I could have ask for a directed verdict on that
4 issue.

5 MR. MOSKOS: But the other side is this is when you
6 know something is non-conforming. You buy it - Let's put
7 it this way. Mr. Whitley could not have gone back to
8 Midland's and said hey, I was standing - I walked around
9 this thing and I saw the damaged door and I thought about
10 it now I want to give it back. No, no, you bought it, you
11 knew what you were getting and you accepted it. There has
12 been no testimony whatsoever that he knew that he was
13 buying a clipped car. None whatsoever. In fact just the
14 opposite. And this is - this isn't even applicable to the
15 case. This is where there is a discussion between the
16 parties or a representation between the parties that they
17 know there is a damaged goods.

18 MR. REIBOLD: Your Honor, I think the UCC clearly is
19 imposing a duty to inspect until the point in time where
20 you do an act inconsistent with ownership. At that point
21 in time you should have inspected it by then. There's no -
22 there's no inconsistency here. They certainly accepted the
23 vehicle. The statute says if they did that and they didn't
24 notify the seller of the breach as called for their barred
25 from any remedy. That's our position.

1 THE COURT: You don't think by calling - by calling
2 the dealership and notifying them it was a car - -

3 MR. REIBOLD: Well I think that's a question of fact.

4 THE COURT: Right. And it is a question of fact.

5 MR. REIBOLD: And if they did that then maybe it
6 satisfies it. If they didn't do it then the defense is
7 valid.

8 MR. MOSKOS: How do you put toothpaste back in the
9 tube, Judge? I mean once you start talking about all this
10 the jury's not gonna understand it and they're gonna come
11 to the wrong conclusion because this is too confusing. And
12 it's dealing with a cause of action that's not even in the
13 pleadings much less been argued in this case.

14 MR. REIBOLD: We raised an affirmative defense in our
15 answer a long long time ago. And it's certainly the facts.

16 MR. MOSKOS: But revocation is not a claim in the
17 case. They never made out a claim for revocation of
18 acceptance.

19 MR. REIBOLD: Well, look, if you're not gonna claim
20 that you didn't revoke acceptance then we can get rid of
21 that charge. You know we don't have to charge on that if
22 you're not gonna try to get out of your acceptance by
23 revoking acceptance. That one can go if his position is
24 what he says it is but the other two are still in play.

25 MR. MOSKOS: No.

1 THE COURT: Well, and most of this - I'm gonna charge
2 twenty-six. Doesn't that usually deal when you order
3 something in the mail and you accept the goods and not send
4 it back you got to pay for 'em?

5 MR. REIBOLD: I'm sorry, say it one more time.

6 THE COURT: If I order, you know, a pair of waders
7 from Cabela's and they send 'em to me and I don't send 'em
8 back and reject them then I owe Cabela's for the waders.
9 Right?

10 MR. REIBOLD: Yeah.

11 THE COURT: But he's already paid for 'em. In this
12 situation he's already paid the purchase price. Right?

13 MR. REIBOLD: He's paid the purchase price.

14 THE COURT: Usually this applies when they hadn't paid
15 the purchase price.

16 MR. REIBOLD: Well --

17 THE COURT: I paid for 'em and I didn't send 'em back
18 though so I don't owe for 'em.

19 MR. REIBOLD: There's two elements to it. The first
20 is on twenty-six, the buyer's accepted goods he or she must
21 pay the contract price. I think that's the part you're
22 discussing.

23 THE COURT: Right.

24 MR. REIBOLD: But the part that I focused on is
25 paragraph number three.

1 THE COURT: Of twenty-six?

2 MR. REIBOLD: Yeah.

3 THE COURT: If a buyer fails to notify the seller of
4 the breach within a reasonable time the buyer is barred
5 from any remedy.

6 MR. REIBOLD: That's what the statute says. It
7 doesn't say contract remedies, commercial, commercial code
8 remedies. It says a remedy. Meaning where the UCC applies
9 it's exclusive. That's your rights.

10 THE COURT: So the question - and you say you're
11 arguing that it's a question of fact.

12 MR. REIBOLD: About whether - on twenty-six - it's a
13 question of fact is where --

14 THE COURT: All right. Then my line is short of that
15 one line.

16 MR. REIBOLD: I'm fine with that.

17 THE COURT: Now the jury could understand that cause
18 it's a question of fact as to whether he called and did
19 that. But if you do all this other stuff what's gonna be
20 confusing.

21 What do you say about that, Mr. Moskos?

22 MR. MOSKOS: Well, as I said, your Honor, I don't
23 think it applies. I think this relates to the - when they
24 say any remedy I think what they're saying is any remedy
25 under the UCC not any remedy whatsoever. I'm trying to -

1 We could have had different remedies under the UCC.

2 MR. REIBOLD: I think that's the crux of it, your
3 Honor. If you conclude it applies to other remedies that
4 you'd charge. If you conclude it does not apply to
5 remedies outside the code it should not be charged.

6 THE COURT: Okay.

7 MR. REIBOLD: Obviously we have different opinions on
8 that.

9 THE COURT: Then back track a minute. As far as all
10 the other charges are concerned are we comfortable with
11 those? Are we ready to go on that?

12 MR. MOSKOS: Well there was one more that I was gonna
13 ask the court to consider.

14 THE COURT: Okay.

15 MR. MOSKOS: This is from the case of *Barry Levine*
16 *versus Park Chevrolet*. And frankly all my documents have
17 been scattered around and I'm not sure if I got one or
18 three copies. I apologize. It is a North Carolina case.
19 '76 North Carolina appellate case. N.C. at 44 on page 48.
20 It is a 1985 North Carolina case and it says, --

21 MR. REIBOLD: That was in his charges, his proposed
22 charges.

23 MR. MOSKOS: And it may be.

24 THE COURT: Okay.

25 MR. MOSKOS: It says here "the court" in this case is

1 quoting another case, another court, the court stated "we
2 hold that a transferor who lacked the actual knowledge may
3 still be found to have intended to defraud and thus may be
4 civilly liable for a failure to disclose that a vehicle's
5 actual mileage is unknown." Obviously we're not dealing
6 with mileage. "A transferor may not close it's eyes to the
7 truth if a transferor reasonably should have known that a
8 vehicle's odometer reading was incorrect. Although he did
9 not know to a certainty the transferee would be defrauded
10 the court may infer he understood the risk of such an
11 occurrence." So I would ask that we modify this language a
12 little bit. I don't know which one.

13 THE COURT: What is y'all's position on that?

14 MR. REIBOLD: You know at some - It's clearly this is
15 a correct statement of the law. Some version of it I think
16 is fair; the facts support it. I don't - I think but not
17 all of it is a little repetitive.

18 THE COURT: Right. And if we can figure out - If you
19 can kind of highlight one or two lines that makes sense and
20 not be repetitive and not deal with that then I'll be glad
21 to put it in here.

22 MR. MOSKOS: Yes, sir.

23 MR. REIBOLD: Anything else?

24 MR. MOSKOS: Your Honor, did you just take the pattern
25 instructions?

1 THE COURT: Huh?

2 MR. MOSKOS: Are you just using the pattern
3 instructions?

4 THE COURT: I'm using those instructions that he gave
5 me that are copied after that that you have gone over.

6 MR. MOSKOS: Yeah. Assuming you took the whole - Like
7 813.21 you took the whole thing.

8 MR. REIBOLD: I don't know if I did it every time
9 their in here. I don't want to represent to you that it's
10 a verbatim copy; it's close. All the charges are in here.
11 Everything that we cited is in here for backup. I'm sure
12 there were occasional times ---

13 THE COURT: I'll --

14 MR. REIBOLD: --- where I changed the wording a little
15 bit to make it more readable.

16 THE COURT: I'll go back in chambers and take them and
17 give you a minute to look over everything and I'll come
18 back and I - And y'all need to look at this verdict form
19 and see if it --

20 MR. REIBOLD: Yeah. I know he hadn't had a chance to
21 see it yet. That was my first stab, I'm not married to the
22 language but.

23 THE COURT: Okay. And I hadn't even looked at it but,
24 you know, y'all go over this and over that and I'll come
25 back and we'll talk about it in a few minutes while the

1 jury's eating and see if we cant' - Next time y'all have a
2 North Carolina case give it to Judge Benjamin or somebody.

3 If you come up with something that you want to change
4 just come to chambers.

5 MR. MOSKOS: Yes, sir.

6 MR. WALKER: Thanks, Judge.

7 (COURT IN RECESS AT 01:19 PM.)

8 (COURT BACK IN SESSION AT 01:49 PM.)

9 THE COURT: All right. You're on the record. Do you
10 object to that?

11 MR. MOSKOS: Yes, sir. At this point for
12 clarification there are - the defendant has presented two
13 request to charge number twenty-six, just a numbering
14 error. The one we're discussing the defendant's request to
15 charge twenty-six UCC effectiveness of the acceptance. I
16 understanding is that the defendant wants the third
17 paragraph which states if a buyer fails to notify the
18 seller of a breach within a reasonable time the buyer is
19 barred from any remedy. I would - First of all I don't
20 think that's applicable to this case. The defendant has
21 already admitted liability in a contract case and this is
22 what applies simply to the contract case. I don't think
23 the UCC saying - I think the remedies that are referred to
24 here relate solely to the UCC remedies none of which we are
25 - are currently issues in the case. We haven't revoked the

1 acceptance. In other words we haven't filed a 2-608 claim
2 and as I said they've already consented; stipulated to the
3 breach of contract claim. So I think it's inapplicable and
4 should be taken out so it doesn't confuse the jury.

5 THE COURT: Do you want - the question was do you -
6 His request was to charge the whole thing. I thought that
7 was one of the things we reached by not charging if the
8 buyer accepts the good then he must pay for the goods and
9 charge the whole UCC and just charge that one to the jury.

10 MR. MOSKOS: Well, no. I understand that that was -
11 was what y'all had agreed that he had agreed to have that
12 one sentence in there. I still don't think its applicable
13 at all.

14 THE COURT: Okay. I note your objection.

15 MR. REIBOLD: We've plowed this ground and I hate to
16 repeat myself at this point.

17 THE COURT: Okay.

18 MR. MOSKOS: And then did your Honor charge my request
19 to charge number eight? That's the one from Huff versus
20 Auto Zone Limited.

21 THE COURT: Yeah, I think that's in here. I thought
22 we added that to their charge on - charge on fraud?

23 MR. REIBOLD: Well this is - He was gonna do some
24 language from that case which I think covers this.

25 THE COURT: Right.

1 MR. REIBOLD: And so he added --

2 MR. MOSKOS: No.

3 THE COURT: I thought we would add that language into
4 their - And the language I thought you wanted to add in was
5 North Carolina has long recognized and has said where
6 material defect is known to the seller and he knows that
7 the buyer is unaware of the defect and that it is not
8 discoverable in the exercise of the buyer's diligent
9 attention or observation the seller has a duty to disclose
10 the existence of the defect to the buyer. And a failure to
11 disclose the truth can support a fraud claim and in as much
12 as an affirmative false representation.

13 I thought that's what you wanted in ---

14 MR. REIBOLD: That was my understanding.

15 THE COURT: --- to take care of that number eight.

16 MR. MOSKOS: Well, I - And I apologize, your Honor. I
17 don't know which one's you've included in your charge. I
18 haven't seen the whole thing. I understand you're using a
19 lot of the pattern instructions and I don't know which
20 ones. If you put in eight that is fine with me. In fact I
21 prefer number eight because I think it's a little more
22 applicable to what we're dealing with.

23 MR. REIBOLD: But I think eight goes a little further
24 than what we propose. I have no problem with what we've
25 just talked about being the charge but eight first of all

1 talks about pleading which isn't relevant. And I think if
2 you went from - I mean there's a couple of sentences you
3 know that are virtually equivalent and I don't have a
4 problem with that but this sort of belabors the point and
5 give it undue emphasis if we charge the whole thing.

6 THE COURT: Yeah, it's stuck its head in the sand in
7 that one. That's more of a somewhat facts that y'all have
8 talked about so I think what - His - The books definition
9 of fraud, as well as the language you want to put, I think
10 covers all that. Okay.

11 MR. REIBOLD: Could it be that we're done?

12 MR. MOSKOS: Huh?

13 MR. REIBOLD: Could it be that we're done?

14 MR. MOSKOS: Well, actually what I'm asking for is
15 really just a couple of sentences, Judge. I know eight
16 looks kind of long but its maybe about four sentences.

17 THE COURT: Okay.

18 MR. MOSKOS: Five.

19 THE COURT: So give me - Come take mine and highlight
20 what you want in there and I'll look at it and see if I can
21 incorporate it in ---

22 MR. MOSKOS: Yes, sir.

23 THE COURT: --- and see how much we gonna be able to
24 give this jury.

25 (PAUSE AT 02:00 PM.)

1 MR. REIBOLD: Your Honor, he's highlighted three
2 sentences. The first two I don't have a problem with
3 although I think they're addressed by the other language we
4 talked about. The third one I think goes a little too far
5 into charging on the facts.

6 THE COURT: And I kind of agree. We kept talking
7 about sticking your head in the sand in that.

8 MR. MOSKOS: Well, I would - I would really like to
9 have the last couple of sentences.

10 THE COURT: But I think that because that's exactly
11 what you all argued I would be commenting on the facts.

12 MR. MOSKOS: But the last little bit there deals with
13 a defendant which deliberately closes it's eyes and that's
14 what we're talking about.

15 MR. REIBOLD: Same concern.

16 THE COURT: Okay.

17 MR. MOSKOS: I mean their position is it's a mistake
18 and we say it's deliberate.

19 MR. REIBOLD: And they argued it.

20 MR. MOSKOS: Yeah.

21 THE COURT: You ask me to define gross negligence.
22 The Supreme Court case we found, we define gross negligence
23 as wanton conduct done with conscious or reckless disregard
24 for the rights and safety of others. And then this statute
25 that defines willful and wanton conduct which is in the

1 punitive damage statute means the conscious and intentional
2 disregard of and indifference to the rights and safety of
3 others which the defendant should or should know is
4 reasonably likely to result in injury, damage, or other
5 harm. Willful and wanton conduct means more than gross
6 negligence.

7 MR. REIBOLD: Suits me.

8 THE COURT: That's what the statute said. Okay.

9 So if I do your portion number eight then I don't need
10 to do that case we dealt with in the other insert from
11 fraud?

12 MR. REIBOLD: I think it's either or.

13 MR. MOSKOS: Is that the --

14 THE COURT: That's when we first dealt with that I
15 read to you a minute ago.

16 MR. MOSKOS: The *Levine* case?

17 THE COURT: Huh?

18 MR. MOSKOS: *Levine* that I read earlier ---

19 THE COURT: Yeah.

20 MR. MOSKOS: --- dealing with the odometer statute?
21 Yes, sir, we don't have to do that one.

22 THE COURT: Okay. So I can leave this out and insert
23 this in. Okay. All right.

24 MR. MOSKOS: And your Honor is gonna read those items
25 that I had to list out this morning?

1 THE COURT: Right. Right. I am.

2 MR. MOSKOS: Oh, your Honor, one more thing.

3 THE COURT: I'm listening.

4 MR. MOSKOS: Yes, sir. On Monday I had ask the court
5 dealing with the - I had ask the court to require the
6 defendant to supplement it's discovery responses as far as
7 document production. We previously ask for and received
8 documents dealer financial statements.

9 THE COURT: Uh-huh.

10 MR. MOSKOS: These dealer financial statements go to
11 the franchise or the - go to the manufacturer and these
12 were produced to Honda and then produced to me. These to
13 to 2011, 2012 and 2013. I ask for '14 and '15 and
14 yesterday I was given a slip of paper, a yellow notepad
15 piece of paper with two numbers on them and the problem is
16 those numbers are half of what's on these. So in 2013 the
17 dealership had a net worth and then in 2014 it winds up
18 being half that maybe even less than that. So I would like
19 to actually see the documents that went to Honda '14 and
20 '15.

21 THE COURT: Okay.

22 MR. WALKER: Your Honor, I've hand wrote - Actually my
23 client hand wrote the numbers yesterday. I put them on his
24 desk; that's what he wanted. He mentioned the financial
25 statements. I told my guy this morning to email them to me

1 so they're on my computer and let me look at them and be
2 sure there is not any kind of issue. But assuming there's
3 not I'll just email them again.

4 THE COURT: Okay.

5 MR. MOSKOS: Well, I don't have any way to print them
6 off. I mean I'm not even sure my email will work in here.

7 THE COURT: Well as soon as I get the charge we'll
8 take a break and figure that out.

9 MR. MOSKOS: Yes, sir.

10 THE COURT: Okay. All right. All right, are we ready
11 for the jury?

12 MR. REIBOLD: I think so.

13 MR. WALKER: Yes, sir, thank you.

14 THE COURT: You want to check this verdict form? Be
15 sure to change --

16 MR. MOSKOS: I would also add to my comments and
17 request that the part dealing with the UCC being a bar to
18 any remedy; that the court take into consideration 25-1-
19 305. It actually deals with remedies to be liberally
20 administered. However it states the remedies provided by
21 this chapter shall be liberally administered. Obviously
22 it's the remedies in the UCC that are being dealt with and
23 as a result taking 606 and implying that remedy means any
24 and all remedy allowed by any claim goes too far. It's
25 only one that the UCC claims.

1 THE COURT: Okay. I guess we will make - We can
2 obviously argue that as to what remedies are barred based
3 on after we get a verdict.

4 They finished eating. I'm gonna bring 'em in and
5 totally confuse 'em.

6 (JURY REENTERS COURTROOM AT 02:09 PM.)

7 THE COURT: Ladies and gentlemen, I am going to now
8 charge you on the law that you are to apply in this case.

9 Okay, I apologize. This case has been somewhat
10 unusual in that the North Carolina applies, so, I've had to
11 get up to speed. I didn't know anything about North
12 Carolina law when I got here Monday. But as the trial
13 judge I have certain duties to perform in this trial and
14 one of which is rule upon the admissibility of the
15 evidence; that evidence that you are to hear. My other
16 duty is to charge you on the law that you are to apply and
17 so if you've got an opinion of what you think the law is
18 and what the law should be, and it differs from what I now
19 tell you the law is you are to disregard your opinion and
20 apply the law exactly as I give it here.

21 Now the same law and constitution that makes me the
22 exclusive judge of the law makes you the exclusive judge of
23 the facts. Under our law I'm not allowed to have an
24 opinion about the facts in this case. That is totally up
25 to you. So if I've said anything or done anything in this

1 case that you think I have an opinion about the facts, you
2 are to disregard that because I'm not allowed to have an
3 opinion about the fact; that is solely up to you.

4 Now the burden of proof in this case is by a
5 preponderance of the evidence. A preponderance of the
6 evidence simply means the greater weight of the evidence.
7 It is evidence is taken as a whole shows that the facts
8 sought to be proved is more likely true than not. This can
9 be illustrated by imagining a set of scales. When the case
10 beings the scales are even. After all the evidence has
11 been presented if the scales remain even or even tip
12 slightly in favor of the defendant the plaintiff has failed
13 to meet his burden of proof and would not be entitled to
14 recover in his case.

15 If on the other hand the scales are tipped either
16 slightly in favor of the plaintiff, the plaintiff would
17 have met his burden of proof and you should return a
18 verdict for the plaintiff. The preponderance of evidence
19 is not determined by the number of witnesses; instead it
20 must be determined by the greater weight of all of the
21 evidence.

22 And there are two types of evidence that's generally
23 presented during a trial. Direct evidence and
24 circumstantial evidence. Direct evidence is testimony of a
25 person who claims to have actual knowledge of a fact such

1 as an eyewitness. It is evidence which immediately
2 establishes the main fact to be proved. Circumstantial
3 evidence is proof of a chain of facts and circumstances
4 indicating the existence of a fact. It is evidence which
5 immediately establishes collateral facts from which the
6 main fact may be inferred.

7 Circumstantial evidence is based on inference and not
8 on personal knowledge or observation. It is proof that
9 does not allow actually the establishment of the fact in
10 question, but the search or describes something else from
11 which you may either reasonably infer the truth of the fact
12 or at least reasonably infer an increase in the probability
13 that the fact was true. For circumstantial evidence to be
14 sufficient to warrant a finding of a fact circumstances
15 must lead to that fact with reasonable certainty. The
16 facts and circumstances should be considered in the light
17 or ordinary experience and common sense. The existence of
18 a fact cannot be based on speculation, surmise, or
19 conjecture.

20 Now, you know, to give you an example of what I just
21 read, we've been in this courtroom at least that doesn't
22 have anyone that's in it. When I came in this morning it
23 wasn't raining. When you leave this courtroom this
24 afternoon if the ground is covered in water you could
25 assume that sometime while we were in here it rained

1 outside. That's circumstantial evidence. If you saw it
2 rain, that's direct evidence, and the law makes absolutely
3 not distinction between the weight or value to be given to
4 either direct or circumstantial evidence. Nor is there a
5 greater weight of certainty required of circumstantial
6 evidence than that of direct evidence.

7 Now, necessarily you must determine the credibility of
8 the witnesses' who have testified in this case.
9 Credibility simply means believability. It becomes your
10 duty as jurors to evaluate the evidence and determine which
11 evidence convinces you of it's truth. In determining
12 believability of the witnesses' who have testified in this
13 case, you may believe one witness over several witnesses,
14 or, several witnesses over one witness. You may believe
15 part of the testimony of a witness and reject the remaining
16 part of the testimony of that same witness. You may
17 believe the testimony of a witness in it's entirety, or,
18 reject the testimony of the witness in it's entirety. You
19 may consider whether a witness has an interest in the
20 result of the trial; whether the witness is prejudice
21 either for the plaintiff or the defendant, and the
22 opportunity for the witness to have seen the matters and
23 things about which the witness may have testified, and the
24 way the witness acted on the witness stand.

25 Now rules of evidence do not ordinarily permit a

1 witness to testify to opinions or conclusions. An
2 exception to this rule exist when witnesses we call expert
3 witnesses. A witness who by education and experience has
4 become an expert in some art, science, or profession may
5 give an opinion as to the subject that that witness claims
6 to be an expert in, and may also give reasons for that
7 opinion. You should consider any expert opinion given by a
8 witness like any other evidence and give it the weight you
9 think it deserves. And if you decide that an expert's
10 opinion is not based on sufficient education and
11 experience, or if you decide that the reasons given in
12 support of the opinion are not sound, or that the opinion
13 is outweighed by other evidence, you may disregard the
14 opinion in it's entirety.

15 An expert witnesses testimony is to be given no
16 greater weight than that of any other witness simply
17 because the witness is an expert. And you do not have to
18 accept the expert's opinion even though it is
19 uncontradicted.

20 Now, in our court's no distinction is made between
21 corporations and individuals. A corporation is a person in
22 the eyes of the law. A corporation is entitled to the same
23 fair and impartial consideration and to justice by the same
24 legal standards as an individual.

25 Now, the plaintiff alleges that the defendant has

1 breached a contract. The defendant contends that no
2 disclosure requirements imposed by the auction but concedes
3 that it did fail to make certain - of the newly required
4 disclosures and therefore in the breach of - and therefore
5 is in breach of the contract in this case. It is therefore
6 your task to determine what if any actual damages should be
7 recovered by the plaintiff in connection to the breach of
8 the contract.

9 Actual damages are the fair compensation to awarded
10 for any economic injury resulting from a breach of
11 contract. In determining the amount of actual damages, if
12 any, you award the plaintiff you will consider the evidence
13 that you have saw and heard to each of the following types
14 of damages. Direct damages, incidental damages and
15 consequential damages. Direct damages are the economic
16 losses that result or - I'm sorry - economic losses that
17 usually are customarily the result from a breach of a
18 contract. In this case the measurement of direct damages
19 is the difference between the sale price of the goods or
20 the vehicle at issue and the actual fair market at the time
21 of the sale.

22 The incidental damages include cost reasonably
23 incurred by the plaintiff, if any, prior to being able to
24 respond to the defendant's breach. Cost reasonably
25 incurred by the plaintiff in response to the defendant's

1 breach and cost reasonably incurred by the plaintiff, if
2 any, to minimize the lost resulted from the defendant's
3 breach.

4 Consequential damages include any loss resulting from
5 the plaintiff's circumstances if the defendant knew or
6 should have known about those circumstances at the time
7 that the parties entered into the contract. Consequential
8 damages do not include losses from which the plaintiff may
9 reasonably have prevented.

10 Parties injured by a breach of contract may be
11 entitled to recover special or consequential damages; that
12 is, actual or economic losses that occur because of the
13 special damages tending to the breach of the contract such
14 as the loss of profit from other transactions. Before you
15 may award such damages the plaintiff's must prove two
16 things by a greater weight of the evidence.

17 One: They must prove that as a result of the breach
18 of the contract they suffered consequential damages or loss
19 of profits other than transactions, and, that this loss was
20 within the common placement of the parties in the time they
21 made the contract. Consequential damages or loss of
22 profits would be withing the contemplation of the
23 contracting parties if the parties were aware of the
24 special circumstances or conditions from which would give
25 rise to consequential damages, or loss of profit, and, the

1 damages for loss of profits were reasonably foreseeable to
2 one who was aware of the special circumstances or
3 condition.

4 Number Two: The plaintiff's must prove the amount of
5 consequential damages or loss of profits withing a
6 reasonable degree of certainty. This does not mean the
7 plaintiff's must prove the amount of their loss with
8 mathematical certainty. It does mean however that these
9 damages if any may not be based on conjecture, speculation,
10 or guess work. An award of damages for loss of profit must
11 be based on actual fact from which the reasonable accurate
12 conclusion regarding the amount of loss can be logically
13 and rationally drawn. The plaintiff may recover damages
14 only for the damages that are direct and proximately caused
15 by the defendant's breach of contract.

16 Causation from damages is an essential element of the
17 plaintiff's case. Stated differently there can be no
18 recovery of damage for a breach of contract when those
19 damages are a direct - I'm sorry - direct and incidental or
20 consequential unless the plaintiff proves by a
21 preponderance of the evidence that those damages were
22 actually caused by the defendant.

23 A proximate cause is defined as a cause which a
24 natural and continuance consequences, unbroken by any new
25 or independent cause, produced the plaintiff's injury

1 without which the injures would not have occurred.

2 A person who - A person has a duty to exercise
3 reasonable care or competence in obtaining or
4 communicating information to others, or, a group of persons
5 that he knows will rely on that information supplied by
6 him. A breach of this duty is a negligent
7 misrepresentation. One of these - One of the issues of the
8 burden of proof is on the plaintiff - I'm sorry - on this
9 issue the burden of proof is on the plaintiff just like it
10 is on the other issues I talked to you about.

11 This means that the plaintiff's must prove by a
12 greater weight of the evidence six things.

13 First, is that the course of - that in the course of
14 his business the defendant supplied information to the
15 plaintiff. Second, that the defendant intended for the
16 plaintiff to rely on the information for guidance or
17 benefit in a particular business transaction. Third, the
18 information supplied by the defendant was false. Fourth,
19 that the defendant failed to exercise reasonable care or
20 competence in obtaining or communicating the false
21 information. Reasonable care of competence means that
22 degree of care, knowledge, and intelligence, or judgement
23 which a prudent person will use under the same or similar
24 circumstances.

25 Fifth, the plaintiff would actually have relied on the

1 false information supplied by the defendant and that the
2 plaintiff's reliance was justifiable. Actual reliance is
3 direct reliance upon false information. Reliance is
4 justifiable if under the same or similar circumstances a
5 reasonable person in the exercise of ordinary care would
6 have relied on the false information or would not have
7 discovered the information was false. And Sixth, that such
8 reliance proximately caused the plaintiff to incur
9 financial damage.

10 The amount - What amount is the plaintiff entitled to
11 recover from the defendant as his damages for negligent
12 misrepresentation? You have - If you have determined that
13 the defendant is liable for negligent misrepresentation the
14 plaintiff's are entitled to recover nominal damages even
15 without proof of actual damages. Nominal damages consist
16 of some trivial amounts such as one dollar in recognition
17 of a tangible injury to the plaintiff.

18 The plaintiff may also be entitled to recover actual
19 damages. On this issue the burden of proof is on the
20 plaintiff. This means that the plaintiff must prove by a
21 greater weight of the evidence the amount of actual damages
22 proximately caused by the negligent misrepresentation of
23 the defendant. The damages recovered for a negligent
24 misrepresentation are those necessarily to compensate the
25 plaintiff for his pecuniary loss proximately caused by the

1 misrepresentation of the defendant.

2 A pecuniary loss is a financial or monetary loss
3 suffered by the plaintiff. A pecuniary loss may include
4 the difference between the value of what the plaintiff has
5 received in the transaction and it's purchase price, or,
6 other value given for it and financial or monetary loss
7 suffered otherwise as a consequential - of the consequences
8 - I'm sorry - to the plaintiff's reliance upon the
9 misrepresentation.

10 The plaintiff's damages are to be reasonably
11 determined from the evidence presented. Your award must be
12 fair and just and you may not award any damages based on
13 speculation or conjecture. In this case the defendant
14 contends that the plaintiff and the plaintiff denied that
15 the plaintiff themselves were negligent in one or more of
16 the following respect.

17 In failing to conduct a sufficient inspection of the
18 automobile and discover it's condition when the vehicle was
19 sold under a red light before purchasing the vehicle, and
20 or, failing to conduct a sufficient inspection of the
21 automobile and discover it's true condition after the
22 delivery of the vehicle but within the arbitration period
23 provided by auction rules. The defendant further contends
24 and the plaintiff deny that the plaintiff's negligence was
25 the proximate cause of and contributed to the plaintiff's

1 own injury or damage.

2 Contributory negligence is not to be assumed from the
3 mere fact of injury or damage. Just as the law imposes
4 certain duties upon the defendant the law also imposes
5 duties upon the plaintiff. The plaintiff like all persons
6 have a legal duty to exercise due care for their own
7 protection.

8 Additionally as retail car dealer's in North Carolina
9 plaintiff's are required to inspect any vehicle for a
10 defect from which might make it a menace to those who might
11 use the vehicle or come in contact with the vehicle if they
12 undertook to repair or recondition the vehicle. Moreover
13 dealer's such as the plaintiff's are charged with the
14 knowledge of any defect from which are open and
15 discoverable in the exercise of due car.

16 Now, in considering contributory negligence did the
17 plaintiff's own negligence contribute to their injury or
18 damage? You will answer this question only if you've
19 already determined that the defendant made a negligent
20 misrepresentation. If you do not determine that the
21 plaintiff had made a negligent misrepresentation, there is
22 no need for you to also consider whether the plaintiff was
23 negligent.

24 On this issue the burden of proof is on the defendant.
25 This means that the defendant must prove by a greater

1 weight of the evidence that the plaintiff's were negligent
2 and that such negligence was a proximate cause of the
3 plaintiff's own injury or damage.

4 The test of what is negligent as I have already
5 defined is explained. It is the same as the plaintiff is
6 the defendant. If the plaintiff's negligence joins with
7 the negligence of the defendant, and the proximate cause of
8 the plaintiff's injury or damages, it is called
9 contributory negligence and the plaintiff cannot recover on
10 their claim when negligence or negligent misrepresentation.

11 A plaintiff's ordinary contributory negligence is a
12 bar to recover from a defendant who commits an ordinary act
13 - I'm sorry - who commits an act of ordinary negligence.
14 It is also well established that a contributory negligence
15 is a part of - on the part of the plaintiff is available as
16 a defense in an action which causes the defendant within to
17 violations - with violation of the statute or negligence
18 per s e. However, a plaintiff's ordinary contributory
19 negligence is not a bar to recover when a defendant's gross
20 negligence or willful or wanton conduct is the approximate
21 cause of the plaintiff's injury. Only gross negligence -
22 On gross contributory negligence by the plaintiff precludes
23 recovery by the plaintiff from a defendant who was grossly
24 negligent.

25 Now gross negligence is defined as a wanton conduct

1 done with conscious or reckless disregard for the rights
2 and safety of others. Willful or wanton conduct means the
3 conscious and intentional disregard of and indifference to
4 the rights and safety of others which the defendant knows
5 or should have known is reasonably likely to result in
6 injury, damage, or otherwise. Willful or wanton conduct
7 means more than gross negligence.

8 Now, one of the elements to the plaintiff's claim is
9 fraud. On this issue the burden of proof is on the
10 plaintiff. This means that the plaintiff must prove by a
11 greater weight of the evidence six things.

12 First, the defendant made a false representation of or
13 concealed a material past or existing fact. A concealment
14 occurs when a person fails to disclose that which under the
15 circumstances he should disclose. A person has a duty to
16 disclose all facts and materials to a transaction or event
17 when he is a fiduciary. He has made a partial or
18 incomplete representation or he's especially - or he is
19 specifically questioned about them. In an arm's lengthy
20 transaction a person has a duty to disclose if he is taking
21 affirmative steps to conceal material facts from the other
22 party.

23 Second, the false representation or concealment was
24 reasonably calculated to deceive. A representation is
25 calculated to deceive when the person who makes it knows it

1 to be false. Or makes it recklessly or without any
2 knowledge of it's truth or falseness as a positive
3 assertion.

4 Third, false representation was made or the
5 concealment was done with the intent to deceive and with
6 the intent to be acted upon.

7 Fourth, the plaintiff was and in fact deceived by the
8 false representation or concealment and acted upon it.

9 Fifth, the plaintiff's reliance upon the false
10 representation or concealment was reasonable. The
11 plaintiff's reliance would be reasonable if under the same
12 or similar circumstances a reasonable person in the
13 exercise of ordinary care of his own affairs would have
14 relied upon the false representation or would not have
15 discovered it - discovered the concealment.

16 Now, when a plaintiff claims - whether there is a
17 claim upon the plaintiff to establish the defendant's
18 intent the defendant's knowledge can be shown where the
19 defendant had limited information but failed to inquire
20 further because he was afraid of what the inquiry would
21 yield. Willful blindness is knowledge enough. A person
22 engaged in knowing - engages in knowing conduct when he
23 intentionally avoids actual knowledge by closing his eyes
24 to the fact which should prompt him to investigate.

25 Intentionally avoiding knowledge implies something

1 verifying own knowledge combined with a degree to escape
2 the consequences of that knowledge. A defendant which
3 deliberately closes his eyes so that he will not discover
4 what is suspected when he suspects is going on can be
5 charged with a form of knowledge or reckless disregard for
6 the truth.

7 And sixth, the plaintiff's has suffered damages as the
8 proximate cause of the defendant's conduct.

9 Reliance is not reason if the plaintiff fails to make
10 an independent investigation or if the plaintiff is
11 informed of the true condition of the property. To support
12 a fraud claim a plaintiff must demonstrate it was denied
13 the opportunity to investigate the property or should not
14 discover the truth about the property's condition by
15 exercising reasonable diligence. A plaintiff must also
16 show that it was induced to forego additional investigation
17 by the defendant's representative. I'm sorry, by a
18 defendant's misrepresentation.

19 If you determine that the defendant committed fraud,
20 as I had defined, then the plaintiff is entitled to recover
21 nominal damages even without proof of actual damages.
22 Nominal damages consist of some trivial amount such as a
23 dollar in recognition of a technical injury to the
24 plaintiff. The plaintiff may also be entitled to recover
25 actual damages on this issue and the burden of proof is on

1 the plaintiff and this means that the plaintiff must prove
2 by a greater weight of the evidence the amount of actual
3 damages caused by the fraud of the defendant.

4 Damages recoverable for fraud consist of an amount of
5 money that in so far as possible to put the plaintiff in
6 the same position or condition as if the fraud had not
7 occurred. The amount of that amount may include the
8 difference between the value of what was received and the
9 value of what was promised. Because a person inquiring
10 about the property by virtue of a commercial transaction
11 who has been defrauded by a false representation or
12 concealment may recover as damages the difference between
13 the actual value of the property at the time of the
14 transaction and the value would have been at the
15 misrepresentation or the representation had been true or
16 concealed in the form of a concealment information
17 disclosed.

18 The amount also may include financial or monetary
19 losses suffered by the otherwise - suffered otherwise by
20 the plaintiff as a result of the fraud. The plaintiff's
21 damages can be reasonably determined by the evidence
22 presented. Your award must be fair and just. You may not
23 award damages based on speculation or conjecture.

24 Now, the plaintiff has made a claim under the North
25 Carolina Unfair Trade Practice Act. Here the plaintiff

1 contends that the defendant committed unfair trade
2 practices by failing to inspect the car prior to putting it
3 up for sale. Failing to disclose the damage of the vehicle
4 and the reconstruction of the vehicle by - and by
5 affirmatively checking on the vehicle block that the
6 vehicle was not damaged more than twenty-five percent. And
7 failing to disclose under body damages per the Matrix. And
8 failing to disclose the recondition nature of the car. Or
9 the reconstruction nature of the car I guess.

10 Failing to follow state law and failing to disclose
11 under the North Carolina Common Law practices. In order to
12 establish the defendant's liable for committing an unfair
13 or deceptive trade practice a plaintiff must show that the
14 defendant did at least one of the following things. In
15 those you must find that at least one of the things that I
16 just read to you that the plaintiff - I mean the defendant
17 is guilty of. And on this the burden of proof is on the
18 plaintiff which simply means that the plaintiff must prove
19 by the greater weight of the evidence that the plaintiff
20 did at least one of the acts that I have described to you.

21 Assuming you find that the defendant's committed an
22 act or actions described above then you would consider
23 whether the defendant's actions were in commerce or
24 affecting commerce. On this issue the burden of proof is
25 on the plaintiff. This means that the plaintiff must prove

1 by a greater weight of the evidence that the defendant's
2 conduct was either in commerce or that it effected
3 commerce.

4 Conduct is in commerce when it involves business
5 activity. Conduct affects commerce whenever a business
6 activity is adversely and substantially effected. To
7 establish that the defendant is responsible for committing
8 an unfair and deceptive trade practice under North Carolina
9 law the plaintiff must also establish that the alleged
10 unfair or deceptive act or practice was the proximate
11 result of the injury of the plaintiff. On these issues the
12 burden of proof is on the plaintiff to prove by a greater
13 weight of the evidence two things.

14 First, that the plaintiff's business had been injured.
15 And two, that the defendant's conduct was the proximate
16 cause of the injury of that business. Approximate cause is
17 the cause which in a naturel and continuous - I'm sorry - a
18 natural and conscientious sequence produces the injury and
19 that it is a cause which a reasonable and prudent person
20 would have foreseen would probably produce such an injury
21 or some similar injurious results. There may be more than
22 one approximate cause of an injury therefore the plaintiff
23 need not prove the plaintiff's conduct was the sole
24 proximate cause of the plaintiff's injury.

25 The plaintiff must prove by a greater weight of the

1 evidence only that the defendant's conduct was the
2 proximate cause. However the defendant's conduct would not
3 be considered a proximate cause of injury to the
4 plaintiff's business for purpose of claiming under the
5 North Carolina Unfair Trade Practice Act unless the
6 plaintiff can also prove that they actually relied on the
7 misrepresentatoin made by the defendant and the reliance
8 was reasonable. Actual reliance requires that the
9 plaintiff affirm to incorporate the alleged
10 misrepresentation into the decision making process and that
11 is that if it were not for the misrepresentation the
12 plaintiff would likely have avoided the injury all
13 together.

14 The plaintiff's reliance would be reasonable if under
15 the same and similar circumstances a reasonable person in
16 exercise of ordinary care of his own interest would have
17 relied on the misrepresentation. The reliance is not
18 reasonable but the plaintiff should have discovered the
19 truth of the matter to the reasonable degree of - to the
20 reasonable diligence but failed to investigate.

21 If you have concluded that the defendant committed an
22 unfair trade practice upon the defendant upon which the
23 defendant actually and reasonably - I'm sorry - from which
24 the plaintiff actually and reasonably relied then you
25 should determine the amount by which the plaintiff's

1 business had been injured. The plaintiff's are entitled to
2 recover nominal damages even without proof of actual
3 damages. Nominal damages is as I've told you three other
4 times consist of trivial amounts such as one dollar in
5 recognizing the technical damages caused by the wrongful
6 conduct of the defendant.

7 The defendant may also be required to prove the actual
8 damages and I defined actual damages to you in the past is
9 the amount of actual damages sustained as a result of
10 injury to the plaintiff's business.

11 Such damages would not include the loss of the bargain
12 to the plaintiff as well as any other incidental or
13 consequential damages such as the proper result of the
14 defendant's alleged conduct. The loss of the benefit of
15 the plaintiff's bargain is measured by the difference
16 between the sale price of the goods or the vehicle at the
17 issue and their actual fair market value at the same time.

18 If a buyer fails to notify the seller of the breach
19 within a reasonable time the buyer is barred from any
20 remedy.

21 Now, Madam Foreman, I have a probable verdict form
22 that I'm gonna send back with you. It's the caption of the
23 case and it's a number of questions that y'all need to
24 answer. And they're pretty well self-explanatory. One
25 deals with breach of contract. On the count of breach of

1 contract you simply state the amount if any of the actual
2 damages that the plaintiff has proven.

3 Number two deals with negligent misrepresentation. On
4 that count you determine - you find either for the
5 plaintiff or for the defendant. If you find for the
6 plaintiff you need to fill in the amount of those damages
7 if any. Number three is fraud. On the count of fraud you
8 either find for the plaintiff or the defendant. And if you
9 find for the plaintiff on that count you simply would fill
10 in the amount in the actual damages that you think the
11 plaintiff has proven. Count four deals with unfair trade
12 practice. And if you find that they violated the North
13 Carolina Unfair Trade Practice Act on this you check yes or
14 no. If you check yes then you would fill in the amount of
15 damages if any. On number five - and the question you have
16 to decide is when do you find that the North Carolina
17 Damages Disclosure Statement that was presented into
18 evidence provided by the plaintiff was at the time of the
19 transaction or sometimes after the plaintiff paid for the
20 car. I need you to make that finding and check which ever
21 one those y'all find as the truth.

22 Now, if you find in favor of the defendant on the
23 plaintiff's claim for negligent misrepresentation, fraud,
24 or unfair trade practice, then your deliberations are
25 complete. However if you found in favor of the plaintiff

1 on all of these or any of these then you are to move like A
2 negligent misrepresentation. If you find in favor of the
3 plaintiff on this claim was you base only on the North
4 Carolina damages disclosure you need to put yes or no.

5 If you find that was based on that disclosure sheet
6 you'd answer that yes or no. And it's the same way with
7 fraud and it's the same way with the unfair trade practice.

8 Now, you - your decision on each one of these has got
9 to be unanimous. I mean all twelve of you got to agree.
10 And so you can't write down the verdict on each form until
11 y'all deal with it. When you do - when you have reached a
12 verdict simply knock on the door I'll bring you back out
13 and we'll receive your verdict. Now, I got to go over my
14 charge with the lawyers to be sure I haven't left out
15 anything. I know it was long and I may have. But if I
16 have I will bring you back out and clear that up. If I've
17 covered everything then I will send this verdict form back
18 with you along with all the evidence. When you get this
19 verdict form that will be your indication to begin those
20 deliberations. If at any time during your deliberation one
21 of you need to be excused and need to go to the restroom or
22 whatever you got stop talking about the case. You can only
23 talk about it when all twelve of you are in the room. You
24 come back and continue your deliberations.

25 If you have a question if you will write it down on a

1 piece of paper and give it to the bailiff I will bring you
2 back out and try to answer it. Having said that I can only
3 answer a question of law. I can't answer a question of
4 fact so if you have some factual question about some
5 testimony I can't answer that. You've heard all you're
6 gonna hear and I can't - I can't answer those questions fo
7 you. I can only answer questions of law. If you have a
8 legal question I can bring you back out and try to explain
9 the law to you. But a factual question you've heard all
10 the evidence you can't reopen the case and present any more
11 so you've got to decide on what they gave you. Okay.

12 I'll send you back. Don't start yet. When you get
13 this and the evidence that will be your indication to
14 start. If I've left something out I'll bring you back out.
15 Okay.

16 (JURY EXITS COURTROOM FOR DELIBERATIONS AT 02:48 PM.)

17 THE COURT: Okay. Any exceptions or deletions on
18 behalf of the plaintiff?

19 MR. MOSKOS: Well, no, sir. The only issue that I
20 would have is just simply the - with all due respect the
21 way the UTPA those items that I had to give to you, I'm not
22 sure that they came across. They were kind of abbreviated.

23 THE COURT: I know and I wrote 'em down. I guess
24 after you forgot to write 'em down. I mean I took -

25 MR. MOSKOS: I mean they got the idea. I mean it only

1 takes one. I'm just not sure what to do about it whether
2 me to give you my sheet and make sure you can read my
3 handwriting, or, maybe wait until they have a question or.
4 I mean the down side is if they come out and find against
5 me there's no way - I don't know. I'm not even sure that
6 that's - Frankly I'm not sure that's an issue because they
7 have all the facts anyway.

8 THE COURT: I know. And they did and they had those
9 issues and if they believe -- I don't know how to put in
10 there other than I make a -- I was trying to be as brief as
11 possible simply because I didn't want to comment on the
12 facts.

13 MR. MOSKOS: Yes, sir.

14 THE COURT: I spent the last thirty-five years
15 training not to do that in dealing with that and you didn't
16 want me to do that.

17 MR. MOSKOS: Yes, sir.

18 THE COURT: I don't know - I understand it was brief.
19 I was just scared if I get too far it seems to have led in
20 with the other and that's how I ended up where I did.

21 MR. MOSKOS: Yes, sir.

22 THE COURT: All right.

23 MR. MOSKOS: As far as the defendant's, your Honor, we
24 would incorporate by referencing our prior objections but
25 nothing new.

1 THE COURT: Okay. I'll take all of those we covered.
2 Now what I need for y'all to do is get the evidence
3 together. Be sure because --

4 MR. WALKER: The court reporter's done a very good
5 job.

6 THE COURT: But if something gets missing I want y'all
7 to get blamed and not her so I want y'all to agree with
8 what she's got and here's the verdict form.

9 (WHEREUPON, PLAINTIFF'S EXHIBIT ONE THRU FORTY-SEVEN;
10 FORTY-NINE THRU NINETY-THREE ALL IDENTIFIED AND PREVIOUSLY
11 MARKED, ENTERED INTO EVIDENCE.)

12 MR. WALKER: And, your Honor, the only remaining loose
13 end, before we keyed the case up I had a motion to compel
14 and to produce this settlement with Nationwide, we're at
15 that point, so ---

16 THE COURT: Okay.

17 MR. WALKER: --- I move to compel --

18 MR. MOSKOS: And I would object because I have a
19 confidential settlement with them that does not relate to
20 any of the amounts paid in this or that the defendant is
21 responsible for.

22 MR. WALKER: The damage here is in solito, it's one
23 loss.

24 MR. MOSKOS: Not necessarily.

25 MR. REIBOLD: Our rights can't be comprised by a

1 private agreement between two other people.

2 THE COURT: Well if the only issue is as to the
3 verdict. Right? You're entitled to a set off.

4 MR. REIBOLD: Yeah.

5 THE COURT: So we'll deal with that I guess when we
6 get there.

7 MR. WALKER: I just didn't want to wait and get the
8 jury back in and you feel surprised, Judge.

9 THE COURT: I understand. Gentlemen, this has been a
10 difficult case simply because we've been dealing with other
11 jurisdictions but I think y'all both did a very good job
12 and I appreciate it.

13 MR. MOSKOS: Thank you, Judge.

14 MR. WALKER: Well, we really appreciate your help.

15 THE COURT: Okay. You got the verdict form?

16 All right. If y'all take it back and ask them to
17 deliberate. And then we'll come back and deal with
18 whatever we need to deal with.

19 (COURT IN RECESS AT 02:58 PM.)

20 (COURT BACK IN SESSION AT 03:45 PM.)

21 (WHEREUPON, COURT'S EXHIBIT NUMBER ONE, IDENTIFIED AND
22 MARKED, RECEIVED INTO EVIDENCE.)

23 THE COURT: I'm told we have a note from the jury.
24 They got a question.

25 MR. MOSKOS: Can you tell me what they're asking or do

1 we have to wait 'til Clay gets here?

2 THE COURT: I don't know that. They want me to re-
3 charge them on fraud, unfair trade practice. And then,
4 they want both Plaintiff and Defendant's calculation on
5 expenses and losses. I can't give them that.

6 MR. MOSKOS: Are you talking about like attorneys'
7 fees and costs?

8 THE COURT: What did you all put up in closing
9 arguments, those numbers you all wrote down.

10 MR. MOSKOS: Oh. Can we show 'em again?

11 THE COURT: No.

12 MR. MOSKOS: No.

13 THE COURT: Not under the rules, that I know of. You
14 see, it's not in evidence. They just have to use their
15 recollection.

16 MR. MOSKOS: Even by stipulation? Clay puts up his, I
17 put up mine, no objection?

18 THE COURT: I don't know? I guess you can do almost
19 anything by stipulation. We get him in here we'll see.

20 MR. MOSKOS: That's a -- Okay. You've obviously tried
21 more cases than I have, Judge. So, I don't -- I don't
22 know.

23 THE COURT: If it's not in evidence, and you know,
24 they didn't have it. Its in evidence -- but I can't, I
25 can't tell them anything that wasn't in evidence.

1 MR. MOSKOS: Yes, sir.

2 (ATTORNEY WALKER ENTERS COURTROOM.)

3 THE COURT: Okay, gentlemen, we have a question from
4 the jury. They want -- We need a legal explanation of
5 fraud, and an explanation of unfair trade practices and
6 they want me to recharge them on that. And then, they need
7 both the Plaintiff and Defendant's calculation of expenses
8 and losses.

9 Now, that's something that I normally can't give them,
10 but that's what y'all did in closing arguments. It's not
11 in evidence, so. So, I propose we bring them back in and
12 re-charge them on those two issues.

13 MR. WALKER: Yes, sir.

14 MR. MOSKOS: And I suggested that -- or I suggest that
15 one thing we could do is to just put them up on the easels
16 and let the jury look at them and without any comment.

17 And side-by-side.

18 THE COURT: And that's something both of y'all got to
19 stipulate to, because that's not normally something I can
20 allow.

21 MR. WALKER: Your Honor, I think mine's probably on
22 two pages, so, we've got three easels. So, I mean --

23 THE COURT: And if y'all want to agree to that and
24 stipulate to it, I guess we can present it to where they
25 can see it. Is that what both sides want to do?

1 MR. WALKER: We can.

2 MR. MOSKOS: Yes, sir. Otherwise, it would be doing
3 it off --

4 THE COURT: So, can you all figure out how to do that
5 before I bring them in here?

6 MR. WALKER: I don't know if mine's on one page or
7 not. I don't remember.

8 MR. MOSKOS: Well, the ultimate number is. Mine is.

9 MR. WALKER: Your Honor, we may block your view doing
10 this.

11 THE COURT: That's fine. Well, what if you get it
12 ready, and after I charge them on this, I'll just let y'all
13 show 'em? You just can't say anything. Will that work?
14 Because I'm not really sure they can understand me if they
15 can't see me.

16 MR. MOSKOS: Oh, I have no problems. You tell me when
17 to stand up, and I'll put it up. That's fine with me.

18 THE COURT: And what I'll do is, you all stipulate to
19 them; I'll re-charge them on this issue; and then, I'll
20 say, ladies and gentlemen of the jury, both attorneys will
21 now show you their poster board that they presented in
22 closing arguments, and you all just show that. That suit?

23 MR. MOSKOS: That's fine.

24 THE COURT: Okay. Bring them in.

25 (JURY RE-ENTERS COURTROOM AT 03:55 PM.)

1 THE BAILIFF: Jury panel is entered, your Honor.

2 THE COURT: Okay. Thank you.

3 Madam Foreman, it's my understanding that you need
4 another charge, for me to repeat the charge on fraud and
5 the unfair trade practice law. Is that correct?

6 MADAM FOREPERSON: Yes. Yes, sir.

7 THE COURT: Okay. All right. And I'll just basically
8 read you all the charge, and the same thing I read you
9 before on fraud. And then, -- and I understand, Ms.
10 Foreman, so.

11 On these, the burden of proof is on the plaintiff.
12 This means that the plaintiff must prove by a greater
13 weight of the evidence six things. This is on fraud.

14 First, that the defendant made a false representation
15 of, or, concealed a material past or existing fact. A
16 concealment occurs when a person fails to disclose that
17 which, under the circumstances, he should have disclosed.
18 A person has a duty to disclose all facts material to the
19 transaction or event when he is a fiduciary. If he has
20 made a partial or incomplete representation, or if he is
21 specifically questioned about them in an arm's-length
22 transaction, a person has a duty to disclose if he has
23 taken affirmative steps to conceal material facts from the
24 other party.

25 Second, a false representation or concealment was

1 reasonably calculated to deceive. A representation is
2 calculated to deceive when the person who makes it knows it
3 to be false, or makes it recklessly, without any knowledge
4 of its truth or falsity, as a positive assertion.

5 Thirdly, the false representation was made or the
6 concealment was done with the intent to deceive, and with
7 the intent to be acted upon.

8 Fourth, the plaintiff was, in fact, deceived by the
9 false representation or concealment and acted upon it.

10 Fifth, the plaintiffs' reliance upon the false
11 representation or concealment was reasonable. The
12 plaintiffs' reliance would be reasonable if, under the same
13 or similar circumstances, a reasonable person, in
14 exercising ordinary care for his own welfare, would have
15 relied on the false representation; or would not have
16 discovered the concealment.

17 Now, while a claim arises -- a claim requires the
18 plaintiff to establish the defendant's intent. The
19 defendant's knowledge can be shown when the defendant had
20 limited information, but failed to inquire further because
21 he was afraid of what the inquiry would yield. Willful
22 blindness is knowledge enough. A person engages in knowing
23 conduct when he intentionally avoids actual knowledge by
24 closing his eyes to the fact which should prompt him to
25 investigate. Intentionally avoiding knowledge implies

1 something verging on knowledge, combining with the desire
2 to escape the consequences of knowledge. A defendant which
3 deliberately closes his eyes so that it will not discover
4 what it suspects is going on can be charged with a form of
5 knowledge, or reckless disregard for the truth.

6 And six, the plaintiff suffered damages as a proximate
7 result of the defendant's conduct.

8 Reliance is not reasonable if Plaintiff fails to make
9 an independent investigation, or if the plaintiff is
10 informed of the true condition of the property. To support
11 a fraud claim, the plaintiff must demonstrate it was denied
12 -- I'm sorry -- must demonstrate it was denied an
13 opportunity to investigate the property; or could not
14 discover the truth about the property's condition by
15 exercising reasonable diligence.

16 A plaintiff must also show that it was induced to
17 forego additional investigation by the plaintiff -- by the
18 defendant's misrepresentation.

19 If you determine that the defendant committed fraud as
20 I have defined it, then the plaintiff is entitled to
21 recover nominal damages and nominal damages could be a
22 trivial amount, such as a dollar, in recognition of a
23 technical injury to the plaintiff.

24 He's also entitled to recover actual damages. You
25 all, I went through actual damages before. You want me to

1 go through it again? Okay.

2 Now, under North Carolina Unfair Trade Practice Act.
3 Here, the defendant is contending that the defendant
4 committed -- was guilty of committing an unfair trade
5 practice. And this is where the plaintiffs contend the
6 defendant did wrong. The defendant failed to inspect the
7 car prior to the sale in North Carolina. That was number
8 one.

9 Number two: The defendant failed to disclose damage
10 about the vehicle.

11 Number three: The defendant failed to affirmatively
12 check the vehicle, check the block that the vehicle was
13 damaged more than twenty-five percent.

14 Number four: The defendant failed to disclose -- I
15 can't read my own writing. Oh, underbody damage, as per
16 the matrix.

17 Number five: The defendant failed to disclose the
18 reconstructive nature of the car.

19 Number six: Defendant failed to follow state law.

20 And number seven: The defendant failed to disclose
21 under North Carolina common law. Those are the factors
22 that the plaintiff claims that the defendant did wrong.

23 In order to establish that the defendant's libel for
24 committing an unfair trade, or deceptive trade practice,
25 the plaintiff must show that the defendant did at least one

1 of those following things. And the burden of proof, as I
2 have told you, is on the defendant -- I mean, on the
3 plaintiff, and they must prove that the defendant did one
4 of these things by a preponderance of the evidence.

5 Assuming you find that the defendant committed an act
6 or acts as described above, then you will consider whether
7 the defendant's actions were actions in commerce, or
8 affecting commerce. One of the issues and the burden of
9 proof is on the plaintiff, and this means that they must
10 prove by a greater weight of the evidence that the
11 Defendant's conduct was either in commerce, or that it
12 affected commerce.

13 And the definition of commerce, conduct -- commerce is
14 conduct in commerce when it involves a business activity.
15 Conduct affects commerce whenever a business activity is
16 adversely and substantially affected. To establish the
17 defendant is responsible for committing an unfair or
18 deceptive trade practice under North Carolina law, the
19 plaintiff must also establish that the alleged unfair or
20 deceptive practice was the proximate result of the actual
21 injury to the plaintiff. And the burden of proof is on the
22 plaintiff, as I said, to prove this.

23 And first that the business -- the plaintiffs'
24 business was injured, and the conduct was the proximate
25 cause of that injury; and that the proximate cause is a

1 cause which is in the natural or continuous sequence
2 produces the injury, and is a cause which reasonably --
3 which a reasonable and prudent person could have foreseen
4 it would be probably -- probably produce such injuries or
5 similar injuries resulted.

6 And there may be more than one proximate cause of the
7 injury. And then, but Plaintiff need only to prove that
8 the defendant's conduct was the sole cause of the injury to
9 the business, the plaintiff. They don't have to prove that
10 it was the sole cause.

11 The plaintiff must prove by a greater weight of the
12 evidence only that the defendant's conduct was a proximate
13 cause. However, the defendant's conduct will not be
14 considered a proximate cause of injury to the plaintiffs'
15 business for purposes of claiming under the North Carolina
16 Unfair Trade Practice, unless the plaintiff can also prove
17 that they actually allowed the representation made by the
18 defendant, and their reliance was reasonable.

19 Reliance requires that the plaintiff firmly
20 incorporated the alleged misrepresentation into their
21 decision-making process. That is, if it were not for the
22 misrepresentation, then the plaintiff would likely have
23 avoided the injury altogether. The plaintiff's reliance
24 would be reasonable if, under the same or similar
25 circumstances, a reasonable person, in the exercising of

1 ordinary care in its own interests, would have relied on
2 the misrepresentation. But reliance is not reasonable when
3 the plaintiff could have discovered the truth of the matter
4 through reasonable diligence, but failed to investigate.

5 Then, if you find that the defendant committed an
6 unfair trade practice, which the defendant actually
7 reasonably relied on -- the plaintiff actually relied upon,
8 then it's just a question of damages. And it's the same
9 damage principle, you will award one dollar, or actual
10 damages, and I'll be glad to explain that to you again, but
11 you all told me last time you had that covered. Okay?

12 That is the law on fraud. Well, one other thing. If
13 the buyer fails to notify the seller of a breach within the
14 time frame, the buyer is barred from any remedy under the
15 law. Now, normally -- y'all have also asked that both the
16 plaintiff and defendant's calculation on expenses and
17 losses. Is that correct?

18 JURY FOREPERSON: Yes, sir.

19 THE COURT: That's not something that was introduced
20 into evidence. But by stipulation of the attorneys, I'm
21 going to allow them to show you their boards that they
22 calculated in closing arguments. Okay?

23 And if y'all would just simply show the jury y'all's
24 calculations that you came up with in closing arguments.

25 MR. WALKER: I'm going to try to get this out of your

1 way, Judge.

2 THE COURT: No problem. I hope we've done -- I can
3 stand up if I get to talk anymore.

4 MR. WALKER: Your Honor, I'm going to flip over to the
5 second page.

6 THE COURT: Okay. No problem.

7 MR. WALKER: Thanks, Judge.

8 THE COURT: When you all have seen enough ---

9 JURY FOREPERSON: We did.

10 THE COURT: --- let me know, and you all can go back
11 to the jury room.

12 JURY FOREPERSON: We did.

13 THE COURT: Thank you.

14 JURY FOREPERSON: Thank you.

15 (JURY EXITS COURTROOM AT 04:08 PM.)

16 THE COURT: Okay.

17 MR. MOSKOS: I have two things, your Honor.

18 THE COURT: Okay.

19 MR. MOSKOS: The first thing, and Mr. Reibold and I
20 had mentioned it beforehand, and you got into the jury
21 charge the first time, and talked about commerce. We've
22 already stipulated to that. The parties stipulated that
23 this is a case in commerce, and that's not a decision that
24 they have to make. I didn't think this was going to come
25 up, so, I didn't think to mention it again, so.

1 THE COURT: Well, I --

2 MR. MOSKOS: So.

3 THE COURT: And now -- if you told that, I don't
4 remember it, but I -- I think it's pretty clear from the
5 facts that this is a case in commerce, and I don't think
6 the jury can dispute that, but.

7 MR. MOSKOS: Well, that's why I didn't make a big deal
8 of it, so.

9 MR. REIBOLD: That's why we stipulated to that. I
10 can't see the harm to the charge.

11 THE COURT: I know.

12 MR. REIBOLD: But we did agree.

13 THE COURT: This said they must -- and I defined
14 commerce as business, and this clearly was in business, so.

15 MR. MOSKOS: The second thing is, when you were --
16 your Honor went through the items that I gave you on the
17 UTPA, you got to the second one, and you talked about
18 failing to disclose ---

19 THE COURT: Right.

20 MR. MOSKOS: --- the damage, but you didn't mention
21 that it was failing to disclose the reconstructed nature of
22 the car under the North Carolina Disclosure Statement. It
23 was just kind of like.

24 THE COURT: Okay.

25 MR. REIBOLD: You did say reconstructive nature of the

1 car but I don't think you mentioned the statement.

2 THE COURT: And then you got the statement.

3 MR. MOSKOS: Right.

4 THE COURT: You want me to bring them back in and
5 explain that? Because I didn't write statement on my
6 notes, and I should have.

7 MR. WALKER: And my concern is gonna be we're going to
8 bury the charge that was given to them the first time.

9 THE COURT: Of course it -- I mean, the statement is
10 the whole reason -- that's the whole box they check.

11 MR. MOSKOS: Yes, sir.

12 THE COURT: I'll try to correct that if you think -- I
13 don't know.

14 MR. MOSKOS: Other than just to read them all again.

15 MR. REIBOLD: I wouldn't want to read them all again.

16 THE COURT: I know.

17 MR. REIBOLD: That would --

18 MR. MOSKOS: Well, I mean, as opposed to singling one
19 out. I don't know.

20 THE COURT: Well, I mean, --

21 MR. MOSKOS: I wanted to say something while you were
22 saying it, but I thought I would get into some serious
23 trouble.

24 THE COURT: Well, the fact that they didn't disclose
25 it, period, they didn't disclose it on the statement, they

1 didn't disclose it at all, they checked no on the
2 statement. They had that into evidence.

3 MR. MOSKOS: Yes, sir.

4 THE COURT: I read that. One of the issues is they
5 didn't disclose it. They didn't disclose it on the
6 statement nor did they disclose it verbally, so, maybe I
7 guess that would have covered it.

8 MR. MOSKOS: You know, I don't know what a juror
9 latches onto. They may say well, you didn't talk about
10 that last item, so that must not be part of it. I don't
11 know.

12 THE COURT: If I bring them back, then I feel they're
13 going to do the whole thing again. At least that part,
14 versus if I read them that one line. I think it'll
15 probably be all right. If I'm wrong -- I think they --
16 that covered it. And I -- Let's talk about the next phase.
17 It is -- are we going into phase two tonight? And I
18 understand you got a plane to catch and I'll be glad to --
19 How long -- if it gets that far. And let's -- If they
20 check block one on contract and nothing else, and my
21 understanding on the law, that's it, we don't get to
22 punitive.

23 MR. MOSKOS: I would think that is correct.

24 THE COURT: Now, if they check anything else, I assume
25 they do get punitive.

1 MR. REIBOLD: Your Honor, I think if they check unfair
2 trade practices, obviously there's no punitive damages, in
3 addition to trible damages on that claim.

4 I didn't think if they were to check negligent
5 misrepresentation, I don't think, under North Carolina law,
6 they get to the -- gross negligence isn't enough, that just
7 -- just like you were talking about earlier. So, I think
8 if it's for punitive, it's going to have to be the fraud.

9 THE COURT: Okay. Do you have an issue on that?

10 MR. MOSKOS: As I think I've said before, Judge, I was
11 up late last night, so I'm pretty tired. I think we've
12 discussed that already with the negligent misrepresentation
13 issue.

14 THE COURT: And I don't think it gets -- and we
15 discussed that yesterday before I read the statute. But
16 under the definition of punitive damages statute you've got
17 those criteria.

18 MR. MOSKOS: Yes, sir.

19 THE COURT: And they have to -- you know, and it's got
20 to be wanton and willful conduct, so. And then, I guess
21 ---

22 MR. MOSKOS: Well, and that --

23 THE COURT: --- and if they do find fraud, then --
24 then I need to charge them on that.

25 MR. MOSKOS: Well, now, thinking about it, I mean,

1 that would have been the reason to have willful and wanton
2 on there. Maybe specifically under negligence or
3 something. I don't know.

4 THE COURT: But willful and wanton is not an element,
5 is it?

6 MR. REIBOLD: No, it's not.

7 THE COURT: It's not an element under North Carolina
8 law. That's why it wasn't in there. It's my understanding
9 it was not one of the elements, so, under that. So, fraud
10 is what gets you there. He didn't do an unfair trade
11 practice you treble damages. Okay. So, from a practical
12 standpoint, if we get a verdict -- we will get one tonight,
13 I assume, or we'll get a hung jury. If we get a verdict,
14 do you want -- I mean, how are we going to bifurcate? Are
15 you all going to -- we going to put up evidence and worth
16 and all that kind of stuff, and breach -- and you all can
17 argue and and we gonna re-charge?

18 MR. MOSKOS: Yes, sir. That's what I would expect.

19 THE COURT: And you all want to do that tonight?

20 MR. WALKER: I've got no clue how long the plaintiffs'
21 case would be, and that might influence things.

22 THE COURT: I know. And I don't know, either.

23 MR. MOSKOS: Well, shouldn't be too long. I mean,
24 we're dealing with one issue. And we've got to get the --
25 the net worth, the official document.

1 MR. WALKER: I've emailed my office to make a copy and
2 bring it over here.

3 THE COURT: All right.

4 MR. MOSKOS: And then, -- and then, I guess argue.

5 THE COURT: Well, do you think it's going to take an
6 hour, an hour and thirty minutes, twenty minutes?

7 MR. MOSKOS: Judge, every time I say, you know, thirty
8 minutes, it winds up being two hours. I would say --

9 THE COURT: Well the log --

10 MR. MOSKOS: I mean.

11 THE COURT: I mean the logical thing at this time I'd
12 bring 'em back in the morning, and start at it in the
13 morning. Simply because --

14 MR. MOSKOS: They look tired.

15 THE COURT: I know they do. Now, if you -- You got
16 somebody? Can you cover for him tomorrow, and let him go
17 catch a plane?

18 MR. WALKER: He's got a doctor's note.

19 MR. REIBOLD: I'm scheduled for surgery in the
20 morning.

21 MR. WALKER: So, I'm going to be re-booking my plane
22 if I have to.

23 THE COURT: Okay. I mean, I --

24 MR. WALKER: I understand.

25 MR. MOSKOS: You -- I'd be willing to move it up to

1 nine o'clock, I mean, instead of starting at nine thirty,
2 maybe nine o'clock, and knock it out.

3 THE COURT: I mean, I'll be glad to accommodate you
4 any way I.

5 MR. WALKER: Well, if we could do that, that would be
6 great, Judge.

7 THE COURT: Sure. I'll get here early. I got here
8 this morning. You all didn't give me much sleep, but I'm
9 gonna take the North Carolina bar. We can do it -- I mean,
10 it obviously depends on what box they check.

11 MR. MOSKOS: Well, sure. It may be a non-issue.

12 THE COURT: I assume, at this point, it's too late to
13 settle this thing, y'all.

14 MR. MOSKOS: I don't have any money, Judge. I'm
15 broke.

16 THE COURT: I understand. But you're a long way apart
17 from where they were. That's up to you all. I don't --

18 MR. WALKER: I understand. And I -- you know, we were
19 -- can we go off the record?

20 THE COURT: Sure.

21 (OFF THE RECORD AT 04:16 PM.)

22 (COURT IN RECESS AT 04:18 PM.)

23 (WHEREUPON, COURT'S EXHIBIT NUMBER TWO, IDENTIFIED AND
24 MARKED, RECEIVED INTO EVIDENCE.)

25 (COURT BACK IN SESSION AT 05:22 PM.)

1 THE COURT: If there is one charge that we cannot
2 agree upon, does that make the remaining charges -- I can't
3 read it -- null and void -- something null and void.

4 In regards to the fraud charge, must all six points be
5 met? So, how do you all want me to answer that?

6 MR. MOSKOS: Well.

7 MR. WALKER: On the second part, the answer is pretty
8 obvious.

9 MR. MOSKOS: And I would probably ask that we send it
10 back, and make sure that -- that you can read whatever
11 they're saying.

12 THE COURT: You all can come and try. If there is one
13 particular charge that we cannot agree upon, does that make
14 the remaining charges -- I just don't know what that word
15 is right there. Bring them on in.

16 MR. WALKER: Yeah, it -- does that make the remaining
17 charges agreed upon null and void?

18 MR. MOSKOS: Except I think she left off the D.

19 MR. WALKER: Well, more important. That's what I'm
20 saying, obviously on the second part, obviously. But on
21 the first part, I'm assuming it's got to be a complete and
22 unanimous verdict as to all or a mistrial.

23 THE COURT: Do you agree with that?

24 MR. MOSKOS: I think that's probably right.

25 THE COURT: All right. Bring them in. You going to

1 get 'em?

2 (JURY RE-ENTERS COURTROOM AT 05:23 PM.)

3 THE BAILIFF: Jury panel all seated, your Honor.

4 THE COURT: Thank you. Madam Foreman, I've got two
5 questions from y'all. If there is one particular charge
6 that we cannot agree upon, does that make the remaining
7 charges agreed upon null and void? The answer to that is,
8 you got -- you got to make a finding on all charges before
9 I can receive your verdict.

10 In regards to the fraud charge, must all six points be
11 met? The answer to that is yes. Okay?

12 MADAM FOREPERSON: Okay.

13 THE COURT: And you all go back and try some more.

14 MADAM FOREPERSON: Yes, sir.

15 (JURY EXITS COURTROOM AT 05:24 PM.)

16 THE COURT: All right. Now, let me run this by y'all.

17 How -- If they can't reach a verdict tonight, are
18 y'all in agreement to have them come back in the morning,
19 or do you want me to keep them all night? I mean, or you
20 want to send them home, and let them reconstitute in the
21 morning? And at some point, I mean, I can order them
22 supper, and we can stay here a reasonable amount of time.
23 If it comes to the point where -- and I've had juries come
24 out and say Judge, we're tired, can we go home and start
25 back in the morning. What is your all's position on it?

1 MR. MOSKOS: I'm find that jurors, as a general rule,
2 really try to do a good job. And -- But I also know that
3 being tired, being hungry because it's now five thirty, may
4 cause some people to capitulate, when they wouldn't
5 otherwise. And I don't know if that works for me or
6 against me.

7 THE COURT: And I don't -- And they may not ask, but I
8 need to have an answer for them because under the rules,
9 I'm not really sure I can let them go home. At least
10 that's the situation in the criminal rules. But -- and
11 we've had this discussion, if both sides agree that they
12 can go home, I think that's not a problem. If you don't
13 agree that they can go home -- Now getting County to put
14 them up in a motel and do it like they do a death penalty
15 is usually expensive, and it's really complicated. So, I
16 don't know if we can go down on this particular case
17 without prior notice and all that. So, we either let 'em
18 work.

19 And I've had, you know, arrangements where both sides
20 agree, Judge, if they come back and ask, we're tired, can
21 we go home, I need at least to discuss that with y'all, and
22 see y'all's position on that. If they don't ask, I'm not
23 going to volunteer that, at least at this point in the
24 game, you know. But.

25 MR. MOSKOS: Judge, I hate to put you on the spot, but

1 I've not really had this issue before. Is there a
2 particular rule that deals with this?

3 THE COURT: It's in the criminal rules.

4 MR. MOSKOS: Oh. All right.

5 THE COURT: I don't know if there's any in the civil
6 rules at all. And I'll note it and y'all may know better
7 than I do, the civil rules are silent on that. But
8 normally, in criminal rules, I'm not supposed to -- you
9 know, I'm supposed to keep the jury together until I get a
10 verdict. And that's in a murder case or something like it.
11 They usually always let 'em go home and the parties
12 stipulate. But in a civil arena -- you know, the lawyers
13 say Judge, we don't have any problem with you letting them
14 go home tonight if they come back and request that and
15 start back in the morning. I just wanted to know what
16 y'all's position, you know. I think some of my colleagues
17 take the position they'd do it whether you agreed to it or
18 not. I'm not sure about that, because I don't know.
19 They're silent on that unless y'all know something
20 different. I was just running that by you, and you can
21 think about it.

22 MR. WALKER: Let me think about it.

23 THE COURT: Sure. I mean.

24 MR. WALKER: And I'm hopeful, within the next hour.

25 THE COURT: And I hope they will, too. And I'm not

1 encouraging that. You know if they come back in here at
2 eight or nine o'clock but I need, having said that, in a
3 little while I need to start thinking about ordering them
4 supper. If their not going to let them go home. But I --
5 but it's fife thirty, let's give them a little bit and see.
6 I'll at least talk to the Clerk's Office and see what's
7 involved in getting them supper and how long it's going to
8 take, because some counties I go to, it's a major job, you
9 know.

10 And some of them don't even have any places to eat,
11 you know. And I had a jury one time before in Orangeburg
12 when they all ask where you gonna get it from, the clerk
13 told me no, we don't want to order from there.

14 If we have to order supper tonight, can you deal with
15 that and how long is that gonna take and what's the
16 possibility? You all normally don't do that?

17 MADAM CLERK: No. The only place I would be able to
18 order from in the evening would be Lizard's Thicket, and
19 you're probably talking about an hour and a half, maybe two
20 hours.

21 THE COURT: What if they serve --

22 MR. WALKER: Order pizza from Lizard's Thicket?

23 MADAM CLERK: Huh?

24 MR. WALKER: It's about four blocks away and it's a
25 meat and three where it takes about if you're sitting there

1 about five minutes to get your food.

2 MADAM CLERK: But it's Thursday night in downtown
3 Columbia, too, and I'm calling in about twenty-something
4 dinners, so.

5 MR. WALKER: Ah. And I apologize if I sounded
6 argumentative.

7 MADAM CLERK: Oh, no, that's -- I understand.

8 THE COURT: What about -- it's --

9 MADAM CLERK: We don't have anybody that we're
10 contracted with to do pizza, Judge.

11 THE COURT: Really?

12 MADAM CLERK: Really.

13 THE COURT: Everybody knows that's the only thing they
14 ever serve here is pizza.

15 MADAM CLERK: I would love order --

16 THE COURT: As soon as we go order it, they'll have a
17 verdict. And I've had some -- in Clarendon County they
18 want to stay and eat but most jury's now as soon go home.

19 I've had 'em stay to get a meal and then get a
20 verdict. All right, we'll give 'em a little while. I just
21 wanted to see -- I was hoping you were gonna tell me you
22 could get a pizza here in twenty or thirty minutes.

23 MADAM CLERK: I wish I could.

24 THE COURT: Okay. Everything's hard up isn't it?

25 MADAM CLERK: Yes, sir. I'd say. Now, what I have

1 done before, to try to be as discreet as possible, is
2 knocked on the door and told the jury, you know, don't tell
3 me anything about what's going on, but if you need me to
4 order something to eat, it's going to be about an hour and
5 a half to two hours before it would get here. Knock on the
6 door -- you know, you all talk about it, knock on the door
7 and let me know if you need to do that. And that would
8 give us -- sometimes gives you an idea about whether
9 they're close, or I don't have to do that.

10 THE COURT: Yeah. And I've done that, too. And you
11 want to give them a few more minute before we ask them
12 that, or give them 'til quarter 'til six or six?

13 MR. WALKER: I've got --

14 THE COURT: I mean, if it's going to be an hour and a
15 half or two hours, it's going to be seven thirty or eight
16 o'clock before we can feed them.

17 MADAM CLERK: Yeah.

18 MR. WALKER: How about a quarter 'til?

19 THE COURT: Okay. Let's give them fifteen or so
20 minutes, and then we'll ask them that question. Okay.

21 MADAM COURT REPORTER: Are we off the record, Judge?

22 THE COURT: Good.

23 (OFF THE RECORD/COURT IN RECESS AT 05:35 PM.)

24 (COURT BACK IN SESSION AT 05:58 PM.)

25 (WHEREUPON, COURT'S EXHIBIT NUMBER THREE, IDENTIFIED

1 AND MARKED, RECEIVED INTO EVIDENCE.)

2 THE COURT: Six points only for fraud. They want me
3 to go over those six points again. Okay.

4 MR. WALKER: Yes, sir.

5 THE COURT: Bring in the jury.

6 (JURY RE-ENTERS COURTROOM AT 5:58 PM.)

7 THE BAILIFF: Jury panel all seated, your Honor.

8 THE COURT: Madam Foreman, it's my understanding that
9 you want me to go over the six points of fraud again?

10 MADAM FOREPERSON: Yes.

11 THE COURT: Okay. The first, that the defendant made
12 a false misrepresentation of, or, concealed a material past
13 or existing fact. A concealment occurs when a person fails
14 to disclose that which, under the circumstances, he should
15 have disclosed. A person has the duty to disclose all
16 facts material to the transaction, or, admit when he has a
17 fiduciary; he has made a partial or incomplete
18 representation; or he is specifically questioned about it.
19 In an arm's-length transaction, a person has the duty to
20 disclose if he has taken affirmative steps to conceal
21 material facts from the other party.

22 Number two. The false representation or concealment
23 was reasonably calculated to deceive. A representative is
24 calculated to deceive when the person who makes it knows it
25 to be false, or makes it recklessly, without any knowledge

1 of its truth or falsity, as a positive assertion.

2 Number three. The false representation was made, or
3 the concealment was done with the intent to deceive, and
4 with the intent that it be acted upon.

5 Number four. The plaintiff was, in fact, deceived by
6 the false representation, or concealment, and acted upon
7 it.

8 Number five. The plaintiff's reliance on the false
9 representation or concealment was reasonable. And the
10 plaintiff's reliance would be reasonable if, under the same
11 or similar circumstances, a reasonable person, in the
12 exercising of ordinary care for his own affairs would have
13 relied on the false representation, or would have not
14 discovered the concealment.

15 Number six. The plaintiff suffered damages
16 proximately caused by the defendant's conduct.

17 Those are the six points, and you must find all six
18 present. Okay?

19 MADAM FOREPERSON: Okay.

20 MR. WALKER: Your Honor, may we approach the Bench?

21 THE COURT: Yes, sir. And I must have left something
22 out. Hold on a minute.

23 (BENCH CONFERENCE, OFF THE RECORD, OUT OF HEARING OF
24 THE JURY, AT 06:00 PM.)

25 THE COURT: From my understanding, there are some

1 other parts of this, but from my understanding, you all
2 wanted those six points. Is that correct?

3 MADAM FOREPERSON: Yes, sir, that's correct.

4 THE COURT: Okay. All right. If you'll return to the
5 jury room, and let us know.

6 (JURY EXITS COURTROOM AT 06:01 PM.)

7 THE COURT: I only covered those six points, because
8 that's what they asked for. I didn't get into those other
9 two points. Which I understand you all -- but they didn't
10 ask for that, and obviously I didn't want to confuse them
11 any more than I already have.

12 MR. WALKER: And I totally understand the Court's
13 position. And for the record, we ask the Court to also
14 charge the language of Defendant's request to charge number
15 seventeen.

16 THE COURT: And I understand that you wanted to charge
17 number eight. They didn't ask for that. And then, if I
18 feel like -- if I charge them something more than what they
19 ask for, I feel like I got to charge the whole fraud thing.
20 So, that's why I only charged them what they asked for.

21 MR. WALKER: And for the record, our position is,
22 number seventeen is part of our number six.

23 THE COURT: Number six. Okay.

24 MR. MOSKOS: And your Honor, I would also ask that,
25 obviously, my, I guess it's request of charge -- request to

1 charge number eight had been charged, also.

2 THE COURT: Okay. And I understand y'all's position.
3 I didn't think that either one were part of six, even
4 though they weren't part of the fraud charge. But they
5 didn't ask for the kind of Fraud charge. They only asked
6 for those six points, so.

7 MR. MOSKOS: You know, -- Oh, are we still?

8 THE COURT: You want to be off the record?

9 MR. MOSKOS: Yes, sir. I was going --

10 THE COURT: Okay.

11 (COURT AT EASE AT 06:03)

12 (BACK ON RECORD AT 6:12 PM.)

13 (JURY RE-ENTERS COURTROOM AT 6:13 PM.)

14 THE BAILIFF: Jury panel is seated, your Honor.

15 THE COURT: Okay. Madam Foreman, I understand y'all
16 have reached a verdict?

17 MADAM FOREPERSON: Yes, sir, we have.

18 THE COURT: Is it unanimous?

19 MADAM FOREPERSON: Yes, sir, it is.

20 THE COURT: If you would pass it up.

21 MADAM FOREPERSON: Oh, you want me to stand up? I'm
22 sorry.

23 THE COURT: No, you're fine. Just pass me the
24 verdict.

25 (VERDICT RECEIVED UP BY THE COURT.)

1 THE COURT: Okay. You may publish the verdict.

2 MADAM CLERK: In the Court of Common Pleas, in the
3 State of South Carolina, the County of Richland, Civil
4 Action Number 2013-CP-40-0319, in the matter of Daniel
5 O'Shields and Roger W. Whitley, a partnership doing
6 business as O And W cars, versus Columbia Automotive
7 Company, LLC, doing business as Midlands Honda, Number one,
8 breach of contract. On the count of breach of contract,
9 please state the amount of actual damages below. Actual
10 damages are Six thousand, six hundred and forty-five
11 dollars.

12 Number two, 'negligent misrepresentation. On the count
13 of negligent misrepresentation, how do you find? For the
14 plaintiff. And the actual damages are Six thousand, six
15 hundred and forty-five dollars.

16 On the count of fraud, how do you find? For the
17 plaintiff. On the actual damages, Six thousand, six
18 hundred and forty-five dollars.

19 On number four, the unfair trade practices, do you
20 find that a violation of the North Carolina Unfair and
21 Deceptive Trade Practices occurred? Jury answers yes.
22 Jury finds -- and the actual damages are Six thousand, six
23 hundred and forty-five dollars.

24 When did you find the North Carolina Damage Disclosure
25 Statement was provided to the plaintiffs? The jury

1 answers, at the time of the transaction.

2 In the negligent misrepresentation, was your verdict
3 based only on the North Carolina Damage Disclosure? No.

4 Fraud. Was the verdict based only on the North
5 Carolina Damage Disclosure? No.

6 Unfair trade practices. Was your verdict based only
7 on the North Carolina Damage Disclosure? The jury answers
8 no. This is the true verdict of the jury, signed by Kiruth
9 Brown, Foreperson.

10 Madam Forelady, is this your verdict, and the verdict
11 of the entire jury?

12 MADAM FOREPERSON: Yes, it's.

13 MADAM CLERK: Thank you.

14 THE COURT: Okay. Anything else from this jury on
15 this issue?

16 MR. MOSKOS: Nothing from the plaintiff, your Honor.

17 MR. WALKER: No, your Honor.

18 THE COURT: Okay. All right, ladies and gentlemen. I
19 need you to be back at nine thirty in the morning, because
20 there's another issue that I need you to decide. Oh, I'm
21 sorry, that's right. We start at nine in the morning. So,
22 if you'll be back at nine in the morning, I have one more
23 issue I need you to consider on this case. Okay? I'll see
24 you at nine o'clock. Thank you so much.

25 (JURY EXITS COURTROOM ON EVENING RECESS AT 06:17 PM.)

1 THE COURT: Okay. I think we've covered, as far as the
2 charge is concerned, on punitive damages, haven't we? Was
3 there any issue about that? It's just we're going to
4 charge the statute in which y'all --

5 MR. WALKER: Yes, sir.

6 THE COURT: Okay.

7 MR. MOSKOS: Well, we -- I don't think we ever went
8 over it, because we hadn't gotten to that point.

9 THE COURT: Okay.

10 MR. REIBOLD: I think the statute tells what's
11 supposed to be covered.

12 THE COURT: The statute covers the whole nine yards,
13 so. And you're the one that submitted -- sent me that
14 statute, so, I'm going to charge the statute.

15 MR. REIBOLD: There's actually a specific provision.
16 Under that statute it says these are what gets -- this is
17 what gets charged to the jury and it list the provisions.

18 THE COURT: Right.

19 MR. MOSKOS: I mean, I understand that. I just -- I
20 haven't read this.

21 THE COURT: And it may -- sure. And it's relatively
22 simple. And I'll be here fifteen minutes early or if you
23 want to meet tonight. But the statute pretty well lays it
24 out.

25 MR. MOSKOS: Yes, sir.

1 THE COURT: And I was just going to read what they say
2 charge.

3 MR. MOSKOS: Okay.

4 THE COURT: And so -- and I won't nec -- I'm not going
5 to charge them when you get here. You all got a right --
6 you got to put up whatever presentation you want to.

7 MR. MOSKOS: Yes, sir.

8 THE COURT: Unless you all get it settled. If y'all
9 do, call me. All right. I'll see y'all.

10 MR. MOSKOS: Thank you very much, Judge. Appreciate
11 it.

12 THE COURT: Thank you. And again, you all need to
13 look at the verdict form.

14 (COURT IN EVENING RECESS AT 06:25 PM.)

15 (COURT BACK IN SESSION FRIDAY, APRIL 22, 2016 AT 09:00
16 AM.)

17 THE COURT: Okay. Anything before we bring the jury
18 in?

19 MR. WALKER: Not from the Defense, your Honor.

20 THE COURT: Okay.

21 MR. MOSKOS: No, sir.

22 THE COURT: Now, do you all want to make from closing
23 arguments after this to the jury or you gonna argue to the
24 jury?

25 MR. MOSKOS: Yes, sir.

1 THE COURT: Okay.

2 MR. WALKER: Yes, sir. Briefly.

3 THE COURT: So, you're not gonna have any opening
4 statements. I'll just tell 'em why we're here and you can
5 call your witnesses.

6 MR. MOSKOS: Yes, sir.

7 THE COURT: And then, we'll make closing arguments,
8 and I'll charge them on this law and see. Okay.

9 MR. MOSKOS: Got it.

10 THE COURT: All right. Bring me a jury, please, sir.

11 (JURY RE-ENTERS COURTROOM AT 09:08 AM.)

12 THE BAILIFF: Jury is seated, your Honor.

13 THE COURT: Thank you, sir.

14 Ladies and gentlemen, I know y'all are kind of
15 wondering why y'all are back today. And we had to
16 bifurcate this trial, basically divide it into two parts.
17 And before we moved to the second part of the trial, you
18 had to make decisions on the first part, and you did that
19 last night, you know, and you dealt with the damages issue.

20 Now, we're dealing with punitive damages. I mean, you
21 must determine whether or not to award punitive damages.
22 So, -- And I will explain to you what punitive damages are
23 on the law, and what your responsibilities are when I
24 charge you on the law.

25 This should not be near as long as the other aspects

1 that you all have dealt with. The parties have a right to
2 put up witnesses. Then, they will make a closing argument
3 to you, and I will charge you on the law on punitive
4 damages, and then you will decide whether or not to award
5 punitive damages in this case. Okay? So, if you'd pay
6 close attention to the attorneys, we'll get started.

7 MR. MOSKOS: Yes, sir. At this time, I would call Mr.
8 Nalewaja to the stand.

9 THE COURT: All right.

10 THE BAILIFF: Place your left hand, raise your right.

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

13 MADAM CLERK: Thank you. Have a seat in the witness
14 stand, please. State your name please.

15 A. Greg Nalewaja.

16 MR. MOSKOS: I guess I need to be very clear. I'm
17 calling Mr. Nalewaja as Midlands Honda.

18 THE COURT: Okay.

19 MR. MOSKOS: Thank you.

20 DIRECT EXAMINATION

21 GREG NALEWAJA BY MR. MOSKOS:

22 Q. Mr. Nalewaja, you've been here all week, correct?

23 A. That is correct, yes, sir.

24 Q. And you are here on behalf of Midlands Honda?

25 A. Yes.

1 Q. And so, you're aware that Midlands Honda -- Well, I
2 think the other day we talked about the auction and the
3 process, all that. We don't need to go through that again.
4 But when Midlands Honda sells cars to -- at the auction,
5 they know they're going to other dealers, right?

6 A. Yes.

7 Q. It's a dealer-only auction, right?

8 A. Yes, sir.

9 Q. And those dealers turn around and they take them, and
10 they put them on their lot and sell them, right?

11 A. Some do, yes.

12 Q. And when you all sell cars at the auction, green
13 light, red light, whatever, you don't think about the
14 consequences of what happens with those cars. They go and
15 they get sold, and they go wherever they go, right?

16 A. Yes.

17 Q. And the other day, you told us that you didn't think
18 that Midlands Honda owed any duty to Roger or anyone else
19 when they sell cars at the auction, right?

20 A. Yes.

21 Q. And you all still don't think you all did anything
22 wrong in the way you sold the car, right?

23 A. No. They should have known the rules. I did say
24 that.

25 Q. Okay. And at the time of the -- back in 2010, when

1 this car was going through the red-light auction, Mr.
2 Ferrell was the used car manager, who had full authority to
3 sell the cars at the auction, right?

4 A. Yes.

5 Q. And he did his job the way that Midlands Honda wanted
6 him to do it, right?

7 A. At that time, the process that they used, I can't say
8 if that was what Midlands Honda wanted at that time. Now,
9 no. My guys, they know the rules.

10 Q. No, no. I'm sorry. Maybe my question wasn't clear.
11 What I'm asking is, Mr. Ferrell sold cars the way Midlands
12 wanted him to sell cars, right? I mean, he didn't get
13 punished for this, did he?

14 A. I've been with Midlands since 2013. I wasn't there in
15 2010. I don't know if -- I can't represent -- Greg
16 Nalewaja cannot represent what Midlands Honda was doing at
17 that time, because I don't know. I wasn't there at that
18 time.

19 Q. Now, well, let's talk about that for just a quick
20 second. You came from Indian River. We discussed this the
21 other day. And that's a sister company with Midlands
22 Honda, right?

23 A. It's Indian Trail.

24 Q. I'm sorry?

25 A. Indian Trail.

1 Q. Excuse me, Indian Trail. And it's a sister company,
2 right?

3 A. It is another store that is owned in the Automotive
4 Group.

5 Q. Right. That's the PCS Automotive Group?

6 A. PSC.

7 Q. And there are two other sister corporations, right?

8 MR. WALKER: Your Honor, these are -- this is Columbia
9 Automotive Company is a defendant, and this is irrelevant.

10 MR. MOSKOS: Not necessarily. I'm trying to get to
11 the way they operate their business.

12 MR. WALKER: Well, we can talk about the way they
13 operate Columbia Automotive. That's the defendant.

14 MR. MOSKOS: No. He says he can't -- he doesn't know
15 the way they were operating. I'm trying to test that.

16 A. We are separate entities.

17 Q. And I appreciate that. But you all get together and
18 talk, right? You all have conferences and retreats, where
19 you all get together and talk about your businesses, right?

20 A. The general manager is the general manager of the
21 store, of each store. So, you know, how Randy was running
22 Midlands back in 2010, or when he was there with his guys
23 and, you know, with Midlands Honda at that time, is maybe
24 different from the way I was running Indian Trail.

25 Q. So, the bosses there weren't -- weren't having

1 consistent or uniform -- or telling you all about
2 consistent and uniform ways to handle your businesses?

3 A. Well, they want business done with integrity and done
4 correctly, and that's how we do our business.

5 Q. I -- right. I understand that.

6 A. Certainly we --

7 Q. I understand that. My question, though, is, were the
8 bosses trying to keep everything uniform and consistent
9 across the four dealerships?

10 A. There are guidelines with, I mean, within -- how to do
11 business correctly, yes. I mean, Honda has guides and laws
12 and rules.

13 Q. And during the --

14 A. We want to stay within those.

15 Q. And during the retreats that you all would have, and
16 the times that you all would talk to -- talk to each other,
17 did anybody say Randy, you're not doing this right?

18 A. I don't know. I mean.

19 Q. You're not aware of anything, right? You don't
20 remember anything like that?

21 A. No, because I was at a different store, in a different
22 entity. I mean, I'm not --

23 Q. No, sir. I'm talking about -- you all -- you had a
24 retreat last week, right, where you got together with the
25 other managers and bosses, and talked?

1 A. Once every six months we get together, but we aren't
2 talking specifically about used cars going to red-light
3 sale, and if they're in this situation. We're talking more
4 broader spectrum of how we're doing, and are we meeting our
5 goals, are we meeting our objectives, things like that.

6 Q. And any of these -- And you met last week, right, too?

7 A. We had a meeting with our service department to
8 discuss our fixed operations, which is our whole service
9 area.

10 Q. Okay. And during any of those retreats, for whatever
11 departments, did you ever hear anybody say Randy, Brent,
12 you guys aren't doing it right, we want you to change the
13 way you're selling cars at the auction?

14 A. I don't recall that in any meetings.

15 Q. Well, you heard Mr. Ferrell the other day testify,
16 right?

17 A. Yes.

18 Q. And when you listened to his testimony, you didn't
19 have any problem with the way he handled things, did you?

20 A. Do I personally have a problem, or are you asking ---

21 Q. Well --

22 A. --- with Midlands? When you say you.

23 Q. Well, you're up there for Midlands, or as Midlands.
24 So, I'll ask Midlands.

25 A. Well, I'm sure Midlands would not, at that time, have

1 -- would definitely have wanted him to know the rules, to
2 follow the rules, and do business correctly. Absolutely.

3 Q. So, Mr. Threatt would have surely made sure that Mr.
4 Ferrell knew the rules?

5 A. I can't speak for what Randy did, but I would assume
6 that he would have definitely wanted him to follow the
7 process and procedures correctly.

8 Q. But you don't know?

9 A. I wasn't there, but.

10 Q. But you don't know Mr. Threatt outside of this case,
11 do you?

12 A. I mean, through meetings and acquaintances. I mean,
13 I'm not like, friends with him, or.

14 Q. Right. You don't go to church with him, or social
15 events, or anything like that?

16 A. No.

17 Q. And it's your understanding, from a review of the file
18 and all the testimony, that Mr. Threatt is the one who sent
19 this car to the auction? Told, not sent, actually, you
20 know, called the transporter and sent it, but he's the one
21 that directed this car to go to the auction, after his
22 conversation with Mr. Ecklund?

23 A. I've heard from the testimony that he instructed Brent
24 to do it. I have nothing from the deal, I mean, just from
25 what we've all heard together here.

1 Q. So, he's the one who made the decision to sell it at
2 the auction, right?

3 A. I think, from what I heard, was he instructed Brent to
4 dispose of the car through a red-light sale. Brent took it
5 and disposed of it through a red-light sale. That's what I
6 heard in the testimony.

7 Q. So, the answer is yes?

8 A. That answer would be yes, if I'm answering that
9 correctly, according to what I heard.

10 Q. Now, if Brent had wanted to, or Mr. Threatt had wanted
11 to, they could have sold it at a salvage auction, right?
12 They had that authority?

13 A. They can sell the car. It's their decision, through
14 whatever auction. That auction is the best auction that
15 they were using at that time. I think that that's what
16 their consideration was, was when you sell it through a
17 red-light sale, that they're disposing of it properly.
18 That's what their thought pattern was, I thought, at that
19 time.

20 Q. They had the authority to sell the car at a salvage
21 auction, correct?

22 A. Correct. They could sell at any auction.

23 Q. Now, by taking this car in and selling it, to Mr.
24 Ecklund and at the auction, the dealership made a profit,
25 right? Made money on this car?

1 A. The --

2 Q. Is that a -- just tell me yes or no and then you can
3 explain.

4 A. Which transaction are you talking about?

5 Q. The whole transaction in dealing with this car.

6 A. I don't know exactly what the complete profit would
7 be.

8 Q. Okay.

9 A. Can I grab my glasses?

10 Q. Sure.

11 (WHEREUPON, PLAINTIFF'S EXHIBIT NUMBERS NINETY-FOUR
12 AND NINETY-FIVE, REMARKED FOR IDENTIFICATION.)

13 MR. MOSCOS: Without objection?

14 MR. WALKER: Yes, sir.

15 (WHEREUPON, PLAINTIFF'S EXHIBIT NUMBERS NINETY-FOUR
16 AND NINETY-FIVE, IDENTIFIED AND MARKED, RECEIVED INTO
17 EVIDENCE.)

18 MADAM COURT REPORTER: Ninety-four, and Ninety-five,
19 Mr. Walker.

20 MR. MOSKOS: Now, the first page, Ms. Wanda, you say
21 is Ninety-four --

22 MADAM COURT REPORTER: Yes, sir.

23 BY MR. MOSKOS:

24 Q. The first page, Exhibit Number Ninety-four. Now, down
25 at the bottom, on the corner, it says there's a gross

1 profit amount. How much is that?

2 A. Forty-one, one-seven.

3 Q. Four thousand, one hundred and seventeen dollars and
4 fourteen cents, right?

5 A. Correct.

6 Q. And this is the dealer recap sheet, where Midlands
7 Honda sold the car to Mr. Ecklund, right?

8 A. Yes.

9 Q. And this document is used by you all to be able to
10 understand whether you're making a profit or a loss on your
11 cars, correct?

12 A. Yes.

13 Q. And at that time, you had a gross profit of Four
14 thousand, one hundred and seventeen dollars and fourteen
15 cents. Apparently, something was taken out. You wound up
16 with a net profit of how much?

17 A. Three thousand, three hundred and one dollars.

18 Q. Okay. So, you took this car in, and it's got the
19 price of the vehicle, the cost you had in it, and the cost
20 includes buying it and washing it, and any parts or
21 inspections, and all that kind of stuff you did, right?
22 That goes into the cost of the vehicle.

23 A. Yes.

24 Q. All right. And then, you've got, down below, the
25 commissions and managers commissions, profit from the sale,

1 et cetera, right? That's all on the left-hand side of the
2 page?

3 A. Yes.

4 Q. And then, the net profit's on the right-hand bottom?

5 A. Yes.

6 Q. All right. So, let's look at Number Ninety-five.

7 Same type sheet, the dealer recap sheet, that's
8 printed -- or that was printed when Mr. Ecklund returned
9 the vehicle to Midlands Honda, right? I mean, this is --
10 excuse me. This is actually the sale of the Accord to Mr.
11 Ecklund; isn't that right? I mis-spoke. Mr. Ecklund came
12 into the dealership. Mr. Threatt traded him out into a
13 2000 Honda Accord; isn't that right?

14 A. Okay. Okay.

15 Q. Does that make sense now?

16 A. Yes, yes.

17 Q. Okay. And the -- the Civic was included on the left-
18 hand side of this document, down at the bottom, right? As
19 the trade-in?

20 A. Yes.

21 Q. And then, over on the right-hand side, it says gross
22 profit, right?

23 A. Correct.

24 Q. It says a negative Nine hundred and thirty-seven
25 dollars and fifty-eight cents. Is that what the document

1 says?

2 A. Yes.

3 Q. Now, I've done the math. I'm more than happy, if
4 you'd like -- if you want to do the math. But it appears
5 that, at this stage, by selling Mr. Ecklund the Accord and
6 the Civic, Midlands has already made Two thousand, three
7 hundred and sixty-four dollars and seven cents; is that
8 correct?

9 A. Correct.

10 Q. And then, Midlands took the car up to the auction, and
11 sold it to Mr. Whitley, Roger, for Fifty-two hundred
12 dollars?

13 A. That is correct.

14 Q. And at that time, -- Let me show you Exhibit Fifty-
15 five, which is the seller's receipt from the auction. Now,
16 when you sold it to Mr. -- to Roger, you didn't get Fifty-
17 two hundred dollars. You had to pay some to the auction,
18 right? How much did Midlands Honda receive selling this
19 car at the auction?

20 A. Five thousand, sixty-five dollars.

21 Q. Any change?

22 A. No.

23 Q. Okay. Okay. Again, in doing the math, if you want to
24 do the math I'm more than happy to let you do so, it looks
25 like the total that Midlands Honda made off of this car is

1 Seven thousand, four hundred and twenty-nine dollars and
2 seven cents.

3 A. No, you have to subtract out the cost of the car,
4 which is Seven thousand. We paid Seven thousand for the
5 car.

6 Q. Right. And that is in -- You talking about at the
7 beginning, with Ms. Watkins?

8 A. No, right here. When you traded him in on the Accord,
9 he paid -- he gave him ten thousand loan, seven thousand as
10 ACV. He gave him in actual cash Seven thousand for the
11 car.

12 Q. So Seven thousand needs to come out, that's your
13 position?

14 A. Yes.

15 Q. Okay. Midlands Honda is still in the positive, isn't
16 it?

17 A. Yes, Four hundred and twenty-nine dollars.

18 Q. All right. So, at the end of the day, this rebuilt,
19 wrecked, unsafe, dangerous car made a Four hundred and
20 twenty-nine dollar profit for Midland, right?

21 A. Yes.

22 Q. And in -- and when they sold it at the auction --
23 excuse me -- and when they sold -- never mind.

24 Now, are you aware of nineteen -- excuse me -- a 2005,
25 maybe 2006 lawsuit that occurred here in Richland County,

1 called *Wright versus Craft Auto*, that -- that was tried
2 here, involving a twenty-year-old fellow buying his first
3 truck, that wound up being an unsafe, rebuilt, wrecked car?

4 A. No, I'm not.

5 Q. Are you aware that there was a punitive deterrent
6 verdict in that case of a fairly sizeable amount?

7 MR. WALKER: I'm -- your Honor, I'm going to object.
8 That's not relevant to anything.

9 MR. MOSKOS: Yes, sir. One of the factors that the
10 jury has to consider is the degree of the defendant's
11 awareness, and of the probable consequences of its conduct.
12 The question is, does it know the consequences of its
13 conduct. And in doing that, I need to know what knowledge
14 it had of other deterrent verdicts from other counties.
15 It's completely relevant to how they conduct themselves.
16 If they know about it and they continue to conduct
17 themselves this way, that's wrongful. If they don't know
18 about it, the jury needs to know that, so that the verdict
19 is appropriate, and that dealers like this get the message.

20 MR. WALKER: Unduly prejudicial by a long shot.

21 THE COURT: You know, unless it's knowledge that he
22 has and he was involved with it, I'll sustain the
23 objection.

24 MR. MOSKOS: Well, I'm asking about Midlands Honda in
25 2010. He's the representative.

1 MR. WALKER: Then, he can ask him what he knows about
2 other verdicts like this.

3 THE COURT: Right.

4 MR. MOSKOS: Okay.

5 Q. Are you aware of other verdicts in South Carolina, or
6 North Carolina for that matter, -- Well, let's -- let's do
7 it this way. Do you know of any other verdicts in North
8 Carolina involving -- Well, we're dealing with Midlands
9 Honda. I'm going to stick with Midlands Honda. So,
10 Midlands Honda is not in North Carolina. Midlands Honda,
11 does it know of other verdicts? How about one in Manning,
12 South Carolina, where there was a deterrent verdict of
13 fifteen percent of the net worth that would be --

14 MR. WALKER: Your Honor, I'll object.

15 MR. MOSKOS: It's all part of what they know. Do they
16 know about these?

17 THE COURT: I understand that. But first, before you
18 can get into all that, you need to ask him whether he knows
19 about it.

20 MR. MOSKOS: I'm sorry, your Honor. I didn't
21 understand your direction.

22 Q. Do you know about any cases in South Carolina where
23 deterrent -- a deterrent verdict was issued, a punitive
24 damages verdict was issued, against a car dealer?

25 A. I don't. I'm not familiar with the case law, and --

1 and, you know, cases going on and have gone on. No.

2 Q. Okay. So, you haven't heard anything in the
3 newspapers about punitive damage verdicts against car
4 dealers in South Carolina? In just the newspapers.

5 A. No.

6 Q. How about industry newspapers and publications?

7 A. Yes.

8 Q. You have heard about those in South Carolina?

9 A. Not in South Carolina.

10 Q. That's what I'm talking about, South Carolina. Have
11 you heard about any in South Carolina?

12 A. No. And how about at these retreats that you go to,
13 does anybody talk about the punitive damage verdicts in
14 South Carolina?

15 A. Not in South Carolina.

16 MR. MOSKOS: Your Honor, I apologize, I only have one
17 copy of my next exhibit.

18 THE COURT: All right. Show it to Defense Counsel.

19 MR. WALKER: And your Honor, may we approach the
20 Bench?

21 THE COURT: Yes, sir.

22 (BENCH CONFERENCE HELD OFF THE RECORD, OUT OF HEARING
23 OF THE JURY, AT 09:33 AM.)

24 THE COURT: Mr. Moscow, I'll sustain the objection.

25 MR. MOSKOS: Yes, sir. Let me do that. Let me just

1 mark this for identification purposes as, I guess, Ninety-
2 six.

3 (WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER NINETY-SIX,
4 PREMARKED FOR IDENTIFICATION.)

5 MR. MOSKOS: Thank you.

6 Q. All right. Mr. Nalewaja, I'm going to hand you what's
7 been marked as Plaintiff's Exhibit Number Ninety-six for
8 identification. And I apologize, I don't have another
9 copy, so I may have to come up there in a second. Can you
10 tell us -- Well, you were the general manager at the
11 dealership last year, right? 2015?

12 A. Yes.

13 Q. And that document that I've handed you is a financial
14 statement that was run on January -- or in January 2016,
15 January 11, 2016?

16 A. Yes.

17 Q. And the -- that contains information about everything
18 that the dealership did last year, right? Well, a lot of
19 information about the financial aspects of the company,
20 right?

21 A. Yes.

22 Q. And that document is required to be sent to Honda ever
23 year, correct?

24 A. Yes.

25 Q. And that's part of your franchise agreement, that they

1 get to know what you're doing, to make sure that you're not
2 hurting their brand?

3 A. Yes.

4 Q. And can you -- would you please tell us, in 2016 what
5 was the revenue of Midlands Honda?

6 A. 2015?

7 Q. Well, it's 2015?

8 A. It's for --

9 Q. That's for 2015, right?

10 A. Yes. This is printed on 2016, but it's for 2015.

11 Q. My apologies. You're absolutely right. What were the
12 revenues at Midlands Honda for 2015?

13 A. Two -- two point three eight one.

14 Q. Is that million?

15 A. Yes.

16 Q. Two million -- what was it?

17 A. Three hundred and eighty-one thousand.

18 Q. Just even?

19 A. Yes. No. Eighty -- sorry, it's really fine print.

20 Q. Sure.

21 A. Normally not this. Two, three, eight, one, eight,
22 eight, eight.

23 Q. Okay. Two million, three hundred and eighty-one
24 thousand, eight hundred and eighty-eight dollars. That
25 was revenue, right?

1 A. Correct.

2 Q. And you understand the net worth is if you took
3 everything that the company owned and sold it, and paid off
4 all the bills, all the debt, all responsibility, what you
5 have left in cash is the net worth, correct?

6 A. I think you're referring to the effective net worth.

7 Q. No, sir. I'm talking about net worth. Isn't that
8 right? If you sold -- Let's just talk about the general
9 concept of net worth for a second. Mr. Nalewaja.

10 A. Yes.

11 Q. I'm not talking about the paper. What I'm saying is,
12 in order to determine net worth, you take all of your
13 liabilities, and then you take all of your assets, you sell
14 your assets, convert it to cash, pay off all the expenses,
15 all the assets, and at the end of the day what you have
16 left is your net worth. Do I have the concept right?

17 A. I think the concept is right, yes.

18 Q. Okay. And can you tell us, based on the document in
19 front of you, Ninety-six, what the net worth is as listed
20 with Honda?

21 A. Not with certainty, because I'm not sure if it's the
22 effective net worth or the net worth total.

23 Q. Well, wouldn't it be the net worth total? I mean, let
24 -- well, let me help you out.

25 A. Sure.

1 Q. Excuse me one second. Where it says total net worth,
2 what is that number right there, right in the middle there?

3 A. That number on line sixty-eight is Ten million, nine
4 sixty-nine, three eighteen.

5 Q. So, at the beginning of this year, Midlands Honda sent
6 the information to Honda, corporate, and said you all are
7 worth Ten million, nine hundred and sixty-nine thousand,
8 three hundred eighteen dollars. Is that true?

9 A. Yes.

10 MR. MOSKOS: I believe I'm finished, your Honor.

11 Thank you, very much.

12 THE COURT: Okay.

13 CROSS-EXAMINATION

14 GREG NALEWAJA BY MR. WALKER:

15 Q. Mr. Nalewaja, I -- I don't have a whole lot of
16 questions for you. I need to hand that to you. Since
17 you've been managing the Midlands Honda location, are you
18 aware of any complaints from any purchasers at auction
19 about the condition of the vehicles you've sold?

20 A. No.

21 Q. Have you had any complaints from the auction itself
22 about any of your conduct at the auction ---

23 A. No.

24 Q. --- since you took over the store?

25 A. No.

1 Q. You were talking with Mr. Moskos about duties owed
2 people who buy at the sale. Okay? Do you remember that?

3 A. Yes.

4 Q. Now, do your salesmen -- excuse me -- does your used
5 car manager need to follow the rules when he sells car at
6 an auction?

7 A. Absolutely.

8 Q. How do you know he's doing that?

9 A. I've instructed him to.

10 Q. You were asked about punishing Mr. Ferrell. Do you
11 remember that? When you were talking with Mr. Moskos.

12 A. Yes.

13 Q. Mr. Ferrell's testified he left the store in 2011, and
14 this suit was brought in 2013. After this suit was brought
15 in 2013, how could you have punished Mr. Ferrell if you had
16 wanted to?

17 A. I mean, he wasn't employed there. So, there's really
18 no way to punish him.

19 Q. I want to talk to you about -- You had this discussion
20 with Mr. Moskos about who made money here.

21 A. Right.

22 Q. You with me?

23 A. Yes.

24 Q. Could you pull that exhibit back up in front of you?
25 And this is the -- the document that it accounts for the

1 transaction 2010.

2 A. Okay.

3 Q. Do you see that piece of paper?

4 MR. WALKER: Your Honor, may I approach?

5 THE COURT: Yes, sir.

6 MR. WALKER: Just to be sure we're looking at the
7 right thing.

8 Q. This is Exhibit Ninety-five. And there's some numbers
9 in the left-hand column, right?

10 A. Yes.

11 Q. You talked to the jury about a figure of Seven
12 thousand dollars?

13 A. Yes.

14 Q. Is it in that column?

15 A. Yes.

16 Q. Would you highlight it, please?

17 (WITNESS COMPLIES.)

18 Q. Is that -- That was the amount of the value assigned
19 to the vehicle at that time, right?

20 A. Correct, yes.

21 Q. Now, do the words dealer cash also appear next to that
22 column?

23 A. Yes.

24 Q. Is there a figure called over-allowance?

25 A. Thirty-six, ninety-two.

1 Q. What was that?

2 A. That was the over-allowance. In other words, they --
3 they gave this gentleman Three thousand, six hundred and
4 ninety-two dollars allowance on this car.

5 Q. Well, can you -- I couldn't hear.

6 THE COURT: I'm sorry, can you repeat that, please,
7 sir? Your answer.

8 A. Thirty-six ninety-two, dealer cash, was added to the
9 seven thousand to give him a trade allowance. In other
10 words, they gave him Ten thousand, six hundred and ninety-
11 two dollars towards this 2000 Honda Accord that he bought.

12 Q. So, we were down to a figure of Four hundred and
13 twenty-nine dollars and Midlands Honda put how much cash in
14 here?

15 A. In the transaction they showed him Ten thousand, six
16 hundred and ninety-two -- Oh, you want me to break it down?
17 Seven thousand for the car; Three thousand, six hundred and
18 ninety-two dollars dealer cash, which, you add those
19 together, they gave him Ten thousand, six hundred and
20 ninety-two dollars for that vehicle against this Accord,
21 2000 Accord.

22 Q. But before this Three thousand, six hundred and
23 ninety-two dollars in cash, we were plus Four twenty-nine.

24 Now, we're negative Three thousand, two hundred
25 dollars and change?

1 A. Yes, sir. Yeah, the dealer cash is lost profit.
2 That's right.

3 MR. WALKER: I don't have any more questions, Judge.
4 Thank you.

5 THE COURT: Okay.

6 MR. MOSKOS: Just a clarification, your Honor, real
7 quick.

8 REDIRECT EXAMINATION

9 GREG NALEWAJA BY MR. MOSKOS:

10 Q. Mr. Nalewaja, let's talk about that document that you
11 just marked on right there. Okay? On the left-hand side
12 of the page, down at the bottom, the way this works is,
13 you've got the price of the vehicle, the cost of the
14 vehicle, trade allowance, ACV, over-allowance, a bunch of
15 other things. And you add in certain expenses, and you
16 subtract -- or you add in things, and you subtract things,
17 and at the end of the document you come up with your profit
18 or loss, right?

19 A. Yeah, but that doesn't include the dealer cash amount.

20 Q. Well, you've got profit of sale at the bottom. Okay?
21 So, if you're adding, subtracting, adding, subtracting,
22 whatever you're doing with the numbers above, it always
23 comes out to the bottom line of profit of sale, right?

24 A. If they're losing Twelve hundred and thirty-seven
25 dollars like that sale, that's including giving him Thirty-

1 six, ninety-two in dealer cash.

2 Q. Right. Oh, I agree with you. The number you talked
3 about is in that. The number is in -- but it's -- but
4 unlike what Mr. Walker -- what Mr. Walker is saying is this
5 Thirty-six, ninety-two is in addition to the Nine thirty-
6 seven.

7 A. It is, because they gave him Ten thousand, six hundred
8 and ninety-two for his trade-in.

9 Q. But you've got gross profit over here. The document's
10 not right?

11 A. The gross profit doesn't include the Thirty-six,
12 ninety-two. That's dealer cash. That's not a customer
13 rebate.

14 Q. So, -- So, when y'all do your numbers, y'all don't
15 include certain numbers?

16 A. Well, dealer cash is not a customer rebate. It's
17 dealer cash on a car and it's -- It's an incentive. All
18 manufacturers do that if you have an excess of cars, or
19 it's a clearance sale, or whatever. They'll give them
20 additional support.

21 Q. Well, my question is this. My experience has been,
22 dealers are very conscious of the numbers that are going on
23 at their dealership. True?

24 A. Yes.

25 Q. And you have to be, because you've got a bunch of

1 numbers, and you have to be paying attention to them very
2 closely. So, this bottom-line number, right here, where it
3 says profit of sale ---

4 A. Negative twelve --

5 Q. --- takes into consideration the Thirty-six, ninety-
6 two, right?

7 A. It does not.

8 Q. It does not?

9 A. It does not.

10 Q. And that's the only place it shows up in this
11 document, is where everything is added up and subtracted.
12 Isn't that right?

13 A. No. That number does not include the Thirty-six,
14 ninety-two. That is dealer cash.

15 Q. Right, right.

16 A. They gave that dealer cash to this customer at ten
17 thousand -- they gave him Ten thousand, six hundred and
18 ninety-two for his car. That's seven thousand in cash,
19 thirty-six in the dealer cash. They combined it, and gave
20 Mr. Ecklund that amount of money against that car.

21 Q. Right. And what they had in the car and all the other
22 expenses, they added it all up, and when it was all
23 finished washing, you lost Nine hundred and thirty-seven
24 dollars and fifty-eight cents.

25 A. Plus the dealer cash, Thirty-six, ninety-two.

1 Q. And that's not listed on the right-hand side of the
2 page, is it?

3 A. No. Because it's not considered a profit. It is
4 directly -- Salesmen are paid a gross profit. That's
5 dealer cash. That's different.

6 Q. Is it on the right-hand side of the page?

7 A. It's not included in that loss.

8 Q. Is it on the right-hand side of the page?

9 A. That's gross profit on -- Okay. It is -- The total
10 loss -- If you're asking me if nine thirty-seven is a gross
11 profit on that type, yes. But, it's not including Thirty-
12 six ninety-two.

13 Q. What I'm asking you is, is Three thousand, six hundred
14 and ninety-two on the right-hand side of the page?

15 A. It is not in that Nine thirty-seven loss. No.

16 Q. Is it -- Is the number on the right-hand side of the
17 page?

18 A. Is what number on the right-hand side of the page?

19 Q. Is Three thousand, six hundred and ninety-two on the
20 right-hand side of the page?

21 A. Nine thirty-seven does not contain the Three six,
22 ninety-two.

23 Q. Is the number three hundred -- Three thousand, six
24 hundred and ninety-two, on the right-hand side of the page?

25 A. The number's not typed on there, no.

1 MR. MOSKOS: No further questions, your Honor.

2 THE COURT: Okay. You can step down. You can step
3 down, sir. I'm sorry.

4 (WITNESS LEAVES WITNESS STAND.)

5 MR. MOSKOS: That's all I have, your Honor.

6 THE COURT: Okay. Do you have anything?

7 MR. WALKER: No, sir.

8 THE COURT: Okay. Anybody need a break? You all
9 ready to go into closing arguments?

10 MADAM FOREPERSON: Yes.

11 THE COURT: All right.

12 CLOSING ARGUMENTS AS TO PUNITIVE DAMAGES BY MR.
13 MOSKOS:

14 MR. MOSKOS: Why we're here today is because you have
15 already found that Midlands Honda intentionally
16 misrepresented this car. That they knew it was dangerous,
17 that it should not be operated on the road.

18 The law, for hundreds of years, have always had two
19 kinds of damage. One is compensatory, the other is
20 deterrent, and the deterrent is not simply to deal with the
21 defendant alone. The deterrent is also for others.

22 Your verdict yesterday was well thought out, it was
23 well-deliberated. It was fair, it was just. But today,
24 we're here to talk about the punitive deterrent damages.

25 Now, you've heard the evidence, and you've seen some

1 new stuff that you weren't entitled to know about until
2 today. Now, you have to determine what amount is necessary
3 to punish and what amount is necessary to deter this type
4 of conduct. Throughout the trial, the defendant has denied
5 some things. They blamed others. They haven't really
6 accepted any responsibility, or accountability for that --
7 for what they did.

8 Now, let's see if they will. Since the beginning,
9 they haven't taken this case very seriously. Now, what
10 amount of money would it take to send a message to these
11 folks that you all will not tolerate, that we won't
12 tolerate, this kind of conduct? In order for that to work,
13 in order for a deterrent amount to work, it has to be big
14 enough, and that means each and every one of you have the
15 power to right the wrong, and ensure that it doesn't happen
16 again. This is the one and only time to do it. There's
17 not going to be another jury that comes in, gets assembled,
18 and hears this case. You all are it. You all are law
19 enforcement today. You all enforce the laws of South
20 Carolina.

21 The verdict, this verdict, although it is meant to
22 punish the defendant, it's also meant to deter others. And
23 this type of conduct, if your verdict is enough, it will be
24 heard across the state, and others will act to prevent this
25 kind of thing. Remember, conduct rewarded is conduct

1 repeated. Make our communities safer. Take your time. I
2 know you didn't expect to be here today, but we are here.
3 Please take your time.

4 A just assessment of punitive deterrent damages is an
5 expression of its moral condemnation. This isn't about
6 Roger any more. He's done. You all dealt with him
7 yesterday with your verdicts. What we're doing now is
8 dealing with our community. You have the opportunity to
9 make our community safer. And if you don't speak loud
10 enough, other jurors will have to sit in that box and hear
11 more of these kinds of cases, until Midlands and other car
12 dealerships get the message that they can't be doing this
13 kind of thing.

14 And if it -- if your verdict is anything less than the
15 full measure of justice, you will fail to change the way
16 Midlands Honda does business, or any other dealership in
17 South Carolina. Instead, what they'll do is, they'll say
18 -- They'll go outside and high-five each other and say, now
19 we know what the cost of business is, factor it in.
20 Business as usual. And if you deny a substantial verdict,
21 I deserve the blame, because I haven't done my job well
22 enough.

23 Now, this is just the tip of the iceberg, what we've
24 heard. And I want to help you do your job, the job that
25 you're here to do, so that you can give effect to the

1 intention of the laws of South Carolina and North Carolina.
2 And if we fail here, all that we've done, all the work that
3 you have put in, will be wasted.

4 Now, Wednesday night I left this courtroom, and I was
5 -- I all of the sudden realized I was pretty upset. I was
6 frustrated, I was pretty angry. And I've thought about
7 that and it occurred to me that, as I was asking Mr.
8 Threatt and Mr. Ferrell questions, I was thinking about my
9 children. I've got a fifteen-year-old who is now learning
10 to drive, and it's an interesting experience going to
11 school. And I started thinking about, what happens when he
12 gets to drive, and if he gets a car, and it's -- and it's
13 one of these. Or maybe he has friends with him and they're
14 driving down the road --

15 MR. WALKER: Your Honor, I'm going to object. There's
16 no personal injury in this case. This is a business
17 dispute between the two car dealers.

18 MR. MOSKOS: The impact on the public, your Honor. I
19 get to talk about it. It's part of the case. It's the-
20 it's the affect that this can have on people.

21 THE COURT: All right. Go ahead.

22 MR. MOSKOS: Thank you. And all kinds of things can
23 happen on the road. You know that. You can get in an
24 accident, take your eyes off the road, deer run out in front
25 of you and run off the road and hit a tree. What happens

1 if the welds just give out? You hit a bump too hard. And
2 he's -- But I think about my son, and he's with his
3 friends, and what if somebody's in the back seat of this
4 car? All of the sudden, they're on the road. And I think
5 about, what if I'm the person behind this car? And all of
6 the sudden, the car in front of me breaks in half, and
7 people are spilling out onto the street, what am I going to
8 do? I'm going to slam on my brakes as hard as I can.
9 Well, now I've got the guy behind me about to hit me; or
10 maybe I swerve, but I hit the person next to me. God
11 forbid, I run over one of those children.

12 And I think about the people on the side of the road,
13 whether a bicyclist or a motorcyclist or somebody just
14 walking, and they get hit by a tire flying. And then, I
15 think about my son. I get a call, and I go the scene, and
16 I see what I did, because I got the car. I got the car.
17 And there are all of these people who are hurt because I
18 bought this car. And I think -- I don't know that I could
19 stand that.

20 Now, my dad passed away a long time ago. I would give
21 anything, all my money, for another day with him. I would
22 give even more to protect my children. But they didn't
23 seem to care about that.

24 Ladies and gentlemen, the DOT, right now, is running
25 an amazing ad. It's called Target Zero. Maybe its running

1 up here; it's running in the low Country. And they go
2 around, and they ask people questions, and the ad I saw had
3 four questions. How many traffic fatalities do you think
4 there were in the U.S. last year? What is a reasonable
5 goal for reducing traffic fatalities in South Carolina?
6 What is a reasonable goal for traffic fatalities in your
7 family? Should we have the same goals for our state as we
8 do for our family?

9 Now, ladies and gentlemen, the judge is going to read
10 you some more jury instructions, and I want to go over
11 those with you real quick. First, North Carolina has
12 stated a purpose for punitive deterrent damages, and that
13 is to punish a defendant for egregiously wrongful acts, and
14 to deter the defendant, and others, from committing similar
15 wrongful acts. Okay. That's the purpose.

16 And in discussing this matter when you all go back,
17 you have, I believe, it's nine things that you can
18 consider. Only nine. If it's not listed on these -- in
19 these nine items, you can't consider it. It's not allowed.
20 The first thing is the reprehensibility of the defendant's
21 motives and conduct. Motive and conduct. What was the
22 motive here?

23 Money. Money over safety. Mr. Threatt made that real
24 clear. He got real defensive on me, and he was real clear
25 that it's about the money. And he's not going -- it

1 doesn't make any sense to spend money on an inspection when
2 you're going to get rid of the car. Those were his words.
3 And Mr. Ferrell didn't care about the cars and what
4 happened 'em. They're just a bunch of metal to him.
5 That's money.

6 But remember the conduct. Mr. Threatt was in control.
7 He was the general manager. He dealt with Mr. Ecklund. He
8 told Mr. Ferrell what to do. Mr. Ferrell was a used car
9 manager. He knew what the rules were. Those guys have
10 been in the business a long time, and they knew what was
11 going on, and they knew what their responsibilities were.
12 They were just simply totally indifferent to the needs of
13 the people of our state. And that's clear, because I asked
14 them, I said, did you think about what was going to happen
15 with these cars? No, we just get rid of them. We just
16 sell them. That's not our problem, that's the buyer's
17 problem.

18 Now, the interesting thing is Midlands had three
19 opportunities to deal with this. Mr. Ferrell could have
20 told the auction about the announcements, or made the
21 announcements. Hey, tell them this is a clipped car so
22 they know. Didn't do that. Roger went to them to buy the
23 car after it came off the block. They had another
24 opportunity when the auction called. He could have said,
25 oh, yeah, that's the -- that's the one that's been wrecked

1 and rebuilt, make sure to tell them. Strike number two.

2 And then, Roger called them. Give me my money back,
3 give me my Fifty-two hundred dollars and we're done. And
4 they didn't. Strike number three.

5 The second thing, the second factor, is the likelihood
6 at the relevant time of serious harm. The likelihood at
7 the relevant time of serious harm. Mr. Allen got up here,
8 and he did a marvelous job. He explained it very well.
9 Okay. A lot of -- a lot of mechanics tend to get all
10 caught up in the jargon, and I thought he did an
11 outstanding job of explaining how the structural components
12 had been modified from what the Honda engineers, who spent
13 millions of dollars, trying to figure out.

14 In fact, some of it was so bad, the pieces of metal
15 weren't even touching. The likelihood of serious harm is
16 huge with this vehicle. It's dangerous to the occupants,
17 of the drivers on the road, and it could be dangerous to
18 pedestrians.

19 The third item is the degree of the defendant's
20 awareness, and of the probable consequences of its conduct.
21 Okay. Now, that's a -- there's a couple things in here
22 that you need to consider. One is the probable
23 consequences. I asked all those guys, what do you think's
24 going to happen with all those cars? We don't know, we
25 don't care. But all it takes is five seconds to know if

1 you put a dangerous car out on the road somebody could get
2 hurt. It's real simple, but they didn't think about it.
3 And the other side of it is, what if we do sell this? What
4 are the consequences to us? Midlands Honda doesn't even
5 know. Hadn't even registered to them. They don't know
6 what the consequences are.

7 To them, the consequences of putting this car out on
8 the road is a profit. They're not aware of any other
9 lawsuits in the State of South Carolina that dealt with
10 deterrent awards. They're not getting the message.

11 The duration of the defendant's conduct. Now, a
12 couple days ago, when they weren't too worried about this,
13 all of them, I called everyone who was involved said, this
14 is the way we do it. This is the way business is done in
15 the automotive industry. You get the car, you're not going
16 to sell it on the lot, you send it to the auction, and you
17 sell it, and you move on. They all said it. They were
18 proud of saying it, too.

19 But now, oh, well, you know, now they show up and they
20 got to your verdict, it's well, you know, we don't want to
21 do that kind of thing any more.

22 The duration of the defendant's conduct I think also
23 includes where they're selling the cars. Now, they were
24 selling them up at the auction in North Carolina, which has
25 *North Carolina's Damage Disclosure Act*. That's great.

1 South Carolina doesn't have that. So, where were they
2 selling cars, at least until a short time ago? South
3 Carolina. Don't have to tell. We don't know what the
4 auction rules are, but if it's as Mr. Ferrell expected,
5 there's no requirement to tell anybody. You sell it at a
6 red light, it's gone. It's the buyer's problem.

7 Now, they say they've gone back to North Carolina, and
8 then Mr. Nalewaja the other day said, well, we sell all
9 over the place. So, there's no telling what's happening at
10 those other auctions.

11 The actual damages, you all know what that is. You
12 all dealt with that yesterday. Any concealment by the
13 defendant of the facts or consequences of their conduct.
14 Did they conceal what they were doing? I'm sure Mr. Walker
15 will say absolutely not. In fact, here's the note. If we
16 wanted to get rid of the evidence, we would have destroyed
17 this note. Maybe. On the other hand I think just the
18 opposite is true.

19 They came in here, and they were very proud of the way
20 they handled this matter, Mr. Ferrell, Mr. Threatt, this is
21 the way we do it. We did everything right, did it the way
22 we should. That was Mr. Nalewaja's testimony, too, 'til he
23 started hearing about all the bad things that were going
24 on. Which, again, shows that they didn't take this very
25 seriously, because it's been going on since 2013. And you

1 heard him today, he said, oh, well, now that I've heard all
2 the evidence and all the information, now, I guess, yeah,
3 we did something wrong.

4 The existence and frequency of any similar past
5 conduct by the defendant. The existence and frequency of
6 any similar past conduct by the defendant. Mr. Ferrell
7 testified the other day that he was selling them when he
8 was there, over two thousand cars a year. How many were
9 trade-ins? I don't know. But you know lots of people
10 trade in their cars, whether it's five hundred or a
11 thousand, and they do it every year.

12 Some of them they send to the green-light sale, some
13 of them they send to the red-light sale. But they do it,
14 and they do it a lot. And they all know that the cars have
15 been in accidents. We all get in accidents. They've got
16 repair shops and everything, and they're in the business.
17 They know.

18 The next item is whether the defendant profited from
19 the conduct. Did the defendant profit from the conduct?
20 You'll have the dealer recap sheets, and you look at the
21 profit, right there, on the right-hand side of the page.
22 And when you add it all up, frankly, it looks like you get
23 Seventy-four hundred dollars. Mr. Nalewaja says oh, well,
24 we had seven thousand we got to deal with too. Four
25 hundred and twenty-nine dollars. They didn't lose any

1 money. They still made money. May not have been as much
2 as they wanted, but they made money, which is what Mr.
3 Threatt and Mr. Ferrell wanted to do. And Midlands Honda,
4 for that matter.

5 And the last item that you can consider, the revenues
6 and the net worth. Two point three million dollars last
7 year, net worth. If that company were to go out of
8 business, the owner said hey, we're tired, we're not going
9 to do this any more, we're going to sell everything off,
10 pay off all of our bills, they would still split Ten
11 million, nine hundred and sixty-nine thousand, three
12 hundred and eighteen dollars. Almost Eleven million
13 dollars.

14 Now, ladies and gentlemen, a corporation is a piece of
15 paper. Doesn't have a conscience, doesn't have a heart,
16 doesn't have a soul. But it can feel pain. But there's
17 only one place that it feels pain, and that's in the
18 wallet. You've got to get these guys' attention, because
19 money is the only thing that they understand.

20 Now, the question is, how do you come up with a
21 number? What's sufficient? What's okay? Now, I want you
22 to understand, we are not asking you to put them out of
23 business. That is not the purpose of today. We are trying
24 to change conduct. We are trying to deter conduct. So,
25 the question becomes, how much is enough? I would urge you

1 to consider between fifteen and twenty-five percent of ten
2 million or eleven million dollars. Fifteen percent to
3 twenty-five percent. That's one point five to two point
4 seven five million dollars.

5 Now, that's going to get somebody's attention, and
6 hopefully it will be in the newspapers. Hopefully, when
7 these fellows go to retreats, they'll talk about it. And
8 hopefully, other dealers will hear about it. I can
9 guarantee you they're going to hear about it. This is not
10 a vacuum. When we walk out of here, these fellows are
11 going to talk. The people in the courthouse are going to
12 talk, and it's going to get out what you all did. So, you
13 all have a choice.

14 Here's your Sixty-six hundred dollars, Mr. Whitley.
15 We think it's okay. Or Midlands Honda, the rest of you
16 guys, knock it off. Do the right thing by the people of
17 South Carolina. And if you'll remember one thing, remember
18 this. A hundred years from now, it's not -- it's not going
19 to matter what my bank account was; the sort of house I
20 lived in, what kind of car I drove. But the world may be a
21 different place because I was important in the life of a
22 child. You can be important in the lives of the children
23 of South Carolina and North Carolina, through your verdict
24 today. Thank you very much.

25 CLOSING ARGUMENT AS TO PUNITIVE DAMAGES BY MR. WALKER:

1 MR. WALKER: Thank you, Judge.

2 Before I talk about the facts and the circumstances, I
3 need to share one thing the judge is going to tell you.
4 This is a different piece of the trial, because there is a
5 different rule, a different standard. And yesterday, Mr.
6 Moskos stood up here and explained that the burden of proof
7 was a preponderance of the evidence, and then you balance
8 the evidence. And if it was slightly in favor of the
9 plaintiff, as you determined, that was your verdict.

10 Today we have a very different rule and it's
11 specifically applies to this fraud claim. And before you
12 can award any punitive damages today, you have to decide
13 that the proof of fraud was more than this preponderance.
14 You have to decide -- it's -- the judge is going to tell
15 you it's called clear and convincing evidence. And he's
16 going to explain that to you, and he's going to explain
17 that it has to be stronger evidence than this
18 preponderance.

19 Now, I don't know exactly what words he's going to
20 use, but he's going to tell you they're going to have to do
21 more than establish liability, like they did yesterday.
22 It's got to be clearer, stronger, and more convincing for
23 you.

24 Now, I want to talk very briefly about some of the
25 facts and circumstances here. I think, first of all, it's

1 clear we're here about one sale six years ago. Six years
2 ago. And it was a sale where two people participated in it
3 that haven't worked for Midlands in five years. Those
4 people are gone from Midlands. You've seen Mr. Nalewaja.
5 He didn't show up in shorts and flip-flops, and he sat here
6 today and told you we make sure our used car people know
7 the rules. That's what we're supposed to do. We're here
8 because Mr. Ferrell didn't know the rules. So, we've done
9 what we're supposed to do to try to remedy that problem, be
10 sure our people know. So, in terms of duration and future
11 conduct, we've done what we can do to solve that problem
12 within our walls.

13 This was the sale of a six-thousand-dollar car; about
14 concealing facts. I'm absolutely gonna tell you -- and you
15 saw the note -- that wasn't very pretty for us, that got
16 produced. The documents that Mr. Nalewaja was questioned
17 about today involving finances, this has been a pretty open
18 book, so, there's nothing been concealed.

19 Mr. Moskos has obviously been very thorough. He's
20 turned over every rock. He's got the auction guy and put
21 up all this testimony for y'all. If there was any other
22 time where Midlands had had this problem with anybody, he
23 would have found it, and you haven't heard about that.
24 This is an isolated event from six years ago. Talking
25 about his expert, he came here and explained about the

1 repairs to the vehicle. That guy said years and years ago,
2 people would put these cars together, but they don't do it
3 any more. This is a rare situation. That's from his own
4 witness, who said this happened years ago. It doesn't
5 happen now, for the reasons he explained. So, it's not
6 like you've got to take a stand to prevent that from
7 happening again. His own people say it's rare; it doesn't.
8 So, this is a one-time thing. It was done by people who
9 were here five years ago. They're not with us now.

10 Fortunately, I understand why Mr. Moskos wants to talk
11 about somebody getting hurt, but nobody got physically
12 hurt, which would be awful. But physically, nobody got
13 hurt in this case. They're not going to get hurt. The
14 car's off the road. We are -- Even before Mr. Nalewaja got
15 involved and Mr. Ecklund brought the car back and they
16 traded him out, I'm -- I'm not great with numbers, but I do
17 understand the words dealer cash and three thousand
18 dollars. And the company put three thousand dollars of its
19 money in there, in addition to this other stuff, to make
20 this go away. So, they lost a hunk of money.

21 But that's in my view not really the most important
22 thing. The most important thing is, this was a one-time
23 event six years ago, by people who haven't worked there
24 since 2011. And we've got new leadership. Mr. Nalewaja's
25 been there awhile. If there had been any problems out

1 there these people they looked everywhere; they told you
2 all about 'em and done it. So, two things. You all -- We
3 don't know what happened while you all are talking; but you
4 all focused on this fraud thing and now you are right back
5 focused on it again. This balancing, if it's -- this time
6 if it's been in their favor that is not the rule any more.
7 You got to be firmly convinced by clear evidence that fraud
8 was perpetrated by these people six years ago who don't
9 work for us anymore. And I would submit to you, it's a lot
10 closer than that, and we've done what we ought to do to be
11 sure our people know the rules. It's all we can do.

12 So, we've taken the steps we need to take. Those
13 people don't work for us any more. I don't think there's
14 fraud by clear and convincing evidence. I respect your
15 verdict, but you all struggled with it, and I understand
16 that. So, I'm not going to suggest any numbers to you.
17 I'm going to just tell you, if you think it's clear and
18 convincing, y'all do what's fair to deal with the Fifty-two
19 hundred dollar sale six years ago by people who aren't with
20 us any more. And I'm grateful for your time, and so is Mr.
21 Nalewaja.

22 MR. MOSKOS: Nothing further, your Honor.

23 THE COURT: Okay. Will you take that down?

24 CHARGE TO THE JURY AS TO PUNITIVE DAMAGES:

25 THE COURT: Okay, ladies and gentlemen, I'm gonna

1 charge you on the law. It will not be near as long as
2 yesterday.

3 To prove -- I mean, to recover punitive damages, the
4 plaintiff must prove the existence of fraud by clear and
5 convincing evidence. Clear and convincing evidence means
6 evidence that is clearer, stronger, more cogent --
7 cogent, I'm sorry, more cogent and convincing in its
8 character or weight than the greater weight or
9 preponderance of the evidence. Stated differently,
10 Plaintiffs must show more to recover punitive damages than
11 they were required to establish liability for compensatory
12 or actual damages.

13 Further, to award punitive damages, it's a matter
14 within the sound discretion of the jury. Punitive damages
15 are not awarded for the purpose of compensating the
16 plaintiff for damage, nor are they awarded as a matter of
17 right. If you decide, in your discretion, to award
18 punitive damages, any amount you award must bear a rational
19 relationship to the sum reasonably needed to punish the
20 defendant for any egregiously wrongful acts committed
21 against the plaintiffs, or plaintiff; and to deter the
22 defendant and others from committing similar wrongful acts.

23 In making this decision, you may consider only the
24 evidence which relates to these nine factors Number one:
25 The reprehensibility of the defendant's motives and

1 conduct.

2 Number two: A likelihood at the relevant time of
3 serious harm to the plaintiff or others similarly situated.

4 Number three: The degree of the defendant's awareness
5 of the probable consequences of its conduct.

6 Number four: The duration of the defendant's conduct.

7 Number five: The actual damages suffered by the
8 plaintiff.

9 Number six: Any concealment by the defendant of the
10 facts or consequences of its conduct.

11 Number seven: The existence and frequency of any
12 similar past conduct by the defendant.

13 Number eight: Whether the defendant profited by the
14 conduct.

15 And number nine: The defendant's ability to pay
16 punitive damages, as evidenced by his revenue or its
17 revenues or net worth.

18 Finally, if you determine, in your discretion, to
19 award punitive damages, you may then award to the plaintiff
20 an amount which bears a rational relationship to the sum
21 reasonably needed to punish the defendant for an
22 egregiously wrongful act, and to deter the defendant and
23 others from committing similar wrongful acts.

24 And Madam Foreman, if you determine or you decide to
25 award punitive damages in this case, you will simply write

1 down the amount on this new verdict form that I'm going to
2 be giving you. If, on the other hand, you determine, in
3 your discretion, not to award the plaintiff any punitive
4 damages, you're simply to write the word none in this
5 blank. Okay? And this verdict, as the other verdict, must
6 be unanimous. All twelve of you must agree.

7 Now, I am going to send you back to the jury room, be
8 sure I've covered everything with the attorneys. If I
9 have, I will send you this verdict form, along with the new
10 evidence that was introduced, and you can begin your
11 deliberations. Just simply knock on the door, and we'll
12 receive your verdict. Okay?

13 MADAM FOREPERSON: Okay.

14 (JURY EXITS COURTROOM AT 10:26 AM.)

15 THE COURT: Any exceptions deletions, happy to hear
16 from you?

17 MR. MOSKOS: Your Honor, no, sir, I don't have any
18 exceptions. I just want to make sure what we're talking
19 about. Mr. -- I'm assuming you read from Defendant's
20 requests to charge A and B that were given to us today by
21 Mr. Walker.

22 THE COURT: Yes, sir.

23 MR. MOSKOS: Okay. I just wanted to make sure.

24 MR. WALKER: B and C, your Honor.

25 THE COURT: B and C. I'm sorry. C is the clear and

1 convincing. And I -- and you said --

2 MR. MOSKOS: Right.

3 THE COURT: And I know from --

4 MR. MOSKOS: I made a mistake. I'm sorry.

5 THE COURT: B.

6 MR. MOSKOS: Right. B and C. I just wanted to make
7 sure that's the ones we're dealing with.

8 THE COURT: Because I left A out, because you said it
9 was repetitive, and it was. And you all look at the
10 verdict form. You're welcome to but if not if you'll look
11 at the evidence.

12 MR. MOSKOS: Yes, sir. That's fine with me.

13 THE COURT: All right, if you'll hand that to the
14 bailiff, along with the evidence, please, sir.

15 MADAM COURT REPORTER: Judge, does all the evidence go
16 back this time, too?

17 THE COURT: No.

18 MADAM COURT REPORTER: Just these?

19 THE COURT: Just what's was entered.

20 MADAM COURT REPORTER: Please verify this is what you
21 want -- I'm sorry to interrupt you, sir.

22 THE COURT: No problem. Just what was introduced
23 today.

24 MADAM COURT REPORTER: Yes, sir. And here's the one
25 marked for ID. It does not go back.

1 THE COURT: No, it doesn't go back.

2 MR. MOSKOS: And that's Ninety-six, right?

3 MR. WALKER: Just those two?

4 MADAM COURT REPORTER: Yes.

5 MR. MOSKOS: Your Honor, he -- well, that's fine.

6 MR. WALKER: He didn't --

7 MR. MOSKOS: He talked about this. But that's all
8 right. Well, your Honor, actually, they -- they did talk
9 about -- or Mr. Nalewaja did refer to Exhibit Fifty-five.
10 Can that go back, too? It wasn't introduced today, but he
11 --

12 MADAM COURT REPORTER: Referenced it.

13 MR. MOSKOS: It was referenced, yes.

14 THE COURT: Okay. I mean, what's your position on
15 that?

16 MR. WALKER: I think just the new documents ought to
17 go, your Honor. It's -- What he's talking about is
18 essentially the bill of sale that was referred to, simply
19 to verify a number.

20 THE COURT: I mean, they had that yesterday. If they
21 want to see it back, we'll give it to them; but I'd just
22 leave it out, and submit what we --

23 MR. MOSKOS: Very good, your Honor. Thank you.

24 THE COURT: Okay.

25 THE BAILIFF: That's it?

1 THE COURT: Okay. And you can tell them they can
2 begin, and let us know ---

3 THE BAILIFF: Yes, your Honor.

4 THE COURT: --- when they've reached their verdict.

5 (COURT IN RECESS AT 10:28 am.))

6 (COURT BACK IN SESSION AT 11:15 AM.)

7 THE COURT: You can bring them in. I'm sorry.

8 (JURY RE-ENTERS COURTROOM AT 11:15 AM.)

9 THE BAILIFF: Jury is seated, your Honor.

10 THE COURT: Thank you. Madam Foreman, I understand
11 you've reached a verdict?

12 MADAM FOREPERSON: Yes, sir, we have.

13 THE COURT: Is it unanimous?

14 MADAM FOREPERSON: Yes, sir, it is.

15 THE COURT: Okay. If you will pass it up here,
16 please.

17 (VERDICT RECEIVED UP BY THE COURT.)

18 THE COURT: Okay. You may publish the verdict.

19 MADAM CLERK: In the Court of Common Pleas for the
20 State of South Carolina, in the County of Richland, Civil
21 Action Number 2013-CP-40-0319, in the matter of Daniel
22 O'Shields and Roger W. Whitley, a partnership doing
23 business as O and W Cars, versus Columbia Automotive
24 Company, LLC, doing business as Midlands Honda, punitive
25 damages are found in the amount of Two million, three

1 hundred and eighty-eight thousand, eight hundred and
2 eighty-eight dollars. This is the true verdict of the
3 jury, signed by the forelady.

4 Madam Forelady, is this your verdict and the verdict
5 of the entire jury?

6 MADAM FOREPERSON: Yes, it is.

7 THE COURT: Okay. Anything before I release the jury?

8 MR. WALKER: No, sir.

9 MR. MOSKOS: No.

10 THE COURT: Okay. Ladies and gentlemen, I want to
11 thank y'all. This completes your service for this week.
12 You don't have to do this again for three years.

13 The Clerk's Office is going to mail you a huge check
14 for your services. And we can't come anywhere close to pay
15 you for what you're worth, because if we did, you couldn't
16 pay your property taxes, so. But I want to thank y'all.
17 You all listened hard, and I understand that this is a
18 difficult case. It was a difficult case for me, because we
19 had to apply North Carolina law, and when I got here Monday
20 I didn't even know North Carolina law. So, but you all
21 were conscientious and paid close attention, and I want to
22 thank you.

23 I've been telling you all week you couldn't talk about
24 this case. Now, you can talk about it to anybody you want
25 to. You don't have to if you don't want to, but you can go