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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU: TRIAL TERM PART 25

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STATE FARM MUTUAL AUTOMOBILE INSURANCE

COMPANY,

Index No.
606797/2017

Plaintiff,

-against-

M.V.B. COLLISION INC., d/b/a MID ISLAND
COLLISION,

Defendant.

- - - - - X

Nassau Supreme Court
Mineola, New York 11501
December 11, 2018

B E F O R E: HONORABLE JACK L. LIBERT
Justice of the Supreme Court

A P P E A R A N C E S:

RUBIN, FIORELLA & FRIEDMAN, LLP
Attorneys for Plaintiff
630 Third Avenue
New York, New York 10017
BY: MICHAEL E. TOMSKY, ESQ.
KYEKO M. STEWART, ESQ.

BARKET EPSTEIN KEARON ALDEA & LOTURCO LLP
Attorneys for Defendant
666 Old Country Road, Suite 700
Garden City, New York 11530
BY: ALEXANDER KLEIN, ESQ.
KEVIN KEARON, ESQ.

PATRICIA HOLSGROVE, RPR
OFFICIAL COURT REPORTER

1 COURT CLERK: All rise. Honorable Judge Jack
2 Libert presiding. Be seated. Come to order.

3 THE COURT: Everybody ready?

4 MR. TOMSKY: Yes, your Honor.

5 COURT CLERK: State Farm Mutual Automobile
6 Insurance Company against M.V.B. Collision Incorporated,
7 Doing Business As Mid Island Collision.

8 THE COURT: Plaintiff, appearances for the
9 record, please.

10 MR. TOMSKY: Good morning, your Honor.
11 Michael Tomsky from Rubin, Fiorella & Friedman for State
12 Farm.

13 MS. STEWART: Kyeko Stewart from Rubin,
14 Fiorella & Friedman for State Farm.

15 MR. KLEIN: For Mid Island Collision, I'm
16 Alexander Klein of Barket Epstein Kearon Aldea &
17 LoTurco, 666 Old Country Road, Garden City, New York.
18 I'm here with Kevin Kearon, same firm. Good morning,
19 your Honor.

20 THE COURT: Good morning. And you have your
21 client with you.

22 MR. KEARON: Yes, Mr. Robert Jesberger. Thank
23 you.

24 THE COURT: Are you ready to call your first
25 witness?

1 MR. TOMSKY: Actually, your Honor, because the
2 lien was filed by the defendant, we're the plaintiff --

3 THE COURT: It's to discharge the lien.

4 MR. TOMSKY: Do you want to hear any opening
5 statements?

6 THE COURT: I have a pretty good idea what the
7 case is about, so you can call your first witness.

8 MR. KLEIN: Your Honor, I prepared an opening
9 to frame the issues. I think it will help.

10 THE COURT: Okay, I'll let you each have a
11 very short opening.

12 MR. TOMSKY: Again, your Honor, even though
13 I'm the plaintiff, I will have the defendant go first.

14 MR. KLEIN: Good morning, Judge.

15 I'm Alexander Klein. I'm here with Kevin
16 Kearon of Barket Epstein Kearon Aldea & LoTurco.
17 Sitting at the table with us is the owner of our client,
18 Mid Island Collision, otherwise known as M.V.B.
19 Collision.

20 We are here today to discuss a dispute that
21 has been bubbling up in Nassau County between Mid Island
22 Collision, which is a collision company or an auto body
23 repair company, with an insurance company, State Farm.

24 When a motorist has a collision on the road,
25 it sets forth a series of business relationships that

1 are not immediately apparent to the naked eye. This
2 case, on its broadest level, is about those
3 relationships; relationship between an insurance company
4 and an insured, its customer; a relationship between an
5 auto body shop and its customer, which in many cases is
6 the same person, the insured and the customer; and also
7 the cross relationship between the insurance company and
8 the auto body repair company which lacks privity of
9 contract but is sort of forced to deal with each other
10 from time to time.

11 THE COURT: I'm sorry, just one moment. The
12 gentleman in the back, is that a witness?

13 MR. KLEIN: Yes, it is.

14 THE COURT: Okay, so he's got to be out of the
15 room.

16 MR. KLEIN: Mr. Jesberger is a witness as
17 well. He owns the company though.

18 THE COURT: Well, he's the owner.

19 MR. KLEIN: He is the manager, so it's up to
20 you. They are both witnesses in this case.

21 MR. TOMSKY: I mean, I don't mind the witness
22 being here for the opening statements, because I know --
23 I believe he is the first witness. I have no problem
24 with it, if you don't, your Honor.

25 THE COURT: Fine. Then proceed.

1 MR. KLEIN: So on its broadest level, those
2 are the players involved, those are the relationships
3 involved, and some of the questions that are going to be
4 dancing in and out of the hearing, as you'll notice, are
5 whether -- the extent to which there's a free market in
6 the auto body industry, the role that an insurance
7 company plays in that free market, the extent to which
8 an auto body repair company can charge what it deems to
9 be an appropriate price, the extent to which a customer
10 can agree on those prices, and the division of labor
11 between what the insurance company's obligations are and
12 what the obligations of the auto body repair company
13 are. Those are some of the 30,000 foot questions that
14 are raised in what otherwise to the naked eye might seem
15 like not an enormous case.

16 On the simplest level --

17 THE COURT: Are you saying there's an
18 antitrust element to this? You're talking about the
19 free market.

20 MR. KLEIN: There is no antitrust element to
21 this because State Farm is not a big enough player in
22 the industry to raise a question about whether it's
23 actually, you know, like Microsoft in the '90s, but it
24 affects --

25 THE COURT: Because you said it is a custom

1 and practice in the industry. You said this affects the
2 relationship between all insurance companies and their
3 employers or their insurers and the parties that do the
4 work, so that suggests to me that you're talking about
5 some kind of relationship that goes beyond the scope of
6 this contract.

7 MR. KLEIN: What I mean, your Honor, is --
8 this case does not involve an antitrust claim. We are
9 the defendants and what this case -- what this hearing
10 is about is simply a lien, and the lien -- I mean,
11 fortunately, for the sake of this hearing, it's just
12 about a lien, because the elements of a lien are
13 straightforward, and those elements can kind of filter
14 some of the issues in this case that might otherwise
15 take more time to review.

16 The four elements of a lien; one is that the
17 auto body company is the bailee of the motor vehicle.
18 That issue is not in dispute. State Farm and Mid Island
19 agree that Mid Island was the bailee of the vehicle.
20 The second element is it performed garage services or
21 stored the vehicle with the consent of the vehicle's
22 owner. In this case, Courtney Pope. In this case,
23 there is no dispute as to that either. The third
24 element is that there was -- that the auto body company
25 is a duly registered motor vehicle repair shop. In this

1 case, there is no question as to that either. The
2 fourth element is what this entire hearing is about, and
3 that element is whether there has been a, quote, agreed
4 upon price, or, if not, if the charges were otherwise
5 reasonable. This whole hearing, and really this whole
6 case, is about that element, whether there was an agreed
7 upon price, and, if not, whether the charges that Mid
8 Island Collision made to the owner were reasonable.

9 THE COURT: Well, let me stop you there again.
10 If there was an agreed upon price, how does the
11 reasonability element come in?

12 MR. KLEIN: It doesn't.

13 THE COURT: So you're saying if it was not
14 agreed upon, then it's the standard of quantum meruit?

15 MR. KLEIN: That's exactly right. So the
16 obligation is -- the way the burden works is an
17 insurance company can force an auto body shop like the
18 one at this table simply by raising their hand and
19 saying we object to the validity of that lien and the
20 burden shifts to us to defend its validity, and the way
21 that the -- that an auto body shop defends the validity
22 of a lien on this element is by doing one of two things
23 or it can do both. One, showing that there is an agreed
24 upon price or showing that the price was reasonable. In
25 this case, our contention is that there is both, an

1 agreed upon price, and even if there hadn't been, a
2 reasonable fee under the circumstances.

3 What the evidence in this case will show, just
4 to briefly set the table, is that at 12:30 p.m. on March
5 27th, 2017 Courtney Pope was driving her pearl white
6 Nissan Armada 2015 version fully loaded car and she came
7 to the corner of Van Wyck Expressway and Rockaway
8 Boulevard, came to a stop. At that point, a car driving
9 perpendicular to her and to several other cars that were
10 on her side going in the same direction smashed into the
11 side of a vehicle with such force that that car then
12 dominoes into another car which then dominoes into the
13 left side of Courtney Pope's Nissan.

14 The next day Ms. Pope arrived at Mid Island
15 Collision and was signed up to hire Mid Island Collision
16 to perform services on her Nissan, and as part of that
17 sign-up, she signed a variety of agreements, including
18 the labor rates, towing rates, what kind of parts she
19 wanted put into the vehicle, et cetera, and these things
20 will be entered into evidence.

21 In accordance with protocol, Mid Island
22 Collision then welcomed an agent of State Farm, called
23 an estimator to come to their shop and to take look at
24 the vehicle and to provide an estimate of the amount of
25 damage and the kind of work that would be necessary to

1 repair the car and the regulatory term is to pre-loss
2 condition.

3 So they come, they take a look at the car, and
4 they report that they think that there is a little more
5 than \$10,000 worth of damage to the Nissan.
6 Immediately, Mid Island knows that it will cost more
7 than that to fix this vehicle and says so. State Farm
8 says we disagree, that's our estimate and they leave.
9 Mid Island, in accordance with protocol, invites State
10 Farm back to do what's called a supplement, and State
11 Farm comes, an estimator takes a look at the car and
12 says, I agree, there is more damage than we initially
13 thought but we still don't think there is as much as Mid
14 Island thinks there is to the car so keep working, and
15 at this point Mid Island is saying this is a total loss.

16 THE COURT: Now, when you talk about protocol,
17 what protocol are you referring to?

18 MR. KLEIN: The protocol is that when a car is
19 at an auto body shop, the insurance company has six days
20 to come and conduct an estimate of the car.

21 THE COURT: I'm not questioning that. What
22 I'm asking is where is that protocol established? Is
23 there a document? Is it custom and practice.

24 MR. KLEIN: Most of the protocols are set
25 forth in Regulation 64, which I would be happy to

1 provide a full copy of. Although, it is quite
2 extensive.

3 THE COURT: Regulation 64 of what?

4 MR. KLEIN: Do you have it?

5 MR. TOMSKY: I do. I'm looking for a copy to
6 give to your Honor. If not, we could provide a copy of
7 it.

8 MR. KLEIN: For what it's worth, there is no
9 dispute among the parties as to the propriety of these
10 steps.

11 THE COURT: Okay.

12 MR. KLEIN: So State Farm comes back, they
13 say, you're right, there's more than we thought but we
14 still don't think -- we still don't think it's a total.
15 Mid Island says -- and they say, you know, basically,
16 get back to work. Mid Island says, okay, we'll keep
17 working on the car. They say -- a few days later they
18 say come back, there is more than you thought to do on
19 this vehicle. State Farm says, okay, we'll come back,
20 and they do a second supplement. They look at the car,
21 they spend time there, they say, you're right, there's
22 more than what we thought but it's still not a total so
23 get back to work. Mid Island says okay. A couple days
24 later, come back, there's more than you thought, we're
25 telling you it's a total. They come back, you're right,

1 more than we thought but get back to work, it's not a
2 total. This happens nine times over the course of four
3 months, starting in March, ending in June. Really,
4 State Farm has, by the time this pattern ends, has been
5 there on 10 occasions, there's nine supplements, and on
6 every occasion they revised their prior estimate upward
7 until it declares the car total.

8 At that point, as Mid Island suspected and
9 reported from the jump, the car had more work than it
10 was worth, and so the exact problem that they envisioned
11 from the beginning had come to pass. They submit a
12 bill, which at this point, when you add up all the
13 bills, was for approximately \$50,000, and State Farm
14 says no, we're not paying the full extent of this bill,
15 and the gap in what they paid and what Mid Island had
16 billed Ms. Pope is \$21,042.68, and, really, that amount,
17 unless there is some stipulation along the way, is what
18 this case is about, that \$21,042.68.

19 Some of the big issues that give rise to that
20 gap start with labor rates, and you'll hear plenty of
21 testimony about what an appropriate rate is that an auto
22 body shop or a collision company can charge its
23 customers, and when I began by talking about the free
24 market, that is a part of what I was eluding to, which
25 is insurance companies come up with labor rates that

1 they think are appropriate in many cases that they will
2 pay, and auto body shops have their own labor rates,
3 and, just like in any industry, there is a variety of
4 skill and talent and sophistication of auto body shops
5 that you would see that charge a variety of different
6 rates, and what you'll -- the evidence -- what the
7 evidence in this case will show is that Mid Island is
8 one of the most sophisticated, first class,
9 state-of-the-art collision centers not just on Long
10 Island and not just in the state but really in the
11 country, an extraordinarily expensive shop to run, and
12 it would be impossible to have a company like this with
13 this level of talent working at it if they could not
14 charge what they charge as labor rates, which in this
15 case are \$120 an hour for the labor on the Nissan, and,
16 actually, on specialty vehicles their rates can go
17 substantially higher. In this case, the labor rate was
18 \$120 an hour, and State Farm deemed the appropriate
19 labor rate to be, approximately, a little more than a
20 third of that.

21 THE COURT: Well, let me ask you this, when
22 State Farm does the estimates, don't they tell the
23 provider, be it your client or any other provider, since
24 we're talking a little globally, what they consider to
25 be an acceptable rate?

1 MR. KLEIN: It's understood, because these --
2 State Farm and Mid Island Collision do so much business
3 together, if you walk into Mid Island Collision today,
4 you would see their labor rates posted on their wall.

5 THE COURT: I'm asking about the State Farm
6 labor rates. They know what the State Farm labor rates
7 are?

8 MR. KLEIN: Everybody knows that there is
9 generally a difference between the \$49 an hour that
10 State Farm pays and the \$120 an hour that Mid Island
11 charges. However, what the regulations require and what
12 happens regularly is that when there is a difference in
13 the price there is a negotiation. It's actually
14 required to negotiate in good faith on what the
15 appropriate billing is.

16 THE COURT: Was there a negotiation in this
17 case?

18 MR. KLEIN: Not on the price, none, not on the
19 labor rate, and --

20 THE COURT: Was there a demand for a
21 negotiation?

22 MR. KLEIN: Yes, every time. And the evidence
23 will show to that point, your Honor, that State Farm has
24 paid \$120 an hour and a lot more to other players in the
25 automotive industry, to Mid Island in particular, that

1 other companies have paid that rate to Mid Island, and,
2 in fact, that even eight, seven, six years ago, in the
3 immediate aftermath of a terrible economy, they were
4 already paying substantially in excess of what they
5 claim to be fair now.

6 All this will be presented in -- I'm hoping to
7 just frame some of these issues for you, but,
8 ultimately, the issue in this case is whether there is
9 an agreed upon price and/or whether the prices are
10 reasonable. In this case, there is both, and, for that
11 reason, we will respectfully request at the end of the
12 hearing that Mid Island's lien be sustained to the
13 extent of \$21,042.68. Thank you.

14 MR. TOMSKY: Good morning, your Honor.

15 THE COURT: Good morning.

16 MR. TOMSKY: As previously stated, Michael
17 Tomsky for Rubin, Fiorella & Friedman, attorneys for
18 State Farm.

19 First off, I want to thank Mr. Klein for his
20 cooperation during the last couple of weeks in preparing
21 for this hearing. I also want to welcome his colleague
22 and his client as well.

23 What Mr. Klein set forth is a larger scope of
24 controversy between an insurance company and a repair
25 shop. As he also stated, this case, it's relatively

1 straightforward and simple. Is the lien valued, and, if
2 so, to what extent?

3 Now, while Mr. Klein mentioned a number of
4 \$21,000, the lien filed by Mid Island Collision, or
5 M.V.B. in this case, is actually \$50,728.44. Again, for
6 the 2015 Nissan Armada that was involved in the
7 collision back on March 27, 2017 with then owner and
8 insured Courtney Pope. The evidence will show that the
9 lien amount, whether it's the 50,000 I just mentioned or
10 the amended rate of 21,000 mentioned by Mr. Klein,
11 grossly exceeds their own market value that they list on
12 the lien of around \$36,000.

13 Now, the witnesses will show that State Farm
14 acted responsibly in this manner. While yes, they did
15 have to go back on multiple occasions, the reason for
16 doing that was to attempt to get Ms. Pope back her car
17 in the pre-loss condition as Mr. Klein mentioned.

18 Now, at a certain time on that date, you will
19 hear around June 5th, 2017, it was determined by State
20 Farm, you'll hear from a witness, Scott Richter
21 (phonetic) that this vehicle was in fact a total loss
22 based on State Farm's estimate of the 75 percent total,
23 which is what they deem for total losses. You will also
24 hear that State Farm has already paid \$29,000 to M.V.B.
25 in this case, as well as over \$40,000 to Ms. Pope and

1 her lien company, TD Bank. So they've already paid
2 almost \$70,000 for a car that their own lien says the
3 market value is \$36,000.

4 Now, as Mr. Klein mentioned, the main bone of
5 contention here will be the labor rate. That does
6 encompass at least more than half of the \$20,000 that
7 they indicate the lien is for. State Farm witnesses
8 will show they acted in accordance with their general
9 practices for similar types of cars and similar types of
10 repairs, and those similar types of repairs -- I'm
11 sorry, those similar types of labor rates have been
12 accepted by other shops all throughout the Long Island
13 area, which is the area that we have to focus on here.

14 Now, I'm sure Mr. Klein will show examples
15 where they have a higher labor rate, but I guarantee --
16 I won't guarantee, but I would imagine that those are
17 for different types of cars using different types of
18 repairs, and my witnesses will also be able to look at
19 those and tell you why those would be different than
20 this case. The evidence will also show through their
21 own testimony that M.V.B. has accepted labor rates well
22 less than \$120 for similar type cars for similar type
23 repairs going down to \$75, \$55, \$95 for certain types of
24 vehicles and certain types of repairs.

25 Now, State Farm -- leaving the labor rate

1 issue aside, State Farm will also show that there are
2 other aspects of the bill, including a rental charge,
3 certain markups and tow fees that we believe were
4 exaggerated or unnecessary.

5 Now, this is not a case like some of the other
6 ones that M.V.B. and State Farm are contending where
7 someone is going to get on from State Farm and say that
8 those repairs were not necessary or those repairs were
9 not done, except for one thing involving a wheel.
10 That's not going to be happening here.

11 State Farm, our witnesses are going to get on
12 the stand and admit that the work they said they did was
13 done and that the work that they asked to do was agreed
14 upon, except for that one thing. Again, going back to
15 the labor rate and certain other aspects of the bill not
16 related to actual repairs.

17 Now, while it is true, and the evidence is
18 going to show, that Ms. Pope, the insured at the time,
19 did sign a piece of paper indicating that they agreed to
20 pay \$120 for a labor rate. The evidence is also going
21 to show that Ms. Pope assigned all of her rights over to
22 M.V.B. in case of a situation like this, and, in fact --
23 and the evidence will show this as well, M.V.B. as
24 plaintiff has filed a lawsuit against State Farm for a
25 breach of contract for the \$21,000 that they believe

1 State Farm owes them that is not in this posture yet in
2 this very same courthouse. So they cannot have it both
3 ways. If you're going after the insured because she
4 signed for \$120, then you can't sue State Farm for
5 breach of contract.

6 Again, after all the testimony is concluded,
7 it's going to be clear, A, that the labor rate was
8 reasonable based on this type of car for this type of
9 repair for this type -- for this area of New York. It's
10 also going to be shown that the additional charges on
11 the bill, including the rental, markups and tow fees
12 were exaggerated, and the one bone of contention on the
13 actual repairs was unnecessary to the extent done by
14 M.V.B.'s repairman. We're going to ask that you find
15 that the lien is invalid up to any amount, and, if it is
16 valid, at a very much lower amount than requested by
17 Mr. Klein and M.V.B. Thank you.

18 THE COURT: Thank you. Mr. Klein, are you
19 ready to call your first witness?

20 MR. KLEIN: Yes, your Honor. We call Brian
21 McGauvran.

22 COURT CLERK: Raise your right hand.

23 Do you solemnly swear or affirm that the
24 testimony you're about to give in this case on trial
25 shall be the truth, the whole truth and nothing but the

1 truth, so help you God?

2 THE WITNESS: I do.

3 COURT CLERK: Have a seat.

4 Please state your first and last name and
5 spell your first and last name and state your address,
6 please.

7 THE WITNESS: Brian, B-R-I-A-N, McGauvran,
8 M-C-G-A-U-V-R-A-N, address is 20 Lakeview Avenue,
9 Rockville Centre, New York.

10 THE COURT: All right, you may inquire.

11 DIRECT EXAMINATION

12 BY MR. KLEIN:

13 Q. Good afternoon, Mr. McGauvran. How are you?

14 A. Good morning. Very well. Thank you.

15 Q. Where do you work?

16 A. M.V.B. Collision.

17 Q. What is your job title?

18 A. General manager.

19 Q. Does M.V.B. Collision have a d/b/a?

20 A. Yes. We do business as Mid Island Collision.

21 Q. Describe for the Court what your responsibilities
22 are as the general manager at Mid Island Collision.

23 A. I run the daily operations of the facility from
24 start to finish when the customer first comes into the
25 facility and is introduced, when the car is either towed or

1 brought in, and then we sign them up, we help them with all
2 the arrangements with the insurance company, setting up
3 claims, scheduling a rental car, scheduling part orders,
4 appointments, first estimates, supplements, completion of the
5 car and delivery back to the consumer.

6 Q. And how long have you held that position?

7 A. 30 years.

8 Q. Prior to working at Mid Island Collision, did you
9 have any experience in the industry?

10 A. I was an automotive technician and I worked for an
11 insurance carrier, GEICO.

12 Q. For how long?

13 A. I was with GEICO six or more years.

14 Q. In total, how long have you been in the industry of
15 repairing or overseeing the repairs of motor vehicles?

16 A. Most of my life. Started after high school. I'm
17 going to say 40 some odd years.

18 Q. Mid Island Collision, it's where you spent the last
19 how many years? Did you say 30?

20 A. 30 plus.

21 Q. 30 plus years. Can you describe for the Court
22 briefly a layout of what Mid Island actually looks like?

23 A. We're the largest facility on the east coast. We
24 have at least four buildings in the facility. It takes up
25 four corners on a street. We have over 120 bays with over 60

1 technicians. It's a large facility with different areas of
2 work. We have an area where the appraisers go over the cars.
3 We have an area where the heavy work is done, an area where
4 the combo work is done, an area where the paint work is done.
5 It's all separated and confined. We have an area where the
6 detailing and mechanical work is done.

7 Q. You mentioned various locations. Do they have
8 separate addresses?

9 A. Yes, they do.

10 Q. How many square feet are we talking?

11 A. I believe it's over 80,000.

12 Q. How does that compare to some of the other,
13 quote/unquote, competitors in the industry?

14 A. When I was at GEICO, I went into shops that were
15 the size of 1,000 square feet.

16 Q. Is Mid Island Collision certified to do business in
17 the auto body industry?

18 A. Yes, we are certified.

19 MR. KLEIN: Your Honor, we've actually
20 introduced some exhibits. The first exhibit I would
21 like to show Mr. McGauvran is Exhibit-I. Exhibit-I is a
22 copy of the business certificates during all relevant
23 times of this case. It's a required element of the
24 lien. It's been stipulated to, but, for the sake of the
25 record, I'm going to --

1 MR. TOMSKY: Correct, we stipulated that the
2 business is a certified repair shop.

3 COURT OFFICER: Showing the witness
4 Defendant's Exhibit-I in evidence.

5 Q. Can you describe what that is, Mr. McGauvran?

6 A. It's a business certificate for the State of New
7 York to operate as a collision shop.

8 Q. In addition to the certificate enabling Mid Island
9 Collision to act as an auto body shop in the industry during
10 all relevant times, does it also have certifications from
11 auto manufacturers?

12 A. Yes. We're certified by many manufacturers.

13 Q. Describe the process for obtaining those
14 certifications and how common it is to have them.

15 A. It's not common. The certifications require
16 that -- we'll take one case for an example, Audi. To be
17 certified by Audi, Audi has to come down and inspect the
18 facility, they require certain areas of expertise, they
19 require certain areas for customer service, they require a
20 clean, large shop with plenty of parking, a nice office, a
21 nice waiting area for the consumer, and that's just on the
22 outside. Then you go inside, they require a quarantine area
23 for certain repairs, they require a certain number of
24 technicians, a certain number of tools, a certain number of
25 equipment and a certain number of spray booths. They need

1 every aspect of the repair to be done in a quality fashion,
2 and they determine that we do it in such a fashion.

3 Then, after they inspect and authorize it, then we
4 send our technicians out for training in every aspect from
5 start to finish, customer service training, structural
6 training, body training, prep training, paint training, even
7 our service reps are trained, and our detailers, our
8 mechanics are also trained. This training is continuous,
9 ongoing for the rest of your time as a technician. You go
10 back quarterly, semi annually, annually depending on your
11 position. Our technicians are constantly in training.

12 Q. Is that cheap?

13 A. It's very expensive, especially with the aluminum,
14 magnesium, boron, and carbon fiber training. The expertise
15 requires a lot of training and a lot of expense. The
16 equipment alone, in the last years we spent well over a
17 million dollars between training and equipment.

18 Q. That's for every kind of car?

19 A. That's for every manufacturer, and each
20 manufacturer has their own standards, their own equipment,
21 their own welders. The number of welders alone is
22 astounding.

23 MR. KLEIN: Your Honor, if I could approach,
24 I'm showing you what's been marked or what's been
25 entered into evidence as Exhibit-H. These are simply

1 pictures of some of the certifications that the witness
2 has described.

3 Q. Can you describe where you have these
4 certifications in the office?

5 COURT OFFICER: Showing the witness.

6 A. These certifications have to be posted in the
7 customer waiting area.

8 Q. So they're on your wall?

9 A. Correct, yes.

10 Q. And those photos are true and accurate?

11 A. Yes. These photos are taken from the office.

12 Q. Can you just go through some of them and describe
13 for the record the kinds of cars?

14 A. The first exhibit is the Elite Certified Mercedes.
15 We were the very first certified shop in the country --

16 MR. TOMSKY: Is counsel going to furnish me
17 with a copy of this?

18 MR. KLEIN: You have it, but --

19 MR. TOMSKY: It's fine. Thank you.

20 A. I'm sorry, should I start again?

21 Q. Sure.

22 A. The first photo is Elite Certified Mercedes-Benz.
23 When aluminum first came into the country as a training
24 certificate, we were the first shop chosen because we were
25 the first shop that had the right equipment to do the

1 Mercedes jobs. We obtained the very first certification and
2 we have been certified as the Elite facility for
3 Mercedes-Benz ever since.

4 The second one would be the Porsche training. The
5 Porsche certification came right after Mercedes-Benz, after
6 we became the exclusive repair shop for the racing team for
7 NASCAR.

8 THE COURT: All right, I don't think we need
9 to go through each and every one of these. I note that
10 there are many certifications; Nissan, Honda, Acura.

11 MR. TOMSKY: We stipulated that that's fine.

12 THE COURT: It's in evidence. You don't have
13 to go through every one.

14 MR. KLEIN: I would just note that one of
15 the -- one or two of the certifications in there I
16 believe are actually for Nissan, which is the car in
17 question, just to highlight that.

18 MR. TOMSKY: Judge, I just need the -- I see
19 one.

20 THE COURT: In my package it's the next to
21 last.

22 MR. TOMSKY: I didn't see two. I just want to
23 make sure.

24 THE WITNESS: Infiniti, which is Nissan, which
25 is what I think he was eluding to.

1 THE COURT: First of all, don't volunteer any
2 information. You only need to respond to questions.

3 THE WITNESS: Okay.

4 THE COURT: Counsel, proceed.

5 Q. In your experience as the general manager of Mid
6 Island Collision, what is the daily interaction that you have
7 to have with insurance companies? Describe that for the
8 Court.

9 A. Insurance carriers are required to come in and
10 adjust cars for the consumer during repairs. We are required
11 to negotiate in good faith with these insurance companies to
12 reach an agreed upon price to repair the car.

13 Q. You said the word "adjust." Can you elaborate on
14 what that means, please?

15 A. To adjust would be to go over every aspect of the
16 vehicle repair from the labor, parts, materials and
17 procedures.

18 Q. So what are the insurance company's obligations in
19 that interaction with you?

20 MR. TOMSKY: Objection.

21 THE COURT: Sustained.

22 Q. What are your obligations in connection with your
23 customer?

24 A. Our obligation is to repair the car to pre-loss
25 condition.

1 Q. What is your understanding of the insurance
2 company's role in that process?

3 A. They're obligated to pay for the car to be restored
4 to its pre-loss condition.

5 Q. Sometimes a layman will hear the term "total," that
6 a car is "totaled," that there is a "total loss." What,
7 actually, is that?

8 A. The Department of Motor Vehicles for New York State
9 dictates the car is a total loss once the damage exceeds 75
10 percent of the car's value.

11 Q. Who declares a vehicle a total loss?

12 A. According to the Department of Motor Vehicles, the
13 insurance carrier.

14 Q. Do you have the authority to declare a total loss?

15 A. No.

16 Q. Does Mid Island?

17 A. No.

18 Q. The most you can do is highlight that one might be
19 appropriate?

20 A. Yes. We suggest when the car exceeds its value, we
21 feel that it's not repairable.

22 Q. You mentioned a moment ago that, you know, the
23 series of certifications that Mid Island Collision has. Is
24 every auto body shop certified?

25 A. No.

1 Q. And is there a different business model that is
2 common in Nassau County?

3 MR. TOMSKY: Objection.

4 THE COURT: Sustained.

5 Q. What is the other business model that is common in
6 Nassau County for auto body shops?

7 MR. TOMSKY: Objection, assumes a fact not in
8 evidence, that there is a different standard.

9 THE COURT: I'm going to allow it. We don't
10 have a jury here.

11 A. Well, you're either a certified body shop or you
12 can be a direct repair body shop.

13 Q. Otherwise known as?

14 A. A DRP.

15 Q. What is a DRP?

16 A. The insurance carriers have programs where they
17 refer cars to other shops for a discounted rate.

18 Q. And so do those shops have certifications?

19 A. Some do, most do not.

20 Q. Why not?

21 A. They're very expensive.

22 MR. TOMSKY: Objection.

23 THE COURT: Sustained.

24 MR. TOMSKY: I would like to strike that
25 answer.

1 THE COURT: I didn't allow him to finish.

2 It's stricken.

3 Q. What is the difference in the business models?

4 MR. TOMSKY: Again, objection, confused by the
5 question.

6 Q. Well, how --

7 THE COURT: I will allow it.

8 Q. How does a DRP get customers?

9 A. A DRP is referred customers by the insurance
10 carrier.

11 Q. And are you?

12 A. No.

13 Q. On March 28, 2017, were you working at Mid Island
14 Collision?

15 A. Yes.

16 Q. And did you have the opportunity to meet someone by
17 the name of Courtney Pope?

18 A. Yes.

19 Q. Why was she at Mid Island Collision?

20 A. Her Armada was involved in an accident.

21 Q. Did you go through some paperwork with Ms. Pope?

22 A. Yes, I did.

23 Q. I would like to show the witness what's been marked
24 in evidence as Exhibit-A.

25 (Whereupon, Defendant's Exhibit-A was marked into

1 evidence.)

2 COURT OFFICER: Showing the witness Exhibit-A
3 in evidence.

4 Q. Can you describe for the record what that item
5 depicts?

6 A. It's the repair authorization.

7 Q. And does it describe a labor rate or labor rates?

8 A. Yes. It posts the different rates of the facility.

9 Q. Does it post any other rates?

10 A. It posts the labor rates and the storage rates.

11 Q. Was this an item -- was this a document that you
12 showed to Ms. Pope?

13 A. Yes.

14 Q. And did she sign it?

15 A. Yes, she did.

16 Q. Is that her signature at the bottom?

17 A. Yes.

18 Q. I'm also going to -- I would like to show the
19 witness Exhibit-B.

20 (Whereupon, Defendant's Exhibit-B was marked into
21 evidence.)

22 COURT OFFICER: Showing the witness Exhibit-B.

23 Q. Can you describe for the record what that is?

24 A. This is a document where I notify the insured that
25 her car will be towed to the dealer for service.

1 Q. Is it signed?

2 A. Yes, it is.

3 Q. By whom?

4 A. Courtney Pope.

5 Q. I show the witness Exhibit-C in evidence.

6 (Whereupon, Defendant's Exhibit-C was marked into
7 evidence.)

8 COURT OFFICER: Exhibit-C shown to the
9 witness.

10 Q. Mr. McGauvran, describe what Exhibit-C depicts.

11 A. This is a form that explains to the consumer the
12 different parts, original versus aftermarket, salvage and
13 reconditioned, and we explain to her that we only use the
14 original OEM.

15 Q. Can you elaborate for a moment on why a document
16 like this is important to your business?

17 A. Yes. When you're a certified repair facility, the
18 manufacturers dictate which parts you can use on repairing
19 their cars. Nissan is one of the manufacturers that requires
20 original equipment only be used in the repair of their
21 automobiles. I explained that to Ms. Pope, and we crossed
22 out the three that Nissan does not allow for.

23 Q. Did she sign?

24 A. Yes.

25 Q. You mentioned requirements from Nissan. I would

1 like to show the witness Exhibit-K.

2 (Whereupon, Defendant's Exhibit-K was marked into
3 evidence.)

4 COURT OFFICER: Showing the witness Exhibit-K
5 in evidence.

6 Q. Mr. McGauvran, how does that document relate to
7 what you were describing a moment ago about Nissan's
8 requirements?

9 A. These are the position statements issued to us from
10 Nissan with regards to repairing certified cars.

11 Q. What does it describe?

12 A. It describes that Nissan does not approve of using
13 used parts, aftermarket or reconditioned parts.

14 Q. I'm sorry, were you reading from it?

15 A. Okay. You want me to read from it?

16 THE COURT: It states, "For this reason,
17 Nissan North America does not," and that's in bold type,
18 approve of the use of aftermarket, grand market or
19 imitation parts."

20 Q. Mr. McGauvran, does Mid Island Collision abide by
21 Nissan's requirements to the best of its ability?

22 A. Yes.

23 Q. And is that the case for every shop in the
24 industry, as far as you're aware?

25 MR. TOMSKY: Objection.

1 A. No.

2 THE COURT: I will allow it. He's familiar
3 with custom and practice. I will allow it.

4 MR. TOMSKY: I objected before he said to your
5 knowledge.

6 Q. What is the difference between Mid Island and some
7 of the other shops that you described --

8 MR. TOMSKY: Objection.

9 THE COURT: Sustained.

10 Q. The requirement from Nissan for original parts --

11 A. Yes.

12 Q. -- describe what is unusual about Mid Island
13 abiding by that.

14 MR. TOMSKY: Same objection.

15 THE COURT: Sustained.

16 Q. Does State Farm abide by that?

17 A. No.

18 Q. How so?

19 A. State Farm in their estimates allow for the use of
20 used, aftermarket and reconditioned parts.

21 Q. Contrary to Nissan's own requirements?

22 A. Contrary to most manufacturers, yes.

23 MR. TOMSKY: Objection. Withdrawn.

24 THE COURT: Overruled.

25 Q. When was State Farm first at Mid Island Collision

1 to inspect Ms. Pope's Armada?

2 A. I believe in early April. I would have to look at
3 the estimate to confirm the exact date.

4 Q. Could we show the witness what's been put into
5 evidence as Exhibit-Y?

6 MR. KLEIN: Your Honor, this exhibit has been
7 tabbed to identify supplements as well.

8 THE COURT: Okay.

9 (Whereupon, Defendant's Exhibit-Y was marked
10 into evidence.)

11 Q. Mr. McGauvran, who performed the first estimate
12 that you can recall on this vehicle from State Farm, from
13 your recollection?

14 A. It says Michael Thompson.

15 Q. Is that accurate?

16 A. No. I think it was Jim Rice.

17 Q. So it appears as though the document from State
18 Farm is incorrect?

19 A. Yes.

20 Q. And when did Mr. Rice perform the estimate on this
21 car?

22 A. On March 31st.

23 Q. What was his estimate for the amount of money that
24 would be necessary to repair this vehicle to pre-loss
25 condition?

1 A. \$10,082.70.

2 Q. Did he tell you that estimate on that date?

3 A. Yes, he told us on March 31st.

4 Q. What was your reaction?

5 A. We felt it was extremely low.

6 Q. Why?

7 A. Because we had written over \$25,000 in damages.

8 Q. I mean, what about it struck you as so off base?

9 A. Well, the used parts, the lack of attention to the
10 suspension and frame damage, and I believe he had written
11 some reconditioned parts.

12 Q. And elaborate for a moment on the use of used parts
13 on this estimate. What is the most notable entry on that
14 estimate, in your view?

15 A. On page four, entry 41 was a recycled door.

16 Q. So what was the price charged for the recycled part
17 there?

18 A. \$375.

19 Q. I would like to show the witness what's been
20 entered in evidence as Exhibit-E, which is a tabulated final
21 bill.

22 (Whereupon, Defendant's Exhibit-E was marked into
23 evidence.)

24 COURT OFFICER: Showing the witness.

25 Q. Mr. McGauvran, what did that door actually cost to

1 replace in accordance with Nissan's requirements?

2 A. \$962.21.

3 Q. And so the estimate was low by about a third?

4 A. Yes.

5 Q. By about two thirds really?

6 A. Correct.

7 MR. TOMSKY: Are you talking about 33 on the
8 final --

9 THE WITNESS: Line 33, page two.

10 MR. TOMSKY: Thank you.

11 Q. So State Farm gave you this estimate and you
12 expressed your displeasure with it. What happens next?

13 A. They left us with a copy of the estimate and told
14 us that when we have the car apart to call for a
15 reinspection.

16 Q. And did you?

17 A. Yes.

18 Q. Did they come back?

19 A. Yes.

20 Q. What happened then?

21 A. They reinspected the vehicle.

22 Q. Who was it this time?

23 A. Looking at Exhibit-Y, supplement number one was
24 inspected by James Rice.

25 Q. What was the additional -- what was the additional

1 supplement for, how much money?

2 A. Supplement was written for \$3,294.

3 Q. On what date, does it say?

4 A. Date was April 12th, 2017.

5 Q. Was that estimate accurate, in your view?

6 A. No. His supplement contained procedures that
7 should have been on the original estimate but still
8 incomplete.

9 Q. At that point, did you actually tell -- did you
10 tell or anyone at Mid Island that you saw tell State Farm
11 this is a total loss, you should total it?

12 A. Yes. We told Jim Rice we felt the car was going to
13 be a total loss and not to go any further.

14 Q. Did they total it?

15 A. No.

16 Q. So what happened?

17 A. He told us he felt it was not a total, that we
18 should continue with the repairs.

19 Q. Did you?

20 A. Yes.

21 Q. And then what happened? Did they come back on
22 April 20th?

23 MR. TOMSKY: Objection to leading him. I
24 understand he's looking at a document, but --

25 THE COURT: I'm going to allow it.

1 A. Supplement two was completed by Michael Thiele on
2 April 20th.

3 Q. Did Mr. Thiele agree with the prior estimate or did
4 he revise it?

5 A. He revised it.

6 Q. What direction?

7 A. In an upward direction again, but --

8 Q. Go ahead.

9 A. The first estimate that's on your Exhibit-Y from
10 Michael Thompson actually was between supplement number one
11 and supplement number two. I don't know how State Farm dated
12 it 3-29, but --

13 THE COURT: Again, listen to the questions and
14 answer the questions. Do not volunteer information. If
15 you think a question is something that you can't answer,
16 just say "I can't answer it" and counsel will reframe it
17 or ask a different question.

18 THE WITNESS: Okay.

19 Q. Does it appear that the first entry was a State
20 Farm error in the date?

21 A. Yes. That was a supplement, not an estimate.

22 Q. And so on 4-20 Mr. Thiele was there?

23 A. Yes.

24 Q. And he revised the estimate upward I think you
25 mentioned?

1 A. Yes.

2 Q. At that point, did he say you finally got it, we've
3 been here several times now, you hit the nail on the head?

4 A. No. At this point, they just made a correction for
5 new versus used but still left the used wheel price in there
6 and they just again adjusted for more procedural.

7 Q. I don't want to take more time than is necessary,
8 but how many times -- is it the case that they continued
9 coming back and the same pattern kept happening?

10 A. Yes. Their issue was show us the damage, buy the
11 parts, and then we'll pay for them.

12 Q. How many supplements did they ultimately issue?

13 A. There were nine supplements.

14 Q. For a total of how many visits?

15 A. The visits were actually -- including the first one
16 by Mike Thompson, there were 11 visits.

17 Q. Spanning how many months?

18 A. Spanning from March 29th to June 7th, I gather that
19 is four months.

20 MR. TOMSKY: I'm going to object just to the
21 classification of that being four months when it's two
22 month and a week.

23 THE WITNESS: I'm sorry. Am I in error?

24 MR. KLEIN: No. It's --

25 Q. Mr. McGauvran, what month --

1 THE COURT: We have specific dates so we don't
2 have to count the --

3 MR. TOMSKY: I just don't want the record to
4 say four months.

5 THE COURT: March 29th to June 27th --

6 MR. KLEIN: From March to June, it's the end
7 of March to the first week or two of June. First
8 estimate was March 31st. The last one was June 7th.

9 THE COURT: June 7th. Okay, got it.

10 Q. How many times did Mr. Thiele in particular come
11 back?

12 A. Let me check. It doesn't say on the estimates
13 because they have both names, Thiele and Rice, but I believe
14 Thiele was there twice, at least.

15 Q. Would it surprise you to know that he was there
16 seven times?

17 MR. TOMSKY: Objection.

18 THE COURT: Sustained.

19 A. If the documents --

20 THE COURT: No. No. We sustained the
21 objection. You don't need to answer.

22 THE WITNESS: I'm sorry.

23 MR. KLEIN: That's okay.

24 Q. Who was there -- who was the final person there?

25 A. James Rice.

1 Q. What was Mr. Rice's final estimate for what it
2 would cost to repair the vehicle to pre-loss condition?

3 A. \$29,410.76.

4 Q. To be clear, Mr. Rice himself had been an estimator
5 on the car at the end of March, correct?

6 A. He was the initial estimator.

7 Q. And so the same person gave an estimate at \$10,082
8 and at \$29,410; is that correct?

9 MR. TOMSKY: Objection to the form.

10 THE COURT: All right.

11 MR. KLEIN: I'm just trying to get through it.

12 THE COURT: It's summary, but, again, there is
13 no jury here.

14 MR. TOMSKY: I understand.

15 THE COURT: I'm going to allow the answer to
16 stand.

17 MR. TOMSKY: I'm just preserving it.

18 A. Yes, that is correct.

19 Q. Had there been additional damage on the car while
20 it was in your shop?

21 A. No.

22 Q. Had anyone taken the car out and gotten into
23 another accident?

24 A. No.

25 Q. So it's the same car in the same condition that

1 went through all of these different estimates; is that
2 correct?

3 A. Correct.

4 Q. How is Ms. Pope getting around town, as far as you
5 know, during this time?

6 A. To my knowledge, she was in a rental.

7 Q. How do you know that she was in a rental?

8 A. We paid the bill.

9 Q. And so from March to June she was in a rental on a
10 bill that you paid?

11 A. I'm not sure of the exact dates, but, yes, she was
12 in a rental and we paid the bill.

13 Q. What was the consequence of this prolonged process
14 on how long she had to be in a rental?

15 A. Well, by delaying this claim she was exposed to
16 out-of-pocket expense.

17 Q. Now, in the final estimate, or in the immediate
18 aftermath of the final estimate, did State Farm ultimately
19 declare the car, as far as you know now, to be a total loss?

20 A. Yes.

21 Q. What is a lien?

22 A. A lien is a process where we attach a lien to a car
23 to protect our financial interest in it.

24 Q. Did you use that vehicle in this case?

25 A. Yes.

1 Q. How did you use that vehicle in this case?

2 THE COURT: Vehicle?

3 Q. Ow did you use the lien in this case? Sorry, the
4 double entendre.

5 A. We used the lien to protect the balance owed to us
6 by State Farm.

7 Q. Owed to you by whom?

8 A. Well, Courtney Pope owed us the balance.

9 Q. And who did you hire to help you with the lien?

10 A. I believe it is All New York Lien.

11 Q. I'm going to show the witness what's been put into
12 evidence as Exhibit-G.

13 (Whereupon, Defendants' Exhibit-G was marked into
14 evidence.)

15 COURT OFFICER: Showing the witness Exhibit-G.

16 THE COURT: Is that mechanic's lien, is that
17 what we're talking about?

18 MR. KLEIN: Yes, it is.

19 THE COURT: Court will take judicial notice
20 that it understands the process and nature of the lien,
21 if that helps.

22 MR. KLEIN: Certainly.

23 Q. Now, does that appear to be the lien that was
24 issued in connection with Ms. Pope's Nissan?

25 A. Yes.

1 Q. And State Farm mentioned that there is a bill on
2 that lien for close to \$50,000. Can you describe -- was that
3 an error?

4 A. That was the estimate written on the vehicle, yes.

5 Q. So that was the total estimate?

6 A. Total estimate written on the vehicle.

7 Q. The amount in controversy, is it that amount?

8 A. No.

9 Q. Describe for a moment why in the world there would
10 be a final bill, when you add up all the payments and unpaid
11 bills --

12 MR. TOMSKY: Objection to --

13 Q. -- for close to \$50,000 --

14 THE COURT: That is a leading question. It's
15 a little too leading.

16 Q. Mr. McGauvran, why were the bills in this case in
17 excess of what the car was worth?

18 A. The car was repaired, and in order to repair the
19 car, the estimate and the final bill to repair the car exceed
20 the final loss value of the car. Hence, it was a total loss.
21 Had it been totaled early on, that bill would never have
22 existed. We would have never repaired the car, but as they
23 chose to fix it, they repaired it based on their standards
24 and we repaired it based on Nissan's standards. Nissan's
25 standards required that bill be done a certain way. We

1 provided and repaired the car as per Nissan and the bill
2 exceeded 50,000.

3 Q. So what would have happened to that bill, to the
4 bill's size if the car had been totaled when State Farm --
5 when Mid Island said it should be totaled?

6 A. The bill wouldn't exist, the car would never have
7 been repaired.

8 Q. Would that have been in Mid Island's financial
9 interest?

10 A. No. We're in the business of fixing cars.

11 Q. So elaborate on that. Why wouldn't that be in your
12 financial interest, to declare the car totaled?

13 A. If we repair a car, we get paid for the repairs.
14 If the car is totaled, we do not repair it so we do not make
15 money repairing the car.

16 Q. And, yet, you urged a total loss in the beginning
17 anyway?

18 A. Yes. It's in nobody's interest to repair a totaled
19 vehicle.

20 Q. So then why did you do that?

21 A. Well, we asked State Farm to total it. They
22 refused.

23 Q. Mr. McGauvran, I think it would be helpful to
24 describe in some more detail, not too much detail, the work
25 that was actually performed on this vehicle.

1 MR. KLEIN: For that purpose, your Honor, I'm
2 not going to go into everything because the parties have
3 stipulated to --

4 THE COURT: And I have the invoice which
5 details from the VIN label on the door through the frame
6 damage, and all of the other items, so if you want to
7 have him give an overview, that's fine.

8 MR. KLEIN: Just an overview of some of the
9 different parts on a car, what was damaged, and then
10 I'll leave it at that.

11 THE COURT: Correct.

12 MR. KLEIN: The photographs that I'm going to
13 be showing the witness are in evidence at Exhibit-J,
14 some of which, on consent of the insurance company, have
15 been blown up just so the Court can see them. I know
16 you have the photos as well, but it might help if we're
17 all operating on the same picture.

18 Can Exhibit-J be shown to the witness, please?

19 (Whereupon, Defendant's Exhibit-J was marked
20 into evidence.)

21 COURT OFFICER: Showing the witness.

22 MR. KLEIN: Your Honor, it might help,
23 actually, if I hand some of these to him so he can point
24 as he is describing a part.

25 THE COURT: You may.

1 MR. KLEIN: Thank you. These are just
2 duplicates of some of the photos that are in J.

3 Q. Mr. McGauvran, the first area of the car that I
4 hope you can talk about is the suspension. What is a
5 suspension?

6 A. The suspension makes up the four corners of the
7 vehicle that have it riding on the road, the wheels, tires
8 and mechanicals that divide the body from the road.

9 Q. Can you describe why the suspension is important?

10 A. The suspension dampens the vibration on the road,
11 keeps the car in control, it steers and gives it direction.

12 Q. What are the components of a suspension?

13 A. In this case, the left rear suspension is comprised
14 of the strut, upper and lower control arms, knuckle, wheel
15 hub and bearing.

16 Q. And so what role does the knuckle play?

17 A. Knuckle holds the wheel straight in the -- in a
18 straight-ward direction.

19 Q. And the control arms?

20 A. The control arms give the vehicle movement up and
21 down as it travels on the roadway surface.

22 Q. Are there any photos that you have in your
23 possession, blown up photographs that would help the Court
24 follow along?

25 A. That is the picture you're looking at. That is the

1 left rear suspension.

2 MR. TOMSKY: If the witness can turn it around
3 so I can catch up with my photos? Thank you.

4 Q. Did you mention the control arms?

5 A. Yes, the control arms.

6 Q. And the strut, what is the strut? Where is the
7 strut?

8 A. The strut is a vertical stabilizer that dampens any
9 vibration, keeps it from constant bouncing.

10 Q. What happened to Ms. Pope's suspension, and, in
11 particular, what happened to those parts?

12 A. The left rear suspension on Ms. Pope's vehicle
13 sustained damage from impact. Where the damage was sustained
14 to the frame and the sub frame, all those perches and
15 mounting points were damaged.

16 Q. Say that in English, please.

17 A. Oh, where the control arms mount into the chassis,
18 the mounts were bent in an upward direction, they were
19 deformed, convoluted and bent.

20 Q. What effect would that have on the operability of
21 her car?

22 A. It would make the car uncontrollable at different
23 speeds.

24 Q. You mentioned a sub frame. What is a sub frame and
25 do you have a picture of one?

1 A. It's that photo.

2 MR. TOMSKY: Again, if you could just -- thank
3 you.

4 Q. What's the sub frame, Mr. McGauvran?

5 A. In the newer models, a sub frame's purpose is to
6 separate the suspension from the main uni body or frame of
7 the car, also dampening vibration and making a nicer,
8 smoother ride.

9 Q. Are there any important items that are connected to
10 the sub frame?

11 A. The sub frame also mounts to the perch. In this
12 instance, the perch is mounted to the frame and the sub frame
13 controls the entire suspension and drivetrain of the vehicle.

14 Q. What is a perch?

15 A. A perch, just as a bird would sit on a perch, the
16 frame sits on a perch, and it looks like those pictures.
17 These are individual perches that are welded to the frame
18 that hold the suspension arms in.

19 Q. What happened to the perches on this car?

20 A. The perches were bent and convoluted from impact.

21 Q. So what does that mean for a company trying to fix
22 the car?

23 A. You would have to remove and re-attach new perches.
24 When you're involved this deeply into a repair, this is the
25 point where you should realize that this car is beyond

1 repair, but they requested that we change the perches, and we
2 did.

3 Q. You mentioned a frame which is attached to the sub
4 frame, I think is your testimony.

5 A. Correct, the mainframe of the vehicle.

6 Q. Now, what is the role of frames in the modern car?

7 A. This photo showing the frame, modern cars today do
8 not have frames. They're uni body construction, but the
9 larger SUVs still carry the uni body built on top of a frame
10 to reinforce it.

11 Q. So what is the effect of having a framed car on the
12 repair work?

13 A. It makes it a much more complex repair when you
14 have to remove the uni body and take the entire body off of
15 the frame to do the repairs to the frame. In this case, the
16 car sustained heavy uni body and heavy frame damage requiring
17 separate pulling and separate repairing on both units.

18 Q. How long does it take to remove the body of the car
19 from a frame?

20 A. For an average technician, easily 10 hours every
21 time you remove it.

22 Q. How many times do you have to remove this one?

23 A. This one was removed at least twice, I believe
24 three times.

25 Q. Why?

1 A. In each stage of repairs, you have a mechanical
2 stage where the suspension was repaired, you have the frame
3 repairs where the framework was done, and then you had to
4 also remove the uni body to repair the uni body, which was
5 also heavily damaged.

6 Q. So each time it takes 10 hours, about?

7 A. Correct.

8 Q. And would this all have been required if the car
9 was totaled when you initially said?

10 A. No.

11 Q. You mentioned, I think, the quarter panel, and, if
12 you haven't, if you could just describe what a quarter panel
13 is and where it is on a car.

14 MR. TOMSKY: Your Honor, I understand what
15 counsel is trying to do with this witness. We've
16 already stipulated that the only actual repair at issue
17 was that one recycled wheel versus a new wheel. For him
18 to go over certain aspects of the car that State Farm is
19 not disputing should have been done, were done and the
20 amount of hours done on those just seems to be a waste
21 of the Court's time.

22 THE COURT: All right, well, I think counsel
23 is trying to establish the extent of the overall work,
24 and I'm going to let him go into that a little bit more,
25 but I do know what a quarter panel is, and, also, I

1 don't know where you are in terms of the examination, I
2 have a previous appointment I'm going to have to leave
3 for in about five minutes, so if you could pick a good
4 point.

5 MR. KLEIN: What I would like to do then is to
6 go through a couple of more elements of this particular
7 repair, and then I think that would be a good time.

8 THE COURT: Then we'll pick up after lunch,
9 okay.

10 MR. TOMSKY: If we could discuss, when he's
11 done, if we could discuss scheduling for the other
12 witnesses.

13 THE COURT: Absolutely.

14 MR. TOMSKY: Great. Thank you.

15 Q. Just a few more items, Mr. McGauvran.

16 Describe the relationship between the door on
17 Ms. Pope's vehicle that had to be repaired and the airbags in
18 the car.

19 A. One of the reasons manufacturers require the use of
20 an OEM door is because you can't determine where a used or
21 reconditioned door has been, and if there's any improper
22 repairs to a door of a car, it will effect the timing of the
23 airbag, which can be deadly to the passengers.

24 Q. Just to be clear, you mentioned OEM. Can you
25 remind the Court what an OEM is?

1 THE COURT: I know what OEM is, Original
2 Equipment Manufacturer.

3 Q. What would have been the consequence for Ms. Pope
4 to drive around in her car immediately after the collision?

5 A. Well, if you're driving in an improperly repaired
6 car and you're involved in another consequential accident,
7 there could be some serious injuries, if not death, if not
8 properly repaired.

9 Q. Can you elaborate for a moment on what it is about
10 the timing of the airbag that is so precise?

11 A. The airbags are timed with sensors in the door that
12 upon impact they are specifically set to go off before the
13 customer hits the door or the person, the occupant, I'm
14 sorry. If the occupant hits the panel of the door prior to
15 the airbag going off, you have serious head injuries.

16 Q. So what was the work that was done on this door?

17 A. It was replaced OEM.

18 Q. The last thing I would like to review is the --
19 something that might sound simple but is the finishing and
20 the painting on this car.

21 What color was the paint on this vehicle?

22 A. It's a pearl white.

23 Q. Why is that significant?

24 A. Pearlescent white paint and any pearl refinish is
25 the most complicated refinish of all.

1 Q. Why?

2 A. It requires several extra steps, it requires more
3 expensive training to be able to apply the different paints
4 to the car.

5 Q. What are the extra steps?

6 A. You've got the base color, you've got the
7 pearlescent color and the clear color on top of the base
8 primer. So if the colors aren't perfect, they will not
9 match, and it takes a much broader area to blend and refinish
10 on the side of a vehicle.

11 Q. What do you mean by a "broader area"?

12 A. If there are 12 steps to painting a car, each step
13 requires you go a certain distance further, so if you have 12
14 different steps, you're going 12 base colors further. If you
15 assume a foot, just as an example, if you go a foot for every
16 color, each color requires a foot, the pearl requires another
17 foot and then the clear goes on even further, and the more
18 paint that you apply gives a different depth and gives a
19 different color depth, changes the color.

20 Q. Ms. Pope's color was?

21 A. Pearl white.

22 MR. KLEIN: Now is a good time to stop.

23 THE COURT: All right, so you can step down
24 for a moment. You can't discuss the case with counsel.
25 We'll recess until 2 o'clock. Let's go off the record

1 now and let's talk about the scheduling.

2 (A recess was taken.)

3 COURT CLERK: All rise. Come to order and be
4 seated.

5 THE COURT: All right, so do you want to come
6 back?

7 COURT CLERK: You're reminded that you're
8 still under oath.

9 THE WITNESS: Yes.

10 THE COURT: All right, Mr. Klein, you may
11 continue your inquiry.

12 MR. KLEIN: Thank you, your Honor.

13 Q. Welcome back, Mr. McGauvran.

14 Where we left off, you had just finished describing
15 some of the work that was performed on the Nissan Armada
16 belonging to Courtney Pope. What I would like to turn to now
17 are the labor rates associated with the work that was
18 actually performed.

19 What was the labor rate that was charged in
20 connection with repairing the Nissan Armada in this case?

21 A. \$120 an hour.

22 Q. And has Mid Island ever received a payment of \$120
23 an hour or more in connection with work performed on a
24 vehicle from State Farm?

25 A. Yes.

1 Q. Is Mid Island aware of payments to other providers
2 in the automotive industry to whom State Farm has paid \$120
3 an hour or more for repairs?

4 A. Yes.

5 Q. I would like to draw your attention and to show you
6 Exhibit-AA and BB, please.

7 (Whereupon, Defendant's Exhibits AA and BB were
8 marked into evidence.)

9 COURT OFFICER: Showing the witness.

10 Q. Mr. McGauvran, can you describe what Exhibits AA
11 and BB are?

12 A. AA is an Audi bill for service work done at Audi
13 Lynbrook that we paid for.

14 Q. And what did Audi -- let me take a step back.

15 Why was Audi performing work on a car that was in
16 Mid Island Collision's hand?

17 A. When we completed the car, we sent the car listed
18 on AA to the dealer for a wheel alignment and computer
19 resets, made sure all the codes were clear, and the
20 headlights were aimed.

21 Q. On that vehicle, Audi charged Mid Island for its
22 services?

23 A. Yes.

24 Q. What labor rate did Audi charge Mid Island?

25 A. 145 per hour.

1 Q. And did that \$145 an hour then make its way into
2 the final bill submitted to the owner of the car and State
3 Farm?

4 A. Yes.

5 Q. And can you point the Court to where that component
6 is in the bill provided by State Farm?

7 THE COURT: I would note that it's on the
8 second page, it's got a number next to it that says
9 three pound sign two, 1ASUZ0, 145, and then that's
10 repeated down below with a different designation and
11 it's 72.50.

12 MR. TOMSKY: I just want to make sure I'm
13 looking at the right thing. Do you mind if I have him
14 point it out?

15 Q. So, Mr. McGauvran, would you mind elaborating to
16 make clear how those documents add up?

17 A. Yes. The Audi AA document gives job number one the
18 wheel alignment at 199.95. That appears on the State Farm
19 estimate at page four, excuse me, page five, line number 80,
20 wheel alignment by State Farm, 199.95 to match the Audi
21 estimate.

22 MR. TOMSKY: I'm sorry, what number is that?

23 A. Job number one on the Audi estimate matches line
24 number 80 on the State Farm estimate.

25 Job number three, aiming headlights are 72.50,

1 appears on State Farm's estimate at the same rate, page
2 three, line number 28.

3 Q. And so, Mr. McGauvran -- were you finished?

4 A. He has the final job, the other job number two at
5 145, appears on State Farm's estimate on page 10, line number
6 238 for 145. That is complete, that's all the items on the
7 bill.

8 MR. TOMSKY: 228?

9 THE WITNESS: Page 10, line item 238.

10 MR. TOMSKY: Thank you.

11 Q. Mr. McGauvran, was the work -- how does the work
12 performed by Audi on that car compare to the difficulty of
13 the work performed by Mid Island on that car?

14 MR. TOMSKY: Objection.

15 THE COURT: Sustained.

16 Q. Well, describe the complexity of the work that Audi
17 performed.

18 A. Line number one is a basic wheel alignment. Job
19 number two is plug and play. They plug in a computer, clear
20 the codes. And line number three is aiming headlights.

21 Q. How does that compare to the work that was
22 performed in your shop?

23 A. Well, that's light mechanical as opposed to heavy
24 frame.

25 Q. The labor rate paid to Audi was how much?

1 A. 145 an hour.

2 Q. How much was paid to Mid Island?

3 A. 49.

4 Q. I would like to draw your attention to Exhibit-CC
5 and DD. It's two exhibits.

6 I'm sorry, what is the date on that?

7 A. July of '18.

8 Q. Who performed the estimate?

9 A. Michael Thiele.

10 Q. I would like to draw your attention to Exhibit-CC
11 and DD.

12 (Whereupon, Defendant's Exhibits CC and DD were
13 marked into evidence.)

14 Q. Let's stick with payments to dealers. Can you
15 describe for the Court what is reflected in Exhibits CC and
16 DD in comparison to what you described a moment ago in AA and
17 BB?

18 MR. TOMSKY: Your Honor, I'm going to object
19 to this line of questioning. This is for a completely
20 different model car, 2015 Audi versus a 2015 Nissan. If
21 he's just going to explain what was -- the work that was
22 done on a different car that's not at issue here, I
23 don't see the relevance. I understand the relevance
24 he's trying to get to, but I don't see how it's coming
25 in now.

1 MR. KLEIN: Your Honor, we're here to -- the
2 biggest issue in this case in terms of the amount of
3 money that it represents is the labor rates. I would
4 like a little bit of leeway to establish that State Farm
5 itself has paid dealers and/or Mid Island directly at
6 labor rates in substantial excess of the labor rates
7 that it is deeming should be binding on the Court here.
8 If given a little bit of leeway, I promise we will get
9 to where my adversary would like us to go, which is to
10 talk about Nissan, but, for the sake of establishing
11 labor rates that are paid that are reasonable, it is not
12 only work performed on Nissan that is relevant to
13 establishing that fact.

14 THE COURT: All right, I'll give you a little
15 bit of leeway subject to connection at this point, but I
16 don't want to go into a whole bunch of vehicles. Let's
17 go through this exhibit that you've just introduced and
18 then maybe we could move on to something -- I'll use the
19 term loosely, closer to home.

20 MR. KLEIN: Okay, so I want to establish --
21 just to streamline where I'm going, I want to establish
22 the reasonability of this labor rate from a variety of
23 different perspectives.

24 THE COURT: On the last exhibit, you said that
25 M.V.B. was paid \$49 an hour.

1 MR. KLEIN: Yes, which is roughly a third or
2 less than a third of what was paid to a dealer for work
3 that was substantially less complicated and --

4 THE COURT: I don't know that it was
5 substantially less complicated, but it's different work.

6 MR. KLEIN: That's what I would like him to
7 elaborate on.

8 THE COURT: You can't ask questions through
9 our discussion on an evidence ruling. Okay? So proceed
10 with your questioning and let's see where you're going.

11 MR. KLEIN: Sure.

12 Q. Mr. McGauvran, can you describe for a moment what
13 you have in front of you, Exhibit-CC and DD?

14 A. CC is the dealership bill for service provided to
15 us by Audi Lynbrook.

16 Q. And was it a similar fact pattern there where the
17 car was given to Audi for certain work?

18 A. Yes.

19 Q. What did Audi charge you in that case?

20 A. We paid Audi the same \$145 an hour for the resets,
21 199 for the wheel alignment, and 72.50 for the headlights to
22 be aimed.

23 Q. And, again, was that bill paid by State Farm?

24 A. Yes, we were paid by State Farm those exact three
25 items on our estimate.

1 Q. Who was the estimator in that case?

2 A. Mike Thiele.

3 MR. KLEIN: Your Honor, I have a series of
4 other cars that fit similar partners. Really, Exhibits
5 AA through XX are along these lines. I don't want to go
6 through every single one of them, so what I'm going to
7 do now is I'm going to jump ahead a few exhibits to talk
8 about payment of labor rates in another context at a
9 rate that is higher than what's --

10 THE COURT: Okay, thank you.

11 Q. Exhibits MM and NN, if that can be shown to the
12 witness, please.

13 (Whereupon, Defendant's Exhibits MM and NN were
14 marked into evidence.)

15 Q. Mr. McGauvran, Exhibits MM and NN, what
16 manufacturer of the vehicle -- who was the manufacturer of
17 the vehicle at issue in those exhibits?

18 A. Nissan, Nissan Maxima.

19 Q. In that case, did you -- did Mid Island submit the
20 vehicle to a Nissan dealership for work?

21 A. Yes. We took the car to Rockaway Nissan. They
22 performed the wheel alignment, head lamp aiming and resets.

23 Q. Can you describe to the Court what is involved in
24 those steps?

25 A. Nissan Maxima standard wheel alignment, just

1 aligning the front wheels and rear wheels, the aiming of the
2 headlights is a standard procedure of aiming head lamps,
3 resets and calibration is a plug and play where you plug in
4 the computer and make sure all the stored codes are cleared
5 and there's no visible present codes.

6 Q. Contrast it with the work that Mid Island provided
7 for this car.

8 MR. TOMSKY: I just want to clarify. When you
9 say "this car" --

10 MR. KLEIN: The Nissan --

11 THE COURT: The Nissan referred to on this
12 exhibit.

13 MR. KLEIN: The Nissan reflected on
14 Exhibit-NN.

15 MR. TOMSKY: Okay.

16 A. Left front structural hit on a Nissan Maxima.

17 Q. So what did Mid Island need to do?

18 A. Mid Island did heavy body work to the left front,
19 repaired the front uni body structure and radiator support
20 was replaced.

21 Q. And for its services, Mid Island was paid at what
22 labor rate?

23 A. \$49 and 52 for a frame.

24 Q. What was Nissan paid by State Farm?

25 A. 125.

1 Q. On the Nissan?

2 A. Yes, \$125 an hour.

3 Q. I would like to show the witness Exhibits OO and
4 PP.

5 MR. TOMSKY: Objection. I haven't been shown
6 these documents. I understand they were State Farm
7 estimates that he's talking about and that State Farm is
8 in possession of these estimates, but there's not -- has
9 there been a foundation laid that Rockaway Nissan is
10 getting paid by State Farm or is it M.V.B. is paying
11 Nissan?

12 THE COURT: I believe that --

13 MR. TOMSKY: I'm sorry for interrupting. He
14 testified that State Farm is paying Nissan directly. I
15 hadn't been shown the Rockaway Nissan bill before today.

16 THE COURT: My understanding -- first of all,
17 I thought all these exhibits were marked in by consent.

18 MR. TOMSKY: Mr. Klein indicated yesterday to
19 me that -- I'm not objecting to them coming in. I
20 just -- because I was not shown these and was not able
21 to show my witnesses these documents, I just want to
22 make sure that -- I understand I have my
23 cross-examination, but just in terms of understanding,
24 is his testimony that Nissan was paid directly by State
25 Farm or Nissan was paid by M.V.B.?

1 THE COURT: My understanding was that Nissan
2 was paid by M.V.B.

3 MR. TOMSKY: Okay, because that's not what he
4 just said.

5 THE COURT: Let's verify that counsel.

6 MR. KLEIN: The way it works is --

7 THE COURT: Why don't you follow up with the
8 witness.

9 MR. KLEIN: I could bring it up through
10 Mr. McGauvran.

11 Q. Mr. McGauvran, I'm going to give a scenario for you
12 and hopefully you can describe the mechanics. Okay?

13 A car is at Mid Island Collision, gets sent to
14 Nissan for certain work, and then in the exhibit in front of
15 you, NN, you've described that there is a bill that's paid.
16 Describe the mechanics of how that bill gets paid, from whom
17 to whom?

18 A. We pick up the car at Rockaway Nissan and we pay
19 Rockaway Nissan. We submit the bill to State Farm in a final
20 inspection. The appraiser comes down and reimburses us for
21 the expenses that we paid Rockaway Nissan.

22 Q. Do they know what the labor rate is behind that
23 bill?

24 A. Yes.

25 MR. TOMSKY: Objection. How can he testify --

1 THE COURT: Sustained.

2 Q. Is a copy of the bill from Nissan provided to State
3 Farm?

4 A. Absolutely.

5 Q. And then they pay it?

6 A. Absolutely.

7 MR. KLEIN: Does that clarify?

8 THE COURT: It does. Thank you.

9 Q. I would like to show the witness Exhibit-OO and PP,
10 please.

11 (Whereupon, Defendant's Exhibits OO and PP were
12 marked into evidence.)

13 COURT OFFICER: Showing the witness.

14 Q. Mr. McGauvran, who made the vehicle reflected on
15 Exhibit-OO and Exhibit-PP?

16 A. It's another Nissan, a Nissan Altima.

17 Q. A what?

18 A. A Nissan Altima.

19 Q. And was this Nissan sent to a Nissan dealership for
20 work?

21 A. Yes. It was sent to Rockaway Nissan.

22 Q. For what kind of work?

23 A. Again, a wheel alignment, resets and aiming of the
24 headlights.

25 Q. And what kind of work was performed in-house on

1 that Nissan at Mid Island Collision?

2 A. Heavy rear structural impact to the rear bumper,
3 rear body panel, deck lid and quarter panels.

4 Q. What's involved in repairing damage like that?

5 A. That's a heavy uni body damaged car.

6 Q. Meaning?

7 A. The rear uni body, similar to the side uni body on
8 the Armada, was collapsed and had to be replaced. It is a
9 welded area.

10 Q. Scratched?

11 A. No, welded panel, replacing rear body and replacing
12 floor and quarter panel structures.

13 Q. How do you do the welding?

14 A. You remove the entire rear body panel, you prep the
15 entire area, then you reweld a new rear body panel onto the
16 car.

17 Q. Does Mid Island have machinery for that?

18 A. Yes.

19 Q. Is that machinery cheap?

20 A. No, and that's artisan work.

21 Q. It's what?

22 A. Artisan work, specialized work.

23 Q. And the people performing that work, are they
24 cheap?

25 MR. TOMSKY: Objection to the word "cheap."

1 THE COURT: Sustained.

2 A. No.

3 Q. You're familiar with what is a general rate of pay
4 for technicians at auto body shops in Nassau County?

5 MR. TOMSKY: Objection.

6 THE COURT: Sustained.

7 Q. Are you familiar with going rates of pay for
8 technicians in Nassau County?

9 A. Yes.

10 Q. How does the rate of pay, without giving the rate
11 of pay, compare at Mid Island Collision?

12 THE COURT: Why are we not giving the rate of
13 pay?

14 MR. KLEIN: I mean --

15 THE COURT: How can you compare it without
16 giving a rate of pay?

17 MR. TOMSKY: How is there any evidence that
18 the witness --

19 THE COURT: I'm sorry, do you have an
20 objection?

21 MR. TOMSKY: No. I'll let him --

22 Q. What are the technicians paid at Mid Island
23 Collision?

24 A. The heavy frame technicians are paid in excess of
25 \$100,000 a year.

1 Q. And are technicians in general paid in excess of
2 \$100,000 a year, as far as you know, in Nassau County?

3 MR. TOMSKY: Objection.

4 THE COURT: I will allow it. He's familiar
5 with the industry.

6 A. No, they are not.

7 Q. What, in your experience, is a more common rate of
8 pay for that kind of job?

9 A. Between 50 and 60.

10 Q. So for the work that Mid Island performed on this
11 Nissan, it was paid what rate? And, to be clear, I'm
12 referring back to the Nissan reflected in Exhibits OO and PP.

13 A. While they paid us 49 and 52, they paid us the 125
14 for the dealer work.

15 Q. 125 for the -- to the dealer?

16 A. To the dealer, correct.

17 Q. What was the kind of work that the dealer did?

18 A. Basic wheel alignment and plug and play.

19 Q. Now, so far the examples that we've gone over with
20 specificity have pertained to vehicles that were sent to
21 dealerships.

22 A. Yes.

23 Q. Now, does it ever happen though that State Farm
24 pays Mid Island directly at rates substantially higher than
25 the rate that they are requesting in this case?

1 A. Yes.

2 Q. By the way, who was the adjustor on that car in
3 front of you?

4 A. Mike Thiele.

5 Q. What was the date of the estimate that paid that
6 rate?

7 A. February 2018.

8 Q. I would like to show the witness Exhibit-XX.

9 (Whereupon, Defendant's Exhibit-XX was marked into
10 evidence.)

11 COURT OFFICER: Showing the witness.

12 Q. Describe for the record, Mr. McGauvran, what you're
13 holding now.

14 A. It's an Audi Q7 estimate from State Farm.

15 Q. When is it dated?

16 A. November of '18.

17 Q. And who was the estimator on the vehicle?

18 A. James Rice.

19 Q. From what company?

20 A. State Farm.

21 Q. What is the labor rate paid directly to Mid Island
22 Collision on that vehicle?

23 A. 125 an hour, page eight.

24 Q. What page is that?

25 A. Page eight in the final -- page eight, two thirds

1 of the way down.

2 Q. I'm going to show you what's been marked or what's
3 in evidence, I should say, as Exhibit-QQ.

4 (Whereupon, Defendant's Exhibit-QQ was marked into
5 evidence.)

6 COURT OFFICER: Showing the witness.

7 Q. Mr. McGauvran, have you had the chance to review
8 Exhibit-QQ?

9 A. Yes.

10 Q. And what is that? What is Exhibit-QQ?

11 A. It's an estimate written by State Farm.

12 Q. To whom?

13 A. Mid Island Collision.

14 Q. What's the date?

15 A. September 2013.

16 Q. Over five years ago?

17 A. Yes.

18 Q. Who was the estimator?

19 A. John Seara.

20 Q. From what company?

21 A. State Farm.

22 Q. What's the labor rate?

23 A. 150 per hour.

24 Q. What kind of work was performed on that car?

25 A. Left side structure similar to the vehicle we

1 worked on with the Armada, left uni side, left fender, and
2 left doors.

3 Q. What kind of work was done on the Nissan in this
4 case?

5 A. Very similar, uni side doors.

6 Q. By the way, you mentioned that Nissan was built on
7 frames earlier.

8 A. Correct.

9 Q. Are Audis -- what kind of car is this one?

10 A. This is an Audi A8.

11 Q. Are Audis built on frames?

12 A. No. Audi is a uni body construction.

13 Q. Remind me what is more complicated to repair, a car
14 on a frame or a car built in a modern way with a uni body?

15 A. Both very difficult. The uni body structure -- the
16 reason the Armada was more complicated was because it was the
17 same uni body structure but over a frame construction on top
18 of it.

19 Q. And this was paid at what rate again?

20 A. 150.

21 Q. Five years ago?

22 A. Yes.

23 Q. I would like to show the witness an exhibit marked
24 RR.

25 (Whereupon, Defendant's Exhibit-RR was marked into

1 evidence.)

2 COURT OFFICER: Showing the witness.

3 Q. Take a moment to review it, please. Mr. McGauvran,
4 what is the date on that estimate?

5 A. November of '18, 2018.

6 Q. From whom?

7 A. State Farm's Mike Thiele.

8 Q. The name of the adjustor is Michael Thiele?

9 A. Mike Thiele, yes.

10 Q. Who is it paid to?

11 A. Mid Island Collision.

12 Q. What kind of damage?

13 A. Doors and uni side construction.

14 Q. Again, like Ms. Pope's vehicle?

15 A. Yes.

16 Q. What is the labor rate paid on this car?

17 A. They paid the body and paint both at 125 an hour.

18 Q. That's in excess of what you charged Ms. Pope?

19 A. Yes, correct, and this was a simpler paint job than
20 Ms. Pope's.

21 Q. Why?

22 A. This is a basic clear coat paint where Ms. Pope's
23 was a three stage clear coat point.

24 MR. TOMSKY: Your Honor I'm objecting because
25 I believe the witness is mischaracterizing the paint and

1 materials. It says 27.9 hours at \$28 an hour, not 125.
2 On page eight, under the estimate totals and entries,
3 it's the third thing, paint and materials.

4 THE COURT: I'm sorry, I'm looking at page
5 eight of nine. Is that what you're looking at?

6 MR. TOMSKY: Yes. It says paint and
7 materials, 27.9 hours at --

8 THE COURT: Where is that?

9 MR. TOMSKY: You see where it says estimates
10 and totals, it's an orange bar, one, two, three down is
11 paint and materials? It says \$28 an hour, not 125.

12 THE COURT: Okay, I see it.

13 Q. Mr. McGauvran, can you address my friend's concern?

14 A. The paint and materials is a formula where they add
15 the total hours of painting time and multiply it by \$28 per
16 hour for the actual physical paint material that is sprayed
17 on the car. The labor rates are down lower where they pay
18 you 125 per hour to physically spray the paint. So the
19 refinish labor is different than paint materials. One is the
20 actual labor to paint and the other one is the actual
21 materials that land on the car as you're spraying the
22 material out of the gun.

23 THE COURT: So if I understand correctly,
24 you're saying that the spraying of the car, whether it's
25 in a booth or with a gun, is for 27 hours worth of

1 paint?

2 THE WITNESS: The paint materials guidelines,
3 State Farm says here paint and materials, 27.9 hours at
4 \$28 an hour.

5 THE COURT: Right.

6 THE WITNESS: So what they did was they
7 determine how many hours of paint was applied to the car
8 and formulate a gage of how much material, how much
9 water in a container, how much paint in a container is
10 \$28 per hour value of that material that is applied to
11 the car, but the physical labor to install the paint and
12 spray it on the car is paid at 125.

13 THE COURT: Right, but I'm asking you a
14 different question.

15 THE WITNESS: Okay. I'm sorry.

16 THE COURT: In terms of determining how much
17 paint is used, are you saying the formula in this case
18 was based upon the car being painted for 27.9 hours?

19 THE WITNESS: Yes.

20 THE COURT: Okay.

21 Q. Some of the exhibits I have just shown you have
22 been payments directly to Mid Island. I would like to bring
23 your attention now to a total loss case. The exhibit that
24 I'll show you as an example is Exhibit VV and WW. Take a
25 moment to review that, Mr. McGauvran.

1 (Whereupon, Defendant's Exhibits VV and WW were
2 marked into evidence.)

3 COURT OFFICER: Showing the witness.

4 Q. What is it that you're looking at now,
5 Mr. McGauvran?

6 A. This is a bill I provided to State Farm for a
7 vehicle that they totaled out.

8 Q. Is there another company that's listed there?

9 A. On WW it's M.V.B. Collision. On VV it is Insurance
10 Auto Auctions, the company that picks up the cars for State
11 Farm.

12 Q. I'm sorry, can you just elaborate on who Insurance
13 Auto Auctions is?

14 A. Yes. Insurance Auto Auctions is a company that
15 picks up salvaged vehicles for insurance carriers, stores
16 them and auctions them.

17 Q. What is a salvage vehicle?

18 A. A total loss, anything that State Farm has totaled,
19 they have a salvage company pick it up and store it and send
20 it to auction.

21 Q. Is there a labor rate -- withdrawn.

22 Was there work done on this car by Mid Island?

23 A. Yes. We took the car in, we set up a folder, we
24 protected it in the yard, we accessed it and we reviewed the
25 charges, we dismantled it for the appraiser, and we

1 forklifted it in and out of the shop.

2 Q. Were you paid a labor rate for that work in
3 connection with the car being totaled?

4 A. Yes. We were paid \$120 an hour.

5 Q. When was that?

6 A. Very recently, actually. No, let's see. Date was
7 9-4 of '18.

8 Q. We've been focusing on a lot of recent cases with
9 the exception of one from 2013. Some of them have been paid
10 directly to State Farm, some of them have been to
11 dealerships. I want to bring your attention now to years
12 prior to where we are just to set some context. In that
13 regard, I'll bring your attention to what is in evidence as
14 Exhibit-SS.

15 (Whereupon, Defendant's Exhibit-SS was marked into
16 evidence.)

17 COURT OFFICER: Showing the witness.

18 Q. Have you had a chance to review it?

19 A. Yes.

20 Q. What is it that you're looking at?

21 A. I'm looking at an estimate provided by State Farm
22 to repair Mr. Parker's vehicle back in 2011.

23 Q. And who was that sent to?

24 A. Mid Island Collision.

25 Q. And the year was 2011?

1 A. Correct.

2 Q. What's the labor rate paid in 2011?

3 A. \$80 an hour.

4 Q. So more than what they're paying now?

5 A. Yes.

6 Q. Has it gotten less complicated to fix cars in the
7 last seven years?

8 MR. TOMSKY: Objection. This is not the car
9 involved in the loss that we discussed and this is the
10 9th car --

11 THE COURT: It is the 9th and the last. Thank
12 you.

13 Q. Let's talk about the car that is being discussed,
14 Exhibit-L.

15 (Whereupon, Defendant's Exhibit-L was marked into
16 evidence.)

17 COURT OFFICER: Showing the witness.

18 Q. Mr. McGauvran, have you had the chance to review
19 Exhibit-L?

20 A. Yes.

21 Q. What car is reflected on that item?

22 A. Courtney Pope's 2015 Armada.

23 Q. The car that forms the basis of this case?

24 A. Yes.

25 Q. What's the date of that bill?

1 A. June of 2017.

2 Q. And who is it from?

3 A. Rockaway Nissan.

4 Q. And why was Rockaway Nissan performing work on this
5 car?

6 A. We sent it down to them to clear the defaults, to
7 do the headlights, to do an alignment, and to work on the
8 mechanicals for the car. It was having starting issues.

9 Q. So on this particular car in this particular case,
10 what did Nissan charge for the work on this particular
11 vehicle?

12 A. 125 per hour.

13 MR. KLEIN: Your Honor, we have gone through
14 some of these exhibits just as examples. I would just
15 bring your attention to the fact that Exhibits AA
16 through XX are all along these lines.

17 THE COURT: Understood.

18 Q. Mr. McGauvran, I want to switch gears away from
19 labor rates for a moment -- one more issue on labor rates.

20 THE COURT: Off the record.

21 (A discussion was held off the record.)

22 Q. On the issue of labor rates, when a car is declared
23 a total loss by the insurance company, what is your
24 understanding of the obligation of you and of the insurance
25 company to resolve the issue of payment for work performed?

1 A. We're obligated to negotiate the damages and
2 mitigate the claim.

3 Q. What is your understanding of the insurance
4 company's obligation?

5 A. To do the same and pay the bill.

6 Q. What do you mean "to do the same"?

7 A. To mitigate the loss, not delay it, get it paid
8 right away and to negotiate the damages.

9 Q. What do you mean by "negotiate"?

10 A. Well, their responsibility, according to the State
11 Insurance Department, is to --

12 THE COURT: I'm going to strike that. You can
13 tell me what the custom and practice is in the industry.
14 You're not -- you may be qualified in the outside world
15 to talk about Insurance Department regulations, but in
16 terms of the courtroom, you're not qualified to talk
17 about that.

18 THE WITNESS: Understood.

19 Q. Mr. McGauvran, please limit your testimony to the
20 customs and practices that you've observed in your 30 plus
21 years in the industry.

22 A. When a car is declared a total loss, we write up
23 the charges and the insurance company pays them.

24 Q. And how are labor rates discussed in those
25 negotiations?

1 A. I write the final bill and a demand at our labor
2 rate, and the insurance companies pay it. We are inclined to
3 negotiate when requested, but they do pay our rates.

4 Q. And that's for rates on work performed up to a
5 total loss?

6 A. That is correct, including storage.

7 Q. Describe the extent to which State Farm negotiated
8 with you here on that labor rate.

9 A. They did not. There was no negotiation.

10 Q. What do you mean by that?

11 A. They refused.

12 Q. Can you bring us into those discussions?

13 A. Yes. I received a phone call from the insurance
14 company's office to negotiate the claim and pay it, and I
15 said, "How would you like to negotiate it?" They said,
16 "Well, you wrote a bill for" --

17 MR. TOMSKY: Objection to this testimony.

18 This is with somebody else who is not on the stand.

19 THE COURT: Yes, that's hearsay. Sustained.

20 MR. KLEIN: We're not introducing it for the
21 truth of what anyone said. We are introducing it for
22 the fact that this conversation occurred to show that
23 there was no good faith negotiation on the insurance
24 company's part.

25 THE COURT: Well, but that's not what he said.

1 He started to talk about what they said, so he can say
2 that they refused to negotiate, that's being used to
3 prove that fact, but in terms of what they said, it is
4 being used to prove the truth of the matter.

5 MR. KLEIN: Okay, I have an objection to that.

6 THE COURT: All right, I'll note your
7 exception.

8 Q. Just to wrap that point up, the labor rate that
9 State Farm initially offered to pay, to what extent did they
10 negotiate that rate with you?

11 A. There was no negotiation.

12 Q. Now I would like to switch gears to replacing
13 parts. We touched on it earlier. Mid Island's practice you
14 testified earlier was to replace OEM; is that correct?

15 A. Yes.

16 Q. Is that what you did on Ms. Pope's vehicle?

17 A. Yes.

18 Q. And part of the equation of calculating what is --
19 what the cost of replacing parts is, can you describe for a
20 moment what a sublet is?

21 A. Parts that are parts or labor that is sublet out to
22 a different location, an example being a sunroof. Excuse me,
23 a convertible top. If you sublet it to an upholstery shop,
24 that would be a sublet bill. If you send the car to a dealer
25 for an alignment and resets, that would be a sublet bill. If

1 you send a car out to have glass installed to a glazier, that
2 would be a sublet bill.

3 Q. So what is the nature of Mid Island's relationship
4 to the sublessee in that case, the company that you're
5 sending the car to on a temporary basis?

6 A. In the case of the Nissan, if you send it to the
7 dealer for the sublet work, you're responsible to ensure that
8 that work is done correctly, so --

9 Q. Who is "you"?

10 A. Mid Island is responsible, M.V.B. Collision is
11 responsible for the work done, in this case, by Rockaway
12 Nissan; whereas when the Nissan bill is paid and submitted to
13 the insurance company, the insurance company is responsible
14 for a 25 to 33 percent markup on that bill to ensure the
15 warranty and insurance on the work done by the sublet
16 company.

17 Q. So just to illustrate, you send a car out to
18 Nissan, any Nissan, and they perform some services that turn
19 out to malfunction and there's a terrible accident, is Mid
20 Island responsible for that?

21 A. Yes.

22 Q. So what does Mid Island do to accommodate for that
23 risk that it is bearing?

24 A. That's what the markup is for. The markup covers
25 the insurance and warranty of the repairs sublet out.

1 Q. And if you didn't charge it, what would it mean?

2 A. We would be doing it on the cuff. It would be on
3 us.

4 MR. KLEIN: Your Honor, I'm trying to narrow
5 it down to the issues that are in dispute. One of the
6 issues that the insurance company has highlighted
7 pertains to these markups that Mr. McGauvran is
8 describing now. So I would like to draw his attention
9 back to Exhibit-E, which is a copy of the final bill.

10 Q. I'm going to draw your attention to three entries
11 that State Farm has highlighted. The first one is 108, and
12 then the last two are the last two entries on the final bill,
13 147 and 148. I think it would be helpful if you could simply
14 describe the nature of each of these entries on the final
15 bill starting with the earliest.

16 A. Would that be number 108?

17 Q. Yes. So 108 describes Auto Haus. Who is Auto
18 Haus?

19 A. Auto Haus is a mechanical shop.

20 Q. Who owns Auto Haus?

21 A. Robert Jesberger.

22 Q. Who owns Mid Island collision?

23 A. Robert Jesberger.

24 Q. Where is Auto Haus?

25 A. It's in a separate area.

1 Q. What kind of work is performed at Auto Haus as
2 opposed to Mid Island?

3 A. All mechanical at Auto Haus. All body work at Mid
4 Island.

5 Q. In fact, if the witness can be shown Exhibit-F, it
6 might help to further clarify.

7 (Whereupon, Defendant's Exhibit-F was marked into
8 evidence.)

9 COURT OFFICER: Showing the witness.

10 Q. Please describe entry number 108 on the final bill,
11 and if the Auto Haus final bill in front of you, Exhibit-F,
12 is helpful, I invite you to incorporate it into your answer
13 to the extent helpful.

14 A. Yes, the Auto Haus bill is for all the mechanical
15 work done to the left rear suspension and sub frame, all the
16 mechanical work done to the vehicle at hand for Courtney
17 Pope.

18 Q. And the final entry, the final two entries that
19 State Farm indicated as concerning 147 and 148 on the State
20 Farm final bill?

21 A. 147 is Rockaway Nissan and 148 is for Certified
22 Towing. Certified Towing was paid 490 to tow the car back
23 and forth to Rockaway Nissan. The Rockaway Nissan bill, 147,
24 should appear in that line item as 2,899.02 but evidently the
25 computer glitched and duplicated the line item in the one

1 below it, 148.

2 Q. So let me take those in turn. The tow bill that
3 you described first, if we could show the witness Exhibit-P,
4 please, to correlate to that bill.

5 (Whereupon, Defendant's Exhibit-P was marked into
6 evidence.)

7 COURT OFFICER: Showing the witness.

8 Q. Mr. McGauvran, take a moment to review those tow
9 bills, please.

10 THE COURT: I have three pages here with three
11 different dates. I'm sorry, there are two pages.

12 MR. KLEIN: Are they the same though?

13 THE COURT: Yes.

14 MR. KLEIN: So this is the 225 or 490?

15 THE COURT: 490 and 225.

16 Q. Mr. McGauvran, have you had a chance to review
17 those tow bills?

18 A. Yes.

19 Q. And what's different about them?

20 A. The tow bill dated 3-27-17 was the initial tow on
21 when the car was brought in from the owner's residence, and
22 the second tow at 6-12-17 was when it was towed to and from
23 the dealer.

24 Q. Why was it at the dealer?

25 A. For the alignment and resets and the repair work at

1 Rock Nissan.

2 Q. And so the total for that towing was?

3 A. 225 and 490.

4 Q. Can you identify on the final bill where those
5 entries appear, please?

6 A. The 490 is line 147 and the 225 is at line 106.

7 MR. TOMSKY: For the record, State Farm has no
8 objection to the 225 tow. I believe that was part of
9 what was already paid.

10 Q. You mentioned a moment ago that there was a mistake
11 because 490 is actually entered twice.

12 A. Correct.

13 Q. The 490 that appears first, what is the mistake?

14 A. The 490 that appears first should actually be
15 2,899.02.

16 Q. From where?

17 A. From the Rockaway dealer bill.

18 Q. The Nissan Rockaway dealer bill?

19 A. Exhibit-L.

20 Q. The one that you were describing a moment ago?

21 A. Yes.

22 THE COURT: I'm sorry, I'm a little confused
23 now. A moment ago I believe the witness said that the
24 error was that the bill for 490 was entered twice. Now
25 we're talking about a 28 odd hundred dollar bill.

1 MR. KLEIN: So he can elaborate or I can.

2 THE COURT: If you can have him clarify it, it
3 would be helpful.

4 Q. Okay, so I'll ask it in two parts. First, why does
5 the number 490 appear twice at the end of that bill?

6 A. When I typed in the last entry at 148, I typed in a
7 dollar amount of 490. Sometimes in the computers when you
8 click on the box it clicks both boxes and you type in the 490
9 it overrides your previous entry. My previous entry on line
10 147 was for \$2,899, but when I put the entry into line 148,
11 it deleted that previous entry and replicated it twice at
12 490, an error.

13 Q. Your Honor, if you'll excuse the leading question,
14 but the first entry was meant to be a bill reflecting the
15 amount paid to Nissan Rockaway; is that right?

16 THE COURT: I understand what he's saying.

17 A. Correct, yes.

18 Q. And the bill, to be clear, from Nissan Rockaway was
19 how much?

20 A. Just shy of \$3,000, 2,899.

21 Q. So there was actually a mistake?

22 A. Yes.

23 Q. And did that mistake render the bill higher or
24 lower?

25 A. Lower.

1 THE COURT: I want to go off for a minute.

2 (A discussion was held off the record.)

3 (A recess was taken.)

4 THE COURT: Please be seated. All right, you
5 may continue.

6 MR. KLEIN: Thank you, your Honor.

7 Q. Mr. McGauvran, you said you have been employed at
8 Mid Island Collision for a better part of 30 years, right?

9 A. Yes.

10 Q. How was Mid Island's labor rate determined?

11 Withdrawn.

12 How was the \$120 an hour labor rate determined?

13 A. Back in 2011 we hired a forensic accountant to
14 break down our expenses and our employees and our parking,
15 our overhead, the size of the property, all the inside spots,
16 outside spots, and he helped us determine the value of the
17 storage inside and out, and the value of the labor and the
18 labor rates.

19 Q. And it was determined that \$120 an hour was what?

20 A. Would be a good base labor rate.

21 Q. Given the expenses?

22 A. The expenses, the employees, the facility, the
23 overhead.

24 Q. What would happen to your business if you had to
25 charge \$49 an hour instead of 120?

1 MR. TOMSKY: Objection, calls for speculation.

2 THE COURT: Sustained.

3 Q. Could you turn a profit at \$49 an hour?

4 MR. TOMSKY: Objection, calls for speculation.

5 MR. KLEIN: He's worked for 30 years. He
6 knows the industry.

7 THE COURT: Well, he's indicated that he works
8 in terms of taking the process of the customer from
9 inception to completion. I'm not certain that there's
10 been any discussion of financial or business
11 participation.

12 MR. KLEIN: Sure.

13 Q. Mr. McGauvran, what is your job title?

14 A. General manager.

15 Q. And as part of your job description as general
16 manager, can you describe for the Court your role in the
17 finances of the company?

18 A. Yeah, the bookkeeping department is run by two
19 ladies that work for me. I oversee that department as well.

20 Q. How familiar are you with the profit margin of the
21 company?

22 A. Relatively.

23 Q. Are you familiar enough to know whether you would
24 be able to turn a profit at \$49 an hour?

25 MR. TOMSKY: Same objection.

1 THE COURT: I'll let him answer whether he's
2 familiar enough, but I'm not certain that that qualifies
3 him, even if he says he's familiar. That's kind of a
4 very specialized field, being able to determine
5 profitability. If you can qualify him, please feel
6 free. I'm not preventing that, but I don't think that
7 question is going to do it.

8 MR. KLEIN: Could I have a moment, please,
9 your Honor?

10 THE COURT: Yes.

11 MR. KLEIN: I think what he's testified to
12 about the familiarity with how the labor rate was
13 established is sufficient on the point.

14 No further questions for Mr. McGauvran.

15 THE COURT: All right, thank you. Are you
16 ready to do your cross?

17 MR. TOMSKY: Yes.

18 THE COURT: Okay, Mr. Tomsky, you can proceed.

19 MR. TOMSKY: Yes, your Honor. Thank you.

20 CROSS EXAMINATION

21 BY MR. TOMSKY:

22 Q. Good afternoon, sir. How are?

23 A. Very good. Thank you.

24 Q. Before we get into this Nissan Armada that was
25 owned by Ms. Pope at the time of the collision, I want to go

1 over a little bit some of the other examples that Mr. Klein
2 provided for different cars and different labor rates.

3 Starting with the Audi of Lynbrook for Glennys
4 Tejada for the 2015 Audi. I'm going to try and do it in the
5 order -- the way he provided them to you.

6 A. Exhibit-AA and BB?

7 Q. Sir, you're looking at the same one? I just want
8 to make sure.

9 A. Yes.

10 Q. So you testified that for specific things, this
11 would be the wheel alignment, electrical, aiming the
12 headlights, State Farm agreed to pay a higher rate than the
13 49/52.

14 A. Yes.

15 Q. Right?

16 A. Yes.

17 Q. Now, looking at the State Farm -- I guess this
18 would be the final estimate from State Farm, the one they
19 provided.

20 A. For Carla David Rose?

21 Q. Yes.

22 A. 2015 Audi? It's 13 pages long with 241 items.

23 MR. KLEIN: Who is the owner?

24 MR. TOMSKY: The owner is Glennys Tejada.

25 Q. It's fair to say that on a 241 line item bill --

1 A. Yes.

2 Q. -- State Farm agreed to pay a higher rate on only
3 three of those charges, correct?

4 A. Yes.

5 Q. Look at the next one, Andrew Wigfall. That is a
6 2015 Audi. Again, I believe that's the second one that you
7 have.

8 A. Yes, I have it.

9 Q. And this, again, you testified that State Farm
10 agreed, this is your testimony, to a higher electrical rate,
11 wheel alignment rate and aiming headlights rate, correct?

12 A. Yes.

13 Q. Now, looking at the final bill, again, this is page
14 eight of 11, you see there is 193 different line items,
15 correct, from State Farm?

16 A. Yes.

17 Q. Again, they agreed to pay a higher rate on only
18 three of those, correct?

19 A. Yes.

20 Q. Okay, moving on to the next one, Mr. -- I don't see
21 a last name, it says Albert for a 2017 Nissan Maxima. I just
22 want to make sure we are on the same page. It's the --
23 again, from Rockaway, date of invoice is 11-19-18.

24 A. Yes, I see that.

25 Q. And, again, your testimony was that State Farm

1 agreed to pay additional labor rate for four wheel alignment,
2 aiming headlamps and maintenance, correct?

3 A. Yes.

4 Q. Now, again, looking at the final bill, which would
5 be -- it's going on to page eight into page nine, there is
6 197 different line items on this one too, correct?

7 A. I don't have that. I'm sorry, what name is --

8 Q. It says -- service advisor says Albert and it was
9 from James Rice and the owner is Tyrelle Coulter,
10 C-O-U-L-T-E-R?

11 MR. KLEIN: MM and NN.

12 A. Found it.

13 Q. Okay, tell me when you're there.

14 A. Okay, go ahead.

15 Q. Again, State Farm agreed, according to your
16 testimony, to a higher rate for the four wheel alignment,
17 aiming headlamps and maintenance, but out of 193 things, I'm
18 sorry, 197 things, those are the only three things they
19 agreed to a higher rate, correct?

20 A. Yes.

21 Q. And the next one is owned -- the vehicle is owned
22 by -- says Rockaway Nissan owns it. This is a 3-30 invoice
23 for 2016 Nissan Armada.

24 A. Yes.

25 Q. And, again, it was your testimony that State Farm

1 agreed to a higher amount for the four wheel alignment,
2 maintenance and aiming of the headlamps, correct?

3 A. Four wheel alignment, resets normalization and aim
4 headlights.

5 Q. Three things; 129.95, 187.50 and 125, correct?

6 A. Yes.

7 Q. Looking at the State Farm estimate, there is 142
8 things on the line item, and, again, they only agreed to pay
9 a higher rate on three of those, correct?

10 A. Yes.

11 Q. And their rate on all four of them, you could take
12 a look at all four, the rate they provided to M.V.B. was \$49
13 for sheet metal, 49 for mechanical/electric, 52 for frame and
14 49 for refinish, correct?

15 A. Yes.

16 Q. So in the four examples, the four cherry picked
17 examples that Mr. Klein provided to you --

18 MR. KLEIN: Objection.

19 THE COURT: Sustained.

20 Q. The four examples that Mr. Klein provided to you,
21 even on those, on 90 something percent, 95, 96, I don't know
22 the math offhand, 95 or 96 percent of the line items State
23 Farm only agreed to pay the 49/52 rate, correct?

24 MR. KLEIN: Objection to the description of
25 what the direct testimony was. This is not the full

1 scope of the cars that he testified to.

2 THE COURT: Overruled. You can answer, if you
3 can.

4 MR. TOMSKY: Can you just repeat the question?
5 (The requested portion was read.)

6 A. Correct.

7 Q. Now, you said something on direct examination that
8 for other providers, other carriers, which I will define
9 things like All State, Progressive, you did not mention these
10 by name, but I'm going to, Allstate, Progressive, you said
11 that when you have disagreements with labor rates with other
12 providers other than State Farm, that those other providers
13 agreed to pay your labor rates; isn't that correct?

14 A. Yes.

15 Q. But isn't it true that M.V.B./Mid Island is
16 involved with multiple litigations involving other insurance
17 companies over labor rates?

18 MR. KLEIN: Objection.

19 THE COURT: Sustained.

20 MR. TOMSKY: If he knows, he's a general
21 manager, if he knows that to be the case.

22 THE COURT: What is the relevance of any other
23 litigation?

24 MR. TOMSKY: Well, the relevance should be if
25 there's other litigation involving labor rate for other

1 providers, that means that his testimony that other
2 providers accepted the 120 labor rate without exception
3 would be incorrect.

4 THE COURT: Yes, but we don't -- okay, if you
5 have a specific case, you can point to an instance where
6 other companies have paid different labor rates, that's
7 fine, but in terms of pending litigation, it's just
8 that, it's pending and it's litigation. We don't know
9 who's right and who's wrong.

10 MR. TOMSKY: It's not about who's right and
11 who's wrong. His testimony was that whenever there is a
12 dispute between labor rates, anybody besides State Farm,
13 they pay them. If there is other litigation that he
14 knows about where there is a dispute over labor rate and
15 they didn't pay it.

16 THE COURT: I'm not certain that that was the
17 testimony. So maybe go back a step and verify that
18 issue, clarify that issue first.

19 MR. TOMSKY: I don't have the testimony in
20 front of me, but I believe I jotted it down correctly.

21 Q. Was it your testimony that for the -- that besides
22 State Farm, when M.V.B./Mid Island has a dispute involving
23 labor rates with other insurance carriers, that the other
24 insurance carriers pay the stated labor rate that M.V.B. has?

25 A. No, that was not my testimony.

1 Q. I believe it was, but, anyway, it's -- we'll go
2 from there.

3 Do you know of any other instances, forget about
4 litigations, do you know of any other instances where M.V.B.
5 has had an issue with other insurance carriers over labor
6 rate?

7 MR. KLEIN: Objection.

8 THE COURT: Overruled.

9 A. Yes, we have.

10 Q. So it's fair to say that it's not just State Farm
11 that at times objects to the labor rate that you set forth;
12 isn't that true?

13 A. Well, the question you're asking sounds double
14 negative. You're saying isn't it.

15 Q. Isn't it true that M.V.B. has had conflict, not
16 litigation but conflicts with other insurance companies over
17 labor rate?

18 A. Yes. That's the nature of the beast.

19 MR. KLEIN: Again, objection to the line of
20 inquiry about other cases. He's using conflicts now
21 instead of litigation, but I think the point is the
22 same.

23 THE COURT: No, the point is not the same.
24 We're talking now specifically about their business
25 practice and whether or not they have had these disputes

1 over the labor rate, whether that's an issue.

2 MR. KLEIN: Okay.

3 Q. Is it fair to say that you had these sort of
4 disputes with the Allstate insurance company at any time in
5 the past, let's say three years, not a litigation but a
6 dispute over labor rate with Allstate in the last three
7 years?

8 A. Yes.

9 Q. Same question in the last three years with
10 Progressive Insurance Company?

11 A. No. They negotiate the rates.

12 Q. How about Nationwide?

13 A. They negotiate the rates.

14 Q. They have never had a conflict with you? They
15 never got to the point where you could not reach a conclusion
16 that was satisfactory to both sides?

17 A. Not to my recollection.

18 Q. Any other insurance companies, besides Allstate and
19 State Farm, that you've had issues with?

20 A. Liberty Mutual.

21 Q. Anybody else?

22 A. Not that I could think of, no.

23 Q. Off the top of your head at least, you can state
24 Allstate, Liberty Mutual and State Farm, M.V.B. has had
25 issues over labor rates that has not been mutually satisfied

1 on a claim?

2 A. Yes.

3 Q. Now, during your direct examination with Mr. Klein,
4 you indicated that initially Jim Rice or James Rice, a State
5 Farm estimator, came and gave you an estimate, correct, the
6 initial estimate for the vehicle?

7 A. Yes.

8 Q. And, give or take, that estimate was a little over
9 \$10,000, correct?

10 A. Yes.

11 Q. Correct me if I'm wrong, the point of an estimate
12 by any estimator, any estimator would be to repair the
13 vehicle to the pre-loss condition for the amount stated; is
14 that correct?

15 A. I'm not understanding that question.

16 Q. Okay. In general, the point of an estimate when
17 written by the insurance company is for the car to be
18 returned to pre-loss or as close to pre-loss condition as
19 possible for that amount of money, correct?

20 A. Yes.

21 Q. So when he gives you an estimate of 10,000 or so
22 dollars, obviously you can't read his mind, but the belief is
23 that that was his belief on how much it would cost to fix the
24 vehicle, correct?

25 A. Correct.

1 Q. And you indicated that -- you believe that was
2 massively low, correct?

3 A. Correct.

4 Q. And you testified that you believe your estimate --
5 I'm going to step back a second.

6 You have been doing this for a long time, correct?

7 A. Yes.

8 Q. And you deal with estimators from insurance
9 companies?

10 A. Yes.

11 Q. And you can look at a car -- have you ever
12 inspected a car yourself?

13 A. I worked for GEICO inspecting vehicles, yes.

14 Q. So you know how the process is done?

15 A. 100 percent.

16 Q. And isn't it true that you stated on direct
17 examination that you believed that the estimate, the correct
18 estimate to repair that car to pre-loss condition was
19 \$25,000?

20 A. Well over, yes.

21 Q. You didn't say "well over." You said \$25,000,
22 didn't you?

23 A. Correct.

24 Q. So your own estimate was \$25,000, right?

25 A. Yes.

1 Q. But as you're sitting here today, you through
2 M.V.B., Mr. Jesberger through you, want State Farm or
3 somebody to pay \$51,000 in repairs for that same car? I
4 mean, that's what the lien amount says, so --

5 A. I didn't know if that was a question.

6 Q. I said -- I thought I said "isn't it true."

7 Isn't it true as you're sitting here today M.V.B.
8 through their own lien is requesting 51,000 total dollars,
9 around that, for the repair of the 2015 Nissan Armada?

10 A. Yes.

11 Q. That's \$26,000 over your own expert estimate; isn't
12 that correct?

13 A. Correct.

14 Q. Now I want to go back to the first day that you met
15 Ms. Pope. Okay?

16 You indicated that was March 28th of 2017, correct?

17 A. Yes.

18 Q. And I believe from either the opening statement or
19 the direct examination that the accident itself was on March
20 27th, 2017, correct?

21 A. I don't know the exact date.

22 Q. It was indicated -- well, what if I told you the
23 accident was the day before and she brought the car in on
24 March 28th for the first time, would that sound accurate?

25 A. I believe we towed it in, but yes.

1 Q. So on March 28th, 2017 the vehicle was brought to
2 M.V.B. under some -- in some respect?

3 A. Yes.

4 Q. I believe it was actually a tow that was talked
5 about on direct examination, correct?

6 A. Yes.

7 Q. And you indicated that when you first met
8 Ms. Pope -- well, withdrawn.

9 When Ms. Pope first came into M.V.B. on March 28th,
10 you were there to speak to her, correct?

11 A. Yes.

12 Q. And you had her -- she had to fill out certain
13 forms in order for you, for M.V.B. through you to accept the
14 car in to start doing anything on it, correct?

15 A. Yes.

16 Q. Isn't it true if she did not sign those forms you
17 would have said we can't accept your car, we can't accept you
18 bringing the car here, we're not going to repair it; isn't
19 that correct?

20 MR. KLEIN: Objection, calls for speculation.

21 THE COURT: No, it's overruled. He's asking
22 what the witness would have done.

23 A. Could you rephrase?

24 Q. Sure.

25 In a scenario where Ms. Pope came in and refused to

1 sign the documents that you indicated she did sign, would
2 M.V.B. have agreed to accept the car and repair it depending
3 on the estimates?

4 A. Well, if she didn't want us to fix it, why would we
5 accept it?

6 Q. For example, she signed -- she checked \$120 for
7 labor rates on March 28th. If she refused to sign that, what
8 would you have done?

9 A. Well, if she refused to sign it, it would be
10 refusing for me to assign the car so then I would not fix her
11 car.

12 Q. Same question for the direction of payment form,
13 use of original parts, authorization for dealer services,
14 those are things that a new potential client must sign in
15 order for you to have an agreement with them to repair the
16 car; isn't that correct?

17 A. No.

18 Q. It's not correct?

19 A. No.

20 Q. So if she refused to sign any one of those
21 documents, you would have still accepted the car and started
22 doing repairs after receiving the estimate?

23 A. Yes. We don't have to receive direct payment. We
24 do need a DR in order to represent the young lady, so we have
25 to have a DR., we have to have authorization to repair.

1 Those two are a must.

2 Q. So the designate the representative form. What is
3 that?

4 A. That allows you to go over the car with the
5 appraiser, stepping into her shoes as the appraiser.

6 Q. And then you've already mentioned the use of the
7 original parts. You mentioned that Nissan must use original
8 parts, and you guys used original parts?

9 A. Correct.

10 Q. So those things she has to sign before -- before
11 you guys will accept her vehicle for repairs?

12 A. It's not required. She needs to acknowledge that
13 we explain it to her. The signature is just a formality of
14 her acknowledging that I told her that we will use original
15 parts on her car.

16 Q. So focusing directly on the form where she agreed
17 to pay the \$120 labor rates, if she refused to sign that, you
18 would not have agreed to accept the car and repair it,
19 correct?

20 A. If she does not authorize me to repair the car,
21 there is nothing further we can do.

22 Q. Now, until your -- again, focus on the last couple
23 of years. How often does a customer -- withdrawn.

24 It's not very often that a customer will make you
25 amend that form, correct, the amount of money for labor rate

1 per hour?

2 A. They will not make me amend my posted rates, no.

3 Q. So in this example Ms. Pope either signed off on
4 \$120 an hour for the repair of her Nissan Armada or you would
5 not have accepted the car; isn't that true?

6 A. No, I don't believe that.

7 Q. Well, then how would you have gotten to repair the
8 car, if she doesn't agree to the 120? I would imagine she's
9 not going to agree to a more expensive rate. You would have
10 had to come down in order for you to agree to repair her car.

11 A. She's acknowledging the rates that we charge to
12 repair the car, so she in fact acknowledged those rates.

13 Q. I understand that. What I'm saying is if a
14 customer -- let's say, for example, so we don't speculate,
15 Courtney Pope comes in and says, I want you to repair my car
16 but I'm not paying \$120 an hour for it, I'll only agree to
17 95, would you have accepted that and accepted her car for
18 repair?

19 A. If she wanted to negotiate the rates with me and
20 she was paying for the car to be repaired, I would negotiate
21 the rates with her, yes.

22 Q. But that did not happen in this case, correct?

23 A. She did not ask me to.

24 Q. And this document was signed on March 28th, 2017,
25 correct?

1 A. I believe that's what the record states.

2 Q. You could take a look. The answer is yes, but you
3 could take a look.

4 A. March 28th, 2017.

5 Q. And according to all the estimates, every document,
6 the date of loss is indicated as March 27th, 2017, correct?

7 MR. KLEIN: Objection. What documents are you
8 referring to?

9 THE COURT: Sustained.

10 Q. The estimates that you were looking at, can you see
11 what the date of loss is on those estimates?

12 A. Exhibit-Y says the date of loss was 3-27 of '17.

13 Q. So the next day the vehicle was brought to you via
14 a tow either by Ms. Pope or through an authorized person to
15 tow that vehicle, correct?

16 A. I don't know the date of the tow. I could look
17 that up for you.

18 Q. This is the initial tow.

19 A. 3-27-17.

20 Q. So within a day of the accident the vehicle was in
21 your shop and she's agreed to pay \$120 an hour for labor
22 rate, correct?

23 A. Yes.

24 Q. Now, at that time there had been no State Farm
25 estimate, correct?

1 A. Correct.

2 Q. And at that point, had you -- had you or anybody
3 who works for M.V.B., had anybody opened the car up, you
4 know, taken off any parts of the car to do an internal
5 inspection?

6 A. No.

7 Q. So the only thing that -- I'll ask you directly,
8 the only thing you had done to the car was look at it, you
9 had looked at the outside of it and you could make your own
10 estimates about the amount of repair that needed to be done,
11 correct, based on your experience?

12 A. Yes.

13 Q. All right, now, is it true that labor rate can
14 differ based on the type of car and the type of work done?

15 A. Yes.

16 Q. But you indicated that -- is your base rate 120?

17 A. Yes.

18 Q. Would you ever agree -- sorry, withdrawn.

19 Forget about agree, would you ever write an
20 estimate under \$120 an hour for a vehicle of this type?

21 A. Yes.

22 Q. Why would you do that?

23 A. If I negotiated with the company, I negotiated with
24 a consumer a different rate, I would write it at that rate.

25 Q. Would you write a different rate if you had not yet

1 agreed to a price with, let's say, for example, State Farm?
2 Would you come down from 120 to a lower rate even if you had
3 not had an official agreement with the insurance company?

4 A. No.

5 Q. Do you know if you've done that recently with any
6 State Farm -- with any vehicles that were inspected by State
7 Farm?

8 A. If I have done what recently?

9 Q. Lowered the rate down from 120 to -- down under
10 120?

11 A. If you could repeat the entire question.

12 Q. Sure.

13 In the last couple of years, have you voluntarily
14 lowered the -- your labor rate from 120 to a lower number
15 without an agreement with the insurance company?

16 A. I'm sure I have.

17 Q. And you've accepted labor rates of \$85 an hour,
18 correct?

19 A. Yes.

20 Q. And 75?

21 A. Yes.

22 Q. Isn't it true that from State Farm you accepted
23 rates as low as \$49 an hour?

24 A. I don't recall that.

25 Q. What about with other insurance companies, have you

1 accepted a rate of lower than \$120 from other insurance
2 companies? Again, Allstate and let's say Liberty Mutual as
3 examples.

4 A. Accepted or taken it?

5 Q. I'm sorry, written, written the estimate lower than
6 120.

7 A. I would have to look. I don't -- it's a --

8 Q. Okay.

9 MR. TOMSKY: Your Honor, I actually have an
10 exhibit in line with the types of examples that
11 Mr. Klein provided to his witness.

12 THE COURT: Has this been marked in?

13 MR. TOMSKY: This has not been pre-marked yet
14 because I wasn't sure if I was going to use them.

15 MR. KLEIN: I've never seen them.

16 THE COURT: If you're going to -- show a copy
17 to Mr. Klein and let's mark it for ID.

18 (Whereupon, Plaintiff's Exhibits 13 and 14
19 were marked for identification.)

20 COURT OFFICER: Showing the witness Exhibits
21 13 and 14 for ID.

22 Q. I would like you to look at what's been marked as
23 Exhibit-13. Do you recognize what you're looking?

24 A. Yes, I recognize it.

25 Q. Isn't it true that this is an estimate that you

1 provided, that M.V.B. provided for a 2017 Nissan Sentra for a
2 customer, Nick Lamon-Defiguera, D-E-F-I-G-U-E-R-A, and the
3 estimate was created on June 5th, 2017; isn't that correct?

4 A. I'm sorry, you have to ask the question again. Are
5 you saying I created it?

6 Q. This is an estimate created by Mid Island
7 Collision, correct?

8 A. By Mid Island Collision, yes.

9 Q. Not necessarily by you but someone that works under
10 your auspices?

11 A. Yes.

12 Q. Now I would like you to look at page four. Isn't
13 it true on this vehicle, again, this is right around the same
14 time as the Nissan Altima, Nissan Armada, I'm sorry.

15 THE COURT: Has this document been marked into
16 evidence yet or is it only marked for ID? You'll
17 stipulate?

18 MR. KLEIN: I have no objection to this coming
19 in.

20 THE COURT: All right.

21 (Whereupon, Plaintiff's Exhibits 13 and 14
22 were marked into evidence.)

23 Q. Isn't it true that the labor rate on your estimate,
24 M.V.B.'s estimate is \$95 for labor?

25 A. You're losing me on the "isn't." Is it not or --

1 the double negative.

2 Q. The way you do a cross, you say "isn't it true" and
3 things like that. I'm sorry that I'm not saying -- sorry
4 that I'm saying it way.

5 Isn't it true that your estimate for your labor
6 rate for labor for body was \$95 for the vehicle, correct?

7 A. Mid Island's estimate was at 95.

8 Q. And for labor for refinish was 75, correct?

9 A. That is correct.

10 Q. And for frame was 95, correct?

11 A. Correct.

12 Q. And labor for mechanical was 95, correct?

13 A. Correct.

14 Q. Now I would like you to look at Exhibit-14, which
15 is the State Farm estimates for the exact same car.

16 THE COURT: I'm sorry, the same exact car as
17 what?

18 MR. TOMSKY: I'm sorry, it's for the same car
19 that we just talked about, the 2017 Nissan Sentra that
20 the Mid Island estimate was made.

21 THE COURT: Why would there be two insurers
22 for the same car?

23 MR. TOMSKY: No. This person Nick is the
24 insured, Nick Lamon-Defiguera, he is the customer.

25 THE COURT: Right.

1 MR. TOMSKY: In both.

2 THE COURT: I see. Two different cars though?

3 MR. TOMSKY: No. It's the same car, so one of
4 them is the Mid Island Collision estimate and the other
5 is the State Farm estimate for the same car.

6 THE COURT: Understood.

7 MR. TOMSKY: I apologize for the confusion.

8 Q. Looking at the final -- looking at page eight of 10
9 on the second to last -- I'm sorry, go from the back seven --
10 seven pages from the back, there is a State Farm labor rate
11 on their estimate, do you see that?

12 A. Yes.

13 Q. Isn't it true that the labor rate for sheet metal
14 is \$49?

15 A. Yes.

16 Q. And for mechanical/electrical, \$49?

17 A. Yes.

18 Q. Frame, 51?

19 A. Yes.

20 Q. And refinish, 49?

21 A. Yes.

22 Q. Now, this is not an example of one of those cases
23 where you had already come to an agreement with the other --
24 with the insurance company, correct, on a labor rate?

25 A. I can't tell because neither these are final.

1 Q. Okay, well, I could tell you right now, and counsel
2 should be familiar with it, this is actually part of another
3 lawsuit that M.V.B. and State Farm -- I have the index
4 number, if you need it.

5 MR. KLEIN: Objection.

6 THE COURT: It's a Court document?

7 MR. KLEIN: I haven't seen it. I'm not the
8 counsel of record on that case. I object to it being
9 referred to as something that we're familiar with.

10 THE COURT: In any event, the fact that there
11 is a lawsuit over it is not relevant here. The
12 question, which you asked, which I think is still open,
13 is whether they had reached a resolution on this rate.

14 Q. Okay, I'll ask it this way.

15 As far as you know, has there been a resolution
16 between M.V.B. and State Farm on the labor rate for this car,
17 the 2017 Nissan Sentra?

18 A. I believe not.

19 Q. So this is an example of one where M.V.B.'s labor
20 rate came down without an agreement with the insurance
21 company; isn't that correct?

22 A. No.

23 Q. It's not correct?

24 A. No.

25 Q. You just said that there was no agreement between

1 M.V.B. and State Farm, correct?

2 A. That's correct.

3 Q. So this would be an example of a case where there
4 was no mutual agreement before you lowered your labor rate?

5 A. No. It's two different situations you're talking
6 about.

7 Q. Please explain.

8 A. Well, if we attempted to negotiate with Mr. Rice on
9 this car and we attempted to negotiate to 95, we would leave
10 it at our attempted negotiate rate. If I attempted to
11 negotiate from 125 to 95 and my last discussion was where
12 Mr. Rice was 125, I would personally leave that. I would go
13 down to the 95. I would not go back to the 125. In this
14 case, it was not mine, I did not negotiate it. I couldn't
15 tell the thoughts that were going through --

16 Q. Okay, all right. Now, for this vehicle, State Farm
17 -- we've gone over this before, but State Farm came in
18 multiple times concerning this car writing multiple
19 supplements and multiple estimates, correct?

20 THE COURT: Which car?

21 MR. TOMSKY: Going back to the 2015 Nissan
22 Armada, the one at issue.

23 A. Not this one. The Armada?

24 Q. I apologize. There were multiple inspections and
25 estimates written by State Farm to you guys, correct?

1 A. Correct.

2 Q. I believe you said there was 10 or 11 total; is
3 that correct?

4 A. Maybe 11 or 12, yes.

5 Q. Were you present for the initial estimate done by
6 Jim Rice, the \$10,000 one that we discussed earlier?

7 A. Yes.

8 Q. Isn't it true that Mr. Rice handed you that
9 estimate at that time?

10 A. No.

11 Q. It is not true?

12 A. No.

13 Q. How does it work, does he hand you a piece of paper
14 or does he upload it?

15 A. He hands it to the young lady sitting in front of
16 me.

17 Q. Would that be Nicky (phonetic)?

18 A. Yes.

19 Q. And do you get a copy of that estimate from your
20 employee?

21 A. Yes. It goes into the computer file, in the
22 written file.

23 Q. You were able to look at that initial estimate
24 before any additional estimates were done, correct?

25 A. Yes.

1 Q. And on that initial estimate, the labor rate was 49
2 for the three and then 51 for the -- for -- the little higher
3 rate?

4 A. Yes.

5 Q. Isn't it true you did not object to Mr. Rice
6 directly about that labor rate?

7 A. Mr. Rice knows we have a standing objection.

8 Q. I just asked you a question.

9 A. I don't recall.

10 Q. Were you present for the supplement done by Mike
11 Thiele on April 11th, 2017? That would be the first
12 supplement after the initial estimate.

13 A. I don't recall.

14 Q. If you were not handed it directly, would it make
15 sense to you that it was given to somebody at M.V.B. and
16 uploaded into the system like the estimate?

17 A. Yes.

18 Q. And at that time did you contact Mike Thiele and
19 object to a labor rate in the initial supplement?

20 A. I do not recall.

21 Q. Now, at some point M.V.B. prepared a lien in
22 connection with this car, correct, the 2015 Nissan Armada?

23 A. Yes.

24 Q. Looking at the lien where it says garage man
25 signature, that is your signature, correct?

1 A. My copy is pretty bad.

2 Q. My copy is as well. I'll ask it a different way.

3 Do you recognize that as being your signature?

4 A. It could be.

5 Q. Would anybody else have signed this besides

6 yourself or Mr. Jesberger?

7 A. Normally I would sign them.

8 Q. Normally you would sign them?

9 A. Yes.

10 Q. It's fair to say that you want to sign these lien

11 documents with accuracy, correct?

12 A. Yes.

13 Q. Because this is going to be an official document

14 that somebody, whether it's the judge or somebody else, is

15 going to use to either validate or invalidate the lien,

16 correct?

17 A. Correct.

18 Q. Now, on this lien there is a section where it says

19 estimated value, correct?

20 A. Correct.

21 Q. And the estimated value of the vehicle on the lien

22 that you prepared is \$36,000, correct?

23 A. That is correct.

24 Q. Now, are you the one who makes that determination

25 or somebody else in terms of the estimated market value of

1 the vehicle that goes onto the lien?

2 A. It says estimated value, not estimated market
3 value.

4 Q. I apologize, estimated value. Are you the person
5 that writes that 36,000 or somebody else?

6 A. I told them estimated value as is on my yard at
7 36,000.

8 Q. It was your estimation or somebody else gave you
9 that estimation and you put it down?

10 A. No, I gave them that estimation.

11 Q. When you say "gave them that estimation," gave who?

12 A. The lien company that came in and did the lien.

13 Q. So did you do an independent analysis on what you
14 believed to be the estimated value of that car at the time of
15 the lien?

16 A. I did the estimated value of what the car was that
17 was sitting in our yard at that point.

18 Q. Is that before being repaired or after?

19 A. No, as it sits that day. It's not the value before
20 the loss, not the value after the loss. The value of the
21 salvage sitting in the yard.

22 Q. So on the lien itself, again, the document M.V.B.
23 wants to utilize to either validate this lien or I guess to
24 validate the lien and get whatever money you believe you're
25 entitled to says \$50,728.44, correct?

1 A. Okay, yes.

2 Q. And the estimated value is \$36,000?

3 A. Correct.

4 Q. So on the lien itself, you're requesting that the
5 lien be validated even though the amount of the lien is over
6 \$14,000 more than your own estimate for the car?

7 A. The value of the car is for the value of the junk
8 sitting in the lot. It's not the value of the car.

9 Q. The junk sitting on the lot?

10 A. Yes, the salvage, the vehicle that's sitting in the
11 yard. It's the value of the vehicle at present, not the
12 retail value of the vehicle.

13 Q. It had been repaired by this point, correct?

14 A. Incomplete.

15 Q. Incomplete?

16 A. Incomplete.

17 Q. Incomplete?

18 A. Incomplete.

19 Q. What percentage would you say you had repaired, it
20 had been repaired?

21 A. 95 percent.

22 Q. So 95 percent had been -- when you say "repaired,"
23 is that back to pre-loss condition?

24 A. I believe it was not at that time. When the lien
25 was placed, it was not at pre-loss condition.

1 Q. I'm looking when the lien was placed. It's got to
2 be -- it says 7-1-17, correct?

3 A. Yes, 7-1-17.

4 Q. And by that time State Farm had deemed it a total
5 loss, correct?

6 A. That is correct.

7 Q. So is it fair to say that no additional work had
8 been done on the car from June 7th or June 5th or June 7th of
9 2017 to July 1st, 2017 when the lien was created?

10 A. Safe to assume, yes.

11 Q. Because you wouldn't do work on a vehicle that was
12 a total loss?

13 A. We were told it was a total loss after it went to
14 the dealer for alignment and resets.

15 Q. My general question is, M.V.B. would not do work on
16 a car after you were told it was a total loss, correct?

17 MR. KLEIN: Objection. I think that the point
18 that he made requires some more nuance in the question,
19 because if the car is out of their hands when they are
20 alerted that it is allegedly a total loss, then the work
21 is not being performed, it's not under Mid Island's
22 control at that point.

23 MR. TOMSKY: I will limit it to work done by
24 M.V.B.

25 THE COURT: Okay, thank you.

1 Q. Would M.V.B. do any work on the car after being
2 told it was deemed a total loss by the insurance?

3 THE COURT: That is other than sublet work?

4 MR. TOMSKY: Correct.

5 A. Unless the owner who instructs us to repair the car
6 tells us otherwise, we would hold off.

7 Q. I'm glad you brought that up.

8 So in this case, isn't it true that you reach an
9 agreement with Courtney Pope that if there was any issue with
10 you and the insurance company, that you would -- that she
11 basically assigned all rights over to M.V.B. and you and
12 State Farm would deal with any issues; isn't that true?

13 MR. KLEIN: Objection.

14 A. I would have to disagree with that
15 characterization.

16 Q. How so?

17 A. How did she assign all her rights to me to go over
18 that at that point?

19 Q. This is Exhibit-11.

20 MR. TOMSKY: If I could have that withdrawn
21 from the witness' attention. I apologize for the delay,
22 your Honor.

23 Q. Did Ms. Pope assign her rights to M.V.B. in this
24 matter for repairs of her car that if there is any kind of
25 disagreement between M.V.B. and State Farm, that M.V.B. would

1 go after State Farm directly as opposed to the insured?

2 A. No.

3 Q. She didn't?

4 A. At what point? At what time?

5 Q. At any time.

6 A. That question is a compound question in that the
7 rights could be assigned, that is the rights to coverage by
8 the insurance company. That is different than an obligation
9 to pay if the insurance company doesn't make sufficient
10 payment. Those would be two separate types of agreements.

11 Q. My question is this, are you aware of any agreement
12 between M.V.B. and Ms. Pope where she assigned her rights
13 that if there was a dispute between State Farm and M.V.B. --

14 THE COURT: Again, that's two separate
15 questions.

16 First question, is there any agreement between
17 M.V.B. and Ms. Pope where she assigned her rights to
18 collect under the State Farm policy?

19 THE WITNESS: Yes.

20 THE COURT: All right, now, was there an
21 agreement between M.V.B. and Ms. Pope that if State Farm
22 did not pay the charges that you assessed that she would
23 pay the difference?

24 THE WITNESS: That Ms. Pope would pay the
25 difference?

1 THE COURT: Correct.

2 THE WITNESS: Ms. Pope is responsible for the
3 difference, but she signed the assignment in order for
4 us to step into her shoes and collect the difference on
5 a different case than this one.

6 Q. So you're saying -- so is it fair to say that there
7 is a current breach of contract case between M.V.B. and State
8 Farm where Courtney Pope is the AAO or the assignor of those
9 rights?

10 A. I would have to speak to the other attorney
11 handling that case. I don't know the exact facts of that
12 case.

13 Q. All right, if I could have the witness shown
14 Exhibit-4, please, and I do have a copy for your Honor.

15 (Whereupon, Plaintiff's Exhibit-4 was marked into
16 evidence.)

17 COURT OFFICER: Showing the witness
18 Plaintiff's 4 in evidence.

19 Q. Please take a look at that for a second while your
20 counsel looks it over.

21 THE COURT: Okay, this action is a replevin
22 action. Given that fact, I'm not sure why we proceeded
23 in reverse order, because the other action that you're
24 referencing now is probably the one where they're
25 looking to recover the difference in the billing, but,

1 be that as it may, let's proceed with the questioning.
2 I needed to clarify that for myself.

3 MR. TOMSKY: I will say -- off the record.

4 (A discussion was held off the record.)

5 THE COURT: I think what we're going to do is
6 let's recess for the day. We can pick up tomorrow.
7 That will also give me a chance to look at these
8 pleadings. Maybe you could e-mail a copy of the
9 complaint and the answer to me and we'll pick up again
10 tomorrow morning at 10 o'clock.

11 MR. KLEIN: Thank you, Judge.

12 MR. TOMSKY: Thank you.

13 THE COURT: We stand adjourned.

14 (Whereupon, hearing was adjourned to
15 12-12-2018, 10 o'clock.)

16
17 * * * * *

18
19
20 CERTIFIED TO BE A TRUE AND ACCURATE
21 TRANSCRIPT OF THE STENOGRAPHIC MINUTES
22 TAKEN HEREIN:

23
24 _____
25 PATRICIA HOLSGROVE, RPR
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