

1 THE SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NASSAU: TRIAL TERM PART 25
3 INDEX NO. 606797/2017

-----X
4 STATE FARM MUTUAL INSURANCE COMPANY,

5 Plaintiff,

6 -against-

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

9 Defendant.
-----X

10 Supreme Court
11 Mineola, New York
12 December 17, 2018

13 B E F O R E:

14 THE HONORABLE JACK L. LIBERT
15 Justice of the Supreme Court

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

17 RUBIN, FIORELLA & FRIEDMAN LLP
18 For the Plaintiff
19 630 Third Avenue
20 New York, New York 10017
21 BY: MICHAEL E. TOMSKY, ESQ.

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BY: ALEX KLEIN, ESQ.
-and-
KEVIN KEARON, ESQ.

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Proceedings

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1 THE CLERK: State Farm Mutual Automobile
2 Insurance Company against M.V.B. Collision Incorporated
3 doing business as Mid Island Collision.

4 MR. TOMSKY: For the record, Ms. Stewart will
5 not be with me today.

6 THE COURT: My recollection is we have just
7 finished with the cross-examination.

8 MR. TOMSKY: The cross of Mike Thiele.

9 THE COURT: So where is Mr. Thiele?

10 MR. TOMSKY: He's outside.

11 MR. KLEIN: Your Honor, one issue. We
12 received a copy of the transcript from the first two
13 days of testimony.

14 THE COURT: Right.

15 MR. KLEIN: I noticed there was one answer
16 that doesn't appear in the record. I can ask a
17 question again, but I don't think there's a dispute
18 that this answer was actually given. It was from Mr.
19 Thiele where the question was something along the lines
20 of if the car had been declared a total, when Mid
21 Island first requested it, how much -- what would the
22 bill have been? And his answer was not verbatim, but I
23 think it was approximately \$2,500 and in the record and
24 I know the page number there's a question and then
25 there is no answer to it. And, you know, I understand

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Cross by Mr. Klein - M. Thiele

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1 it's not a job I can do.

2 THE COURT: Do you both agree that it would be
3 approximately \$2,500?

4 MR. TOMSKY: Yes, I believe that's almost
5 exactly what he said 2,500 or 2250.

6 THE COURT: We have that as a stipulation.
7 You don't need to answer it again. It's in the record
8 now. No need to ask it again nor to answer it again.

9 MR. KLEIN: It's totally understandable.

10 THE COURT: Okay, thank you. Let's finish up
11 then with Mr. Thiele.

12 THE COURT: Good morning, Mr. Thiele, you can
13 come right back up.

14 THE CLERK: Mr. Thiele, you're reminded you're
15 still under oath.

16 THE COURT: Mr. Klein, you may continue.

17 CONTINUED CROSS-EXAMINATION

18 BY MR. KLEIN:

19 Q Welcome back, Mr. Thiele, thank you for being here
20 again.

21 A Sure.

22 Q Where we left off we were discussing collective
23 repairs. Do you recall that?

24 A Yes.

25 Q The collective repair is when an auto body shop has

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Cross by Mr. Klein - M. Thiele

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1 to fix a problematic repair performed somewhere else, right?

2 A Yes.

3 Q And you've seen cars that have been taken to Mid
4 Island Collision for corrective repairs, right?

5 A I have.

6 Q Do you have a ballpark figure of how many times
7 you've seen that happen?

8 A I think twice at this point.

9 Q And does State Farm provide coverage to motorists
10 who need corrective repairs?

11 MR. TOMSKY: Objection. That calls for a
12 legal conclusion on how State Farm would do.

13 THE COURT: Overruled.

14 A What was the question again, I'm sorry?

15 Q Does State Farm provide coverage, insurance
16 coverage for motorists who need corrective repairs?

17 A We did pay for them, yes, the corrective repairs,
18 we did.

19 Q And so the corrective repairs make it more
20 expensive for State Farm for the repair of the vehicle?

21 A Well, we have to pay out something, so as far as
22 coverage, there's no particular coverage that I know of, but
23 as far as payments for the corrective repairs, yes.

24 Q To give you an example, if the car is written out
25 on an estimate for \$10,000 and the repair is performed for

Redirect by Mr. Tomsky- M. Thiele

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1 \$10,000 and the repair is not done properly, and so it needs
2 to be taken for a corrective repair, is it the case that
3 State Farm covers the \$10,000 and then whatever it costs to
4 do the corrective repair?

5 A I'm not positive on that. I don't know -- I know
6 that we pay for the corrective repairs. But I don't know
7 about the prior claim.

8 MR. KLEIN: No further questions, your Honor.

9 THE COURT: Thank you. Redirect?

10 MR. TOMSKY: Yes, your Honor, thank you.

11 REDIRECT EXAMINATION

12 BY MR. TOMSKY:

13 Q Good morning, how are you doing?

14 A Good.

15 Q A couple of things that I want to discuss that we
16 talked about during the cross-examination. Mr. Klein gave
17 you a couple of examples of other cases of other vehicles
18 where there were certain parts of the bill that you did pay
19 at higher labor rate. Do you remember those were the other
20 day?

21 A Yes.

22 Q In those specific examples that Mr. Klein gave you,
23 why did you write an estimate for higher than the 49 or \$51
24 that you see in this case?

25 A It was considered a mechanical operation.

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Redirect by Mr. Tomsy- M. Thiele

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1 Q By "mechanical operation," just what do you mean by
2 that?

3 A There are different operations when you're
4 repairing a car. It could be done on the body. It could be
5 mechanical. It could be refinish.

6 Q Now, there was specifically one of them about
7 aiming the headlights which to a non vehicle expert seems
8 like not the hardest thing in the world, but can you please
9 explain why that is more complicated than what it seems?

10 A Well, the vehicles today they have to have -- they
11 might have certain systems that have to be aimed with the
12 headlamps. The headlamps have to be -- the vehicle has to
13 be on a perfectly level surface.

14 Q Now, going back to this vehicle, the 2015 Nissan
15 Armada. You've seen the final bill, and I know you've seen
16 your estimates. Is there anything that was done on that
17 final bill, the final repairs that you believed required a
18 higher labor rate?

19 A The mechanical repairs to the dealership, yes.

20 Q But nothing else?

21 A Not that I saw, no.

22 Q Now, as you're aware, there were multiple
23 supplements in this case that was brought up especially on
24 cross-examination. Why were there so many supplements in
25 your mind?

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1 A The shop continued to call us back and when they
2 call us back, that's usually for a reason that there may be
3 some additional damage that we just didn't see the first
4 time.

5 MR. TOMSKY: Nothing further.

6 THE COURT: All righty, thank you. Mr. Klein?

7 MR. KLEIN: No further questions.

8 THE COURT: All righty. You are excused. You
9 may step down.

10 THE WITNESS: Thank you.

11 THE COURT: Okay. Now, I know we had taken
12 Mr. Thiele out of order.

13 MR. TOMSKY: Thank you.

14 THE COURT: So we're back in order now?

15 MR. TOMSKY: Yes.

16 THE COURT: Would you like to call your next
17 witness?

18 MR. KLEIN: Yes, your Honor. Mid Island calls
19 Joe Maruca, M A R U C A.

20 COURT OFFICER: Witness entering.

21 THE CLERK: Do you swear or affirm that the
22 testimony you are about to give in this case on trial
23 shall be the truth, the whole truth and nothing but
24 truth, so help you God?

25 THE WITNESS: Yes.

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1 THE CLERK: You may have a seat. Please state
2 and spell your first and last name and state your
3 address.

4 THE WITNESS: First name is Joe, J O E. Last
5 name Maruca, M A R U C A. Address is 9 Leech Circle
6 South, L E E C H, Circle South, Glen Cove, New York.

7 THE CLERK: Zip?

8 THE WITNESS: 11542.

9 THE CLERK: Thank you.

10 THE COURT: All right. You may inquire.

11 DIRECT EXAMINATION

12 BY MR. KLEIN:

13 Q Good morning, Mr. Maruca, how are you?

14 A Good morning.

15 Q What do you do for a living?

16 A I am a service director for a Nissan dealership out
17 in Bay Shore, automotive.

18 Q What does a service director do at Nissan?

19 A I oversee the operation, you know, cars, mechanics,
20 advisors, you know, I run the operation, put policies in
21 place.

22 Q Where did you work prior to Nissan?

23 A Prior to Nissan I worked for Infinity for four
24 years, and prior to that I worked for Audi for twenty-five
25 years as a service director.

Direct by Mr. Klein - J. Maruca

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1 Q By the way, what is the relationship between
2 Infinity and Nissan?

3 A Same brands, sister company.

4 Q How long have you been in the automotive industry?

5 A Forty years.

6 Q How old are you now?

7 A Fifty-nine.

8 Q How long have you been working on Long Island in
9 the industry?

10 A Forty years.

11 Q Have you had the opportunity to come into contact
12 with Mid Island Collision?

13 A Yes, I have.

14 Q In a business capacity?

15 A Yes.

16 Q How did that relationship begin?

17 A Me and Brian met one day. I heard he does
18 excellent body, you know, body repairs and he was certified
19 in a lot of manufacturers, and that's what we were looking
20 for, so we started to give our business.

21 Q When you say "Brian," what is Brian's last name?

22 A Kaller [phonetic], I think it is.

23 What's Brian's last name?

24 THE COURT: If you don't know, you don't know.

25 THE WITNESS: I always know him from Brian.

Direct by Mr. Klein - J. Maruca

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1 Q What is Brian's job, as you understand it?

2 A He oversees the Mid Island Collision operation.

3 Q You mentioned that you were looking for a certified
4 shop?

5 A Yes. We, as a dealership, we need to -- our cars
6 need to be sent to repair centers that are certified.

7 Q That's as opposed to what kind of body shop?

8 A I guess a non certified body shop.

9 Q Is every auto body shop certified?

10 A No.

11 Q Why did Nissan or any of your other companies want
12 to be working with a certified shop?

13 A Well, the vehicles need to be repaired after a
14 collision to their specifications when they come out of
15 their factory and, you know, the original parts need to be
16 reinstalled in a car.

17 Q And did you have experience working with auto body
18 shops that were not certified?

19 A Yes, I have.

20 Q And what was that experience like?

21 A It wasn't good because a lot of the repairs weren't
22 up to specifications, you know, they used -- they wouldn't
23 use factory parts. They would repair the part instead of
24 replace the part, and as a dealership, we need to send the
25 car back to the customer with all of the specifications. We

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1 don't use aftermarket parts, we don't repair parts. If the
2 part is broken, we have to fix it.

3 Q And so what are some of the consequences of a
4 dealership being in a position of having an improperly
5 repaired vehicle?

6 A It's a liability to us. We as a dealership as a
7 service manager if I'm not going to give the customer back
8 the vehicle in the shape it was when he purchased it, then
9 it's a liability to me because it might not operate
10 correctly. These cars have sensors, you know, carb sensors,
11 ABS sensors, mirror sensors, avoiding collision mechanisms
12 in them, so if they're not repaired correctly, they might
13 not operate, and if they don't operate, it's a liability on
14 my part.

15 Q Does Nissan sell preowned vehicles?

16 A Yes, we do, certified preowned.

17 Q Is Nissan allowed to tell -- what are the
18 consequences of having a preowned vehicle that was in a
19 prior collision?

20 MR. TOMSKY: Just object to the word
21 consequences. Is that a legal conclusion? I'm
22 confused about the question.

23 THE COURT: I'm not sure I understand the
24 question either. Could you rephrase phrase it, please?

25 MR. KLEIN: Absolutely.

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1 Q Suppose Nissan has a vehicle that has in the past
2 experienced a collision?

3 A Right.

4 Q What does Nissan need to do before selling that
5 vehicle as a preowned car?

6 A We have to bring it up to specifications. If it's
7 unable to be certified, then we can't sell it.

8 Q Does that put a premium on the prior repair?

9 A Absolutely, yeah.

10 MR. KLEIN: Your Honor, I don't believe that
11 there is a dispute as to his qualifications as an
12 expert from State Farm.

13 MR. TOMSKY: Well, there is a little confusion
14 about what exactly he's an expert on. I believe he's,
15 you know, worked in the area for forty years. If
16 there's a certain aspect of a fact witness, it would be
17 more of a fact witness than an expert.

18 THE COURT: I'm going to have to ask the
19 witness to step out for a moment, so we can discuss
20 this.

21 THE WITNESS: Step out?

22 COURT OFFICER: Yes.

23 THE COURT: You can just go in the back there.
24 (Whereupon, the witness exits the courtroom.)

25 THE COURT: I would like a proffer, Mr. Klein,

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1 as to what this witness is going to be testifying to.

2 MR. KLEIN: Sure. Just a few subjects. One
3 subject that he will be testifying to is the
4 relative -- the comparative difficulty of what the
5 dealership does to repair a vehicle versus what Mid
6 Island does to repair a vehicle. The second is to
7 discuss Nissan's requirements for parts, and his
8 familiarity with the labor rates in the industry.

9 THE COURT: Okay, I'm not sure that that
10 requires expert qualifications. Those seem to be fact
11 items but to the extent he needs to be an expert to
12 talk about that, I'll allow it.

13 MR. TOMSKY: And I apologize to Mr. Klein. I
14 indicated I would not have a problem with that.

15 THE COURT: That's all right, it was a proper
16 question.

17 MR. TOMSKY: It is so I have no problem with
18 that conversation.

19 THE COURT: The inquiry was correct and fine
20 and we're good to go.

21 MR. TOMSKY: Again, I want to apologize to Mr.
22 Klein. We have a good relationship in this, and I
23 don't want him to think that I'm sandbagging him.

24 MR. KLEIN: I don't think that.

25 THE COURT: We just had to clear up some

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1 business.

2 THE WITNESS: Sure, sure.

3 THE COURT: Okay, proceed.

4 MR. KLEIN: Can I ask for the last question to
5 be read back?

6 (The requested portion was read back.)

7 Q What does your Nissan dealership charge in labor
8 rates?

9 A Our door rate is a \$150 an hour.

10 Q Your what rate?

11 A Door rate.

12 Q Are there other rates?

13 A There's also a warranty rate that the manufacturer
14 pays us that's one thirty-five an hour.

15 THE COURT: I'm sorry, what is a door rate?

16 THE WITNESS: A customer rate.

17 MR. KLEIN: I'm sorry, what did you say?

18 THE WITNESS: Customer rate.

19 THE COURT: In other words, meaning if
20 somebody walks in the door from off the street, that's
21 the rate they charge?

22 THE WITNESS: Right.

23 THE COURT: Like a rack rate in a hotel.

24 THE WITNESS: Right.

25 Q What kind of work generally does Nissan provide for

Direct by Mr. Klein - J. Maruca

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1 cars that are brought into the dealership directly?

2 A We do mechanical work. Mechanical repairs and
3 services.

4 Q Wheel alignments?

5 A Wheel alignments, tire replacements, engine
6 repairs. We do it from A to Z.

7 Q Straightening headlamps?

8 A Aiming headlights, fixing flats, you name it, we do
9 it.

10 Q What is involved in aiming headlamps?

11 A Just putting it on a rack. There's a chart on the
12 wall, we line them up, we adjust it, level it off.
13 Sometimes use a scan tool. It doesn't take too long.

14 Q Is that a complex task?

15 A No.

16 Q On a scale of one to ten, where would you line it
17 in terms of difficulty?

18 A A two.

19 Q How about aligning wheels, same question?

20 A Wheel alignment, same thing, put it on the
21 alignment rack. Put these sensors on. There's a laser beam
22 on the board. It tells you if it's in or out. You turn the
23 nut, you know, you adjust tire rod ends, you bring it in,
24 bring it out. It's not that complicated.

25 MR. KLEIN: I would like to show the witness

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1 two exhibits. One is Exhibit L, which is the Nissan
2 bill for Ms. Pope's Nissan, and the other is the
3 Exhibit E, like Edward, Mid Island's final bill.

4 COURT OFFICER: Showing the witness.

5 Q Mr. Maruca, I'm going to ask that you review both
6 of those exhibits, please, and let me know when you've had
7 the chance to do that.

8 THE COURT: I'm sorry, off the record.

9 (A discussion was held off the record.)

10 A I'm all set.

11 Q What was the work performed by Nissan on the Nissan
12 Armada that is reflected in Exhibit L?

13 A Exhibit L?

14 Q Yeah.

15 A It looks like he did a basic setting reset which,
16 you know, check the computers on a car and cleared them.
17 Then he also aimed the headlights, he did a wheel alignment
18 and also did a default, a readiness set on the computer.

19 Q And you've had the chance to review Exhibit E as
20 well, correct?

21 A E is just -- looks like it's a body shop repair
22 estimate.

23 Q And as you review -- in your experience, forty
24 years in the industry, can you offer an opinion as to what
25 work was more difficult between the work performed at Mid

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Direct by Mr. Klein - J. Maruca

17

1 Island and the work performed at the dealership?

2 A Well --

3 MR. TOMSKY: I'm going to object to that, your
4 Honor. I think more difficult is a subjective thing.
5 I understand he's a fact witness talking about his
6 experience, but --

7 THE COURT: I understand the question. I'm
8 going to allow it. He's really asking which requires
9 more work or more time. We'll let the witness
10 elaborate on it.

11 A Well, you know, bodywork is definitely more
12 complicated than mechanical repair work especially in these
13 two instances. This is just a reset, a wheel alignment.

14 Q And where's the bodywork performed, to be clear?

15 A Where was it performed?

16 Q Yes.

17 A Mid Island Collision.

18 Q And is that generally what you see in your
19 experience that the more difficult work is performed at the
20 body shop rather than the dealership?

21 MR. TOMSKY: Objection.

22 THE COURT: Again, I'm going to allow it. I
23 understand the question. I think your objection is
24 probably correct, but in the context of a bench trial,
25 I'm okay with it.

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Direct by Mr. Klein - J. Maruca

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1 A The body repairs are definitely more difficult than
2 mechanical repairs.

3 Q And you mentioned --

4 THE COURT: I'm sorry, I'm going to clarify.
5 When you say more difficult, what do you mean by that?

6 THE WITNESS: I mean there's measurements
7 involved for chassis damage you have to measure it.
8 You have to weld. Mechanical repairs in this day and
9 age now, you know, more replace the alternator, replace
10 the starter. We're not rebuilding them. The
11 manufacturer now has you replace items instead of, you
12 know, repair them and weld them.

13 THE COURT: Sort of plug and play?

14 THE WITNESS: There you go, plug and play.

15 THE COURT: Thank you. Okay.

16 Q You mentioned that you're familiar with Mid Island
17 in the industry?

18 A Yes.

19 Q What is their reputation as far as you can gather?

20 A Very good. They do excellent work. They do it
21 right. They use factory parts and they do excellent work.

22 Q In your experience, how many auto body shops have
23 you crossed paths with on Long Island in your forty years?

24 A Quite a few.

25 Q Ballpark?

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Direct by Mr. Klein - J. Maruca

19

1 A Thirty.

2 Q And how many in Nassau County?

3 A I've always been in Nassau County, so I have to say
4 30.

5 Q Of those 30, Mr. Maruca, where does Mid Island rank
6 in terms of quality of repairs?

7 MR. TOMSKY: Objection. Has the witness done
8 a list that I can see between one and thirty?

9 THE COURT: I'm going to sustain that.

10 MR. KLEIN: What was it that you asked for,
11 Mike?

12 THE WITNESS: A list.

13 THE COURT: You asked him to rank the thirty
14 shops where Mid Island would be on that ranking and we
15 don't know that there is a ranking.

16 MR. KLEIN: Okay. I'm just asking him to tell
17 me who he thinks is the best shop in Nassau County, is
18 that okay?

19 THE COURT: That is.

20 Q Okay. So who do you say is the best shop in Nassau
21 County?

22 A That I've done business with, Mid Island Collision.
23 So superior it's unbelievable, and that's why he gets our
24 work.

25 Q You're familiar that Mid Island Collision charges

Cross by Mr. Tomsky - J. Maruca 20

1 \$120 an hour for labor?

2 A Yes.

3 Q Is that reasonable?

4 A I thought they would get a little more, you know,
5 would get a little more than 120 for body repairs. Because
6 it's definitely more difficult than mechanical repairs.

7 MR. KLEIN: No further questions for Mr.
8 Maruca.

9 THE COURT: Counsel?

10 MR. TOMSKY: Thank you, your Honor.

11 CROSS-EXAMINATION

12 BY MR. TOMSKY:

13 Q It's Maruca?

14 A M A R U C A, yes.

15 Q How are you, sir? My name is Mike.

16 A How are you doing, Mike?

17 Q I'm doing good. How are you doing?

18 A Good.

19 Q Thanks for coming in today. First things first.
20 The one thing I noticed when Mr. Klein was asking you
21 questions you said you were aware that Mid Island rate is
22 120 an hour, correct?

23 A Yes.

24 Q On the piece of paper that Mr. Klein showed you
25 from Rockaway for Ms. Pope, it looks like the labor rate is

Cross by Mr. Tomsky - J. Maruca 21

1 the \$125 an hour from Rockaway. I want to make sure I got
2 that accurate.

3 A That's what it states on this invoice.

4 Q And you indicated that the work that was done at
5 Rockaway was less complicated than the work that was done at
6 Mid Island Collision, correct?

7 A Yes.

8 Q Are you gonna give your customers a refund after
9 you get done today?

10 A I don't understand the question.

11 MR. KLEIN: Objection.

12 THE COURT: Sustained.

13 MR. TOMSKY: Your Honor, he said that the work
14 done was less complicated than M.V.B. and M.V.B.'s
15 labor was 120. He should be giving his customers a
16 refund, right?

17 MR. KLEIN: Objection.

18 THE COURT: First of all, it's not his Nissan
19 dealership that we're dealing with.

20 THE WITNESS: Right.

21 THE COURT: Second of all, I believe the
22 witness said, and I may have -- I want to look back in
23 my notes, but I believe he said his rate was 150.

24 THE WITNESS: Right. My door rate is 150.

25 MR. TOMSKY: I apologize for interrupting.

Cross by Mr. Tomsky - J. Maruca 22

1 THE COURT: Yes, what he called the door rate,
2 so the question about giving a refund, I just don't see
3 where that's a proper question.

4 MR. TOMSKY: I apologize, your Honor.

5 Q But the \$125 rate that's on the Rockaway Nissan
6 from Ms. Pope, do you believe that's inflated?

7 A Do I believe that rate's inflated?

8 Q Yeah.

9 A No, I don't believe it's inflated at all.

10 Q When were you first contacted about coming in and
11 testifying on behalf of Mid Island Collision on this case?

12 A Two weeks ago.

13 Q And how long have you known Mr. Jesberger?

14 A Mr. who?

15 Q Mr. Jesberger sitting at the table.

16 A Twenty years.

17 Q And how about Brian?

18 A Twenty years.

19 Q Have you ever testified for them in a civil dispute
20 before?

21 A Never. First time testified in my whole life.

22 Q Do you have a file for this case?

23 A No.

24 Q Have you seen the vehicle -- the vehicle that we're
25 talking about today in person?

Cross by Mr. Tomsy - J. Maruca

23

1 A No.

2 Q Have you seen photographs of the vehicle?

3 A No.

4 Q Have you seen any State Farm's estimates?

5 A From this?

6 Q Yes.

7 A No.

8 Q Are you being paid to be here today?

9 A No.

10 Q Would you classify yourself as a busy man?

11 A Yes.

12 Q And you're employed, you're gainfully employed,
13 correct?

14 A Yes.

15 Q As a service director?

16 A The service director.

17 Q How many hours a day do you usually work?

18 A Eleven.

19 Q So you came in today for free to testify on behalf
20 of your friends?

21 A Yes.

22 MR. KLEIN: Objection. Friends?

23 A Well, clients.

24 Q Would you consider Mr. Jesberger's a friend as well
25 as a client?

Cross by Mr. Tomsy - J. Maruca 24

1 A Yeah, I guess so.

2 Q Would you consider Brian a friend as well as a
3 client?

4 A Yeah, he's a business relationship as a friend,
5 yeah.

6 Q Are you aware that Mid Island Collision is involved
7 in many disputes about labor rates and repair bills with
8 State Farm Insurance?

9 A No.

10 MR. KLEIN: Objection.

11 THE COURT: He answered no, so I'm going to
12 allow it.

13 A I answered it.

14 Q Are you aware that Mid Island Collision is involved
15 in many disputes with other insurance companies about labor
16 rates and repair bills?

17 THE COURT: Now I'm going to sustain it. I'm
18 not sure of the relevance.

19 Q Now, you mentioned the certified repairs, correct?

20 A Right.

21 Q Is there such a thing as a certified collision care
22 network or certified collision network that Nissan offers?

23 A Well, I -- to be certified, there's not a network.
24 If you want to work on Nissan or you want to work on Audis,
25 the manufacturer wants the body shop -- the repair center to

Cross by Mr. Tomsy - J. Maruca 25

1 be certified, so they have to purchase equipment, special
2 equipment. They have to send their technicians to school,
3 follow vigorous guidelines in how a car needs to be
4 repaired. State of the art stuff, you know.

5 Q Now, if I was a customer and I wanted to make sure
6 that I went to a certified collision repair shop, one that
7 fit into the qualifications that you just mentioned --

8 A Right.

9 Q -- is there a way to go and do that? Like how
10 would I go do that?

11 A If you owned an Audi, you go on the Audi website
12 and they would send you to a certified Audi --

13 Q How about Nissan?

14 A If you went to a Nissan, you go to a Nissan website
15 and they would send you to a certified repair center.

16 Q As far as you know, if I tried to do that on the
17 Internet, would they give you a list of dealerships -- I'm
18 sorry, repair shops within that network that are certified?

19 A It should. I think -- I know there are only a
20 few -- there are only a few Nissan certified. There's only
21 a few Audi certified dealerships. A lot of body shops don't
22 want to do because it's very expensive and they don't want
23 to follow the guidelines and purchase the equipment.

24 Q Of course. And you testified that Mid Island
25 Collision, M.V.B., is on that list?

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1 A They're a certified Nissan repair center.

2 MR. KLEIN: I don't think he testified to a
3 list at all.

4 MR. TOMSKY: I can rephrase it if you want.

5 THE WITNESS: Right.

6 THE COURT: I'm not sure that was the
7 testimony or not. So --

8 MR. TOMSKY: Okay.

9 Q Is Mid Island Collision one of the certified repair
10 shops in Long Island for Nissans?

11 A I think they're the only. I think they're the only
12 one that I know that they're certified Nissan. I know
13 they're certified Nissan. I know they're certified Audi. I
14 know they're certified Infinity. Because those are the
15 three manufacturers that I work for.

16 Q Okay. So you believe that Mid Island Collision is
17 the only certified collision repair shop in the Nissan
18 network in Long Island?

19 MR. KLEIN: Objection. That was not his
20 testimony.

21 MR. TOMSKY: I believe he said that was the
22 only one.

23 THE COURT: That was his testimony.

24 MR. KLEIN: It was the only one he was aware
25 of, was his testimony.

Cross by Mr. Tomsy - J. Maruca 27

1 THE COURT: Okay. That was substantially his
2 testimony. I understood what he meant.

3 Q So with that testimony being what it is, would it
4 surprise you to learn that Master Collision at 525 Lakeview
5 Avenue in Rockville Centre 11570 is also on the certified
6 collision repair network that I found on line.

7 A I'm not aware.

8 Q So you wouldn't know that Master Collision also
9 accepted labor rates of 49 to \$51 from State Farm for
10 similar type vehicles similar type repairs in 2017 and 2018?

11 A I'm not aware.

12 Q Are you aware that Finish Line Collision Inc. at 21
13 Railroad Avenue, Valley Stream, New York 11580 is also on
14 the certified collision repair network that I found on line.

15 A I'm not aware.

16 Q So that means that you did not know that Finish
17 Line Collision also accepted the 49 to \$51 labor rate State
18 Farm issued for similar type Nissan and similar type repairs
19 in 2017 and '18?

20 MR. KLEIN: I'm going to object to these
21 questions calling for hearsay. He's talking about out
22 of court representations as to what other body shops
23 that are not here today claim to charge which he is
24 trying to ask about for their truth.

25 THE COURT: It's overruled. He's asking

Cross by Mr. Tomsky - J. Maruca 28

1 whether he's aware of it. So it's overruled.

2 Q Are you aware of that?

3 A No.

4 Q Are you aware that Touch of Class Collision Corp.
5 is also on the certified collision repair network I found on
6 line?

7 A Not aware of it, no.

8 Q So I guess it's true, same question, that you're
9 not aware that Touch of Class Collision Corp. also accepted
10 the 49 to \$51 rate from State Farm for similar type Nissans
11 for similar type repair work in '17 and '18?

12 A Not aware, but I don't know how their repair work
13 is.

14 MR. TOMSKY: Objection. Move to strike that
15 last part of the answer nonresponsive?

16 THE COURT: I've got it. He's not aware of
17 these shops. Obviously, if he's not aware of the
18 shops --

19 THE WITNESS: The repair work --

20 THE COURT: Excuse me, excuse me.

21 THE WITNESS: I'm sorry, your Honor.

22 THE COURT: You don't have to ask that part of
23 it anymore. If you want to ask about other shops,
24 please feel free.

25 Q What if I told you besides Mid Island Collision

Cross by Mr. Tomsky - J. Maruca 29

1 there were 22 other certified collision repair networks that
2 I found on line in Long Island, would that surprise you?

3 A No, it wouldn't surprise me. I just said I wasn't
4 aware of it.

5 Q You were not aware of that and, obviously, you
6 would not be aware of the rates that they accepted for
7 similar type cars for similar type repairs, correct?

8 A Yeah.

9 MR. TOMSKY: Nothing further, your Honor,
10 thank you.

11 THE COURT: Okay.

12 MR. KLEIN: Your Honor, no further questions
13 for Mr. Maruca. Can we have five minutes for us to
14 confer about whether there are any further witnesses to
15 call?

16 THE COURT: Absolutely.

17 MR. KLEIN: Just for the timing sake, if
18 there's not, my other witnesses are outside.

19 THE COURT: Okay, thank you. So let's take a
20 short break.

21 (Whereupon, a short recess was taken.)

22 THE COURT: Mr. Klein.

23 MR. KLEIN: M.V.B. Collision has no further
24 witnesses at this time.

25 THE COURT: You rest?

Cross by Mr. Tomsky - J. Maruca 30

1 MR. KLEIN: Yes.

2 THE COURT: Counsel.

3 MR. TOMSKY: All right. At this time State
4 Farm wishes to -- really for a directed decision that
5 the lien in itself is invalid according to Lien Law
6 201A because the -- on the lien itself the amount
7 requested is over the amount of the estimated value on
8 the same lien and, therefore, it's invalid on its face.

9 THE COURT: All right, Mr. Klein?

10 MR. KLEIN: Your Honor, we oppose that
11 position that the motion by the insurance company. The
12 Lien Law 201A is explicit about the options between
13 invalidating a lien versus reducing a lien. In this
14 case the parties agree that the amount that is actually
15 in controversy is 21 -- is around \$21,000. That's what
16 this hearing has been about. Until now, State Farm has
17 known about the lien calling for \$50,000 and change
18 instead of the 21. It never submitted that as an
19 argument for why the lien should be invalidated,
20 although if they truly thought, that they could have
21 done so right at the outset of the case.

22 The lien in this case is valid because there
23 is an agreement as to the predominant issue at the
24 hearing which is the labor rate. And even if there had
25 not been an agreement on the labor rate, the amount

Cross by Mr. Tomsy - J. Maruca

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1 that was charged on this case was reasonable for a
2 variety of the reasons that were set forth during the
3 course of the hearing. There are two experts that have
4 said that the labor rate is reasonable. Between those
5 experts, there's over a half century worth of
6 experience in the industry. State Farm has paid labor
7 rates at or above the \$120 an hour in other cases
8 directly to Mid Island Collision. Dealers across the
9 area get paid by State Farm at or above the \$120 an
10 hour rate. There has been an expert who testified that
11 the work that Mid Island performs is actually more
12 difficult than the work that is performed at the
13 dealership, which is also a fact that even from a
14 layman's perspective, is readily observable from the
15 kind of work that the dealers actually perform on these
16 cars.

17 For these reasons, and for -- in light of all
18 the evidence that has been presented thus far, we
19 respectfully request that the insurance company's
20 application be denied.

21 THE COURT: All right. I'm going to deny Mr.
22 Tomsy's motion. At this point in time, the only issue
23 is whether a prima facia case has been made, and I
24 believe that it has. In terms of motions for a
25 directed verdict, we'll talk about that when we get

kc

Direct by Mr. Tomsky - J. Rice 32

1 there. I guess a directed verdict is a wrong term.

2 MR. TOMSKY: I believe I used the wrong term.

3 THE COURT: No, I'm talking about me using it
4 now. Because directed verdict is a jury. I can't
5 direct myself.

6 So are you ready to proceed, Mr. Tomsky?

7 MR. TOMSKY: Yes. I call James Rice.

8 COURT OFFICER: Witness entering.

9 THE CLERK: Do you solemnly swear or affirm
10 that the testimony you're about to give in this case on
11 trial shall be the truth, the whole truth and nothing
12 but the truth, so help you God?

13 THE WITNESS: I do.

14 THE CLERK: You can be seated, please state
15 and spell your first and last name and state your
16 address.

17 THE WITNESS: James Rice, J A M E S R I C E,
18 and my company's office address is 1 State Farm Place,
19 Ballston Spa, New York, 10220.

20 DIRECT EXAMINATION

21 BY MR. TOMSKY:

22 Q Good morning, Mr. Rice.

23 A Good morning.

24 Q What is your official title at State Farm?

25 A Auto estimatics appraisers.

Direct by Mr. Tomsy - J. Rice

33

1 Q How long have you been an auto estimatics appraiser
2 for State Farm?

3 A I was for my first four years with the company and
4 the last three or four.

5 Q When was the first four years of the company?

6 A I started with them in 1997.

7 Q Then did you leave in 2001?

8 A I became a property claims trainer and I was that
9 for fourteen years and then I came back to -- they
10 eliminated that position, and I was forced to take a job as
11 an auto estimatics appraiser again.

12 Q How long have you been working for State Farm in
13 total?

14 A Twenty-one years.

15 Q Mr. Rice, could you just keep your voice up so
16 everybody can hear you?

17 A Okay.

18 Q Thank you.

19 Do you have any certifications as an estimator?

20 A I am ASE certified in all aspects of collision
21 repair, which is five different tests.

22 Q Can you briefly describe that for me?

23 A There is a test on painting and refinishing on
24 structural damage, on nonstructural damage, on estimating
25 structural, nonstructural, estimating painting and

Direct by Mr. Tomsy - J. Rice

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1 refinishing. There's one other one. I can't -- I'm drawing
2 a blank.

3 Q How do you go about getting those certifications?

4 A You have to take tests.

5 Q What kinds of tests?

6 A It's a state-issued test or it's an issued test
7 that you take at one of those testing facilities like
8 Rometrics.

9 Q Do you have to get recertified or does it count
10 forever?

11 A Yes, every five years you have to be recertified
12 and next year my certification comes up, so I have to take
13 the test again.

14 Q As of March through June of 2017, were you
15 certified at that time?

16 A Yes, I was.

17 Q Are you familiar with State Farm's overwriting
18 process?

19 A Yes, I am.

20 Q Briefly what is an overwriter, as far as you know?

21 A Somebody reviews my file, estimate and photos and
22 if they see something that my photos don't justify, they
23 consider that an overwrite.

24 Q As far as you know, for this, for the handling of
25 this claim were any overwrites done on any of your

kc

Direct by Mr. Tomsy - J. Rice

35

1 estimates?

2 A I was not made aware of anything.

3 Q In general, do you have a geographic area that you
4 handle for State Farm?

5 A Yes, south Nassau County.

6 Q What is your general day-to-day as an estimator?

7 A I receive six or seven assignments and try to
8 confirm them, and I try to get five assignments done per
9 day.

10 Q How long have you been working in the Nassau County
11 area?

12 A About two years.

13 Q Do you do other areas as well?

14 A I do -- I rarely do Queens and I also do Suffolk
15 County occasionally.

16 Q On an average week, how many estimates would you
17 write, normally write?

18 A Probably about between 20 and 25.

19 Q How many different repair shops would you go to in
20 an average week?

21 A Probably 20.

22 Q Is one of those repair shops Mid Island Collision
23 or M.V.B.?

24 A Yes.

25 Q Is it now, on average do you use a shop's labor

kc

Direct by Mr. Tomsy - J. Rice

36

1 rate such as M.V.B.'s labor rate or the one approved by
2 State Farm management?

3 A State Farm management had set the labor rates for
4 us for that market area and I don't deviate from it unless
5 the vehicle is a specialty vehicle and understand that case
6 I would have to discuss that with my manager and they would
7 tell me if I was authorized to try and negotiate it, a
8 higher rate.

9 Q So it's not you who determines the labor rate on
10 your estimates, right?

11 A No, it's not.

12 Q Now, in the other locations that you go to besides
13 Mid Island Collision, do you usually run into issues between
14 the labor rate you use and the shop's labor rate in terms of
15 acceptance?

16 MR. KLEIN: Objection.

17 A They usually accept --

18 MR. KLEIN: Objection.

19 THE COURT: Rephrase it, please.

20 Q Excluding Mid Island Collision, do the other repair
21 shops that you frequent and give estimates for usually
22 accept the State Farm labor rate?

23 A I usually get agreed prices on every estimate.

24 Q For different types of vehicles?

25 A Yes.

kc

Direct by Mr. Tomsky - J. Rice

37

1 Q And different types of repairs?

2 A Yes.

3 Q Have you had issues getting an agreed upon price
4 with Mid Island Collision in the past?

5 A Yes.

6 Q Does that include the current case we're here
7 talking about today for Ms. Pope's 2015 Armada?

8 A In my case I did the initial estimate, so we didn't
9 really discuss labor rate.

10 Q Let's talk about that. When did you first get
11 involved in this claim?

12 A I wrote the original estimate. It was March of
13 2017, I believe.

14 Q What number is the --

15 MR. KLEIN: Y, is yours.

16 MR. TOMSKY: If the witness can be shown
17 Exhibit Y, please.

18 COURT OFFICER: Sure.

19 THE COURT: Show the Judge.

20 COURT OFFICER: Showing the witness Exhibit Y.

21 THE WITNESS: Thank you.

22 COURT OFFICER: You're welcome.

23 Q Mr. Rice, do you recognize what you've been shown?

24 A Yes.

25 Q Is that your initial estimate?

Direct by Mr. Tomsy - J. Rice

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1 A It appears to be, yes.

2 Q If you can just take a look at the front of it and
3 give me the date that you wrote it.

4 A March 31st, 2017.

5 Q What was your original estimate?

6 A It was for \$10,082.70.

7 Q Besides that initial estimate, did you write any
8 other estimates for this case?

9 A For this case, no, but that day I wrote another
10 estimate at the shop.

11 Q Are you aware in this case that the vehicle was
12 deemed a total loss?

13 A I am now aware of that, yes.

14 Q When were you made aware of that fact?

15 A When I went back there for supplement No. 9 which
16 was in June, June -- early June.

17 Q Based on what you know now and looking at whatever
18 estimates and the final bill, was that initial estimate you
19 wrote too low?

20 A Based on the initial damages that they found, yes,
21 there was additional damages, obviously, but I only could
22 write what was visible at the time, and it was raining that
23 day.

24 Q If you can explain that a little bit. I want to go
25 into that a little bit. Can you please describe what

kc

Direct by Mr. Tomsky - J. Rice

39

1 happened on the first date you went to Mid Island Collision
2 to look at the 2015 Nissan?

3 A I had two cars that day. So Bob walked me outside
4 and showed me the damages on the two cars. It was a light
5 mist rain but it took a while to write the two cars. It
6 started raining while I was writing them. And --

7 THE COURT: I'm sorry, who's got the text on?

8 ** MR. KEARON: I'm not sure what's beeping,
9 but I think it's coming from one of my devices. I've
10 got three of them. I've been trying to turn them off.
11 Forgive me for the interruption, your Honor. I'll
12 double and triple check and use a different computer.
13 I don't know what's causing that. It's not a text, I
14 just checked.

15 THE COURT: Kelly, could you read back the
16 question and answer?

17 (The requested portion was read back.)

18 MR. TOMSKY: I'll continue on that. I don't
19 want the answer to be too longwinded.

20 Q During the time that you were looking at the
21 vehicle, did the rain prevent you from doing a full
22 estimate, to the best of your ability?

23 A I couldn't lay down on the ground to look
24 underneath the car.

25 Q Is there anything --

kc

Direct by Mr. Tomsy - J. Rice

40

1 MR. TOMSKY: Withdrawn.

2 Q Now, that day, did you physically hand your
3 estimate to anyone at M.V.B. or is it done a different way?

4 A I believe that day I physically handed the estimate
5 because I actually had to have a conversation with Bob
6 because I wrote a recycled door and we had a disagreement
7 about the recycled door.

8 Q What do you mean disagreement?

9 A I had to go through the steps to inform our insured
10 that we weren't able to reach an agreed price based on the
11 used door.

12 Q So what happened after this disagreement concerning
13 the recycled door?

14 A I notify the claims department and they notify the
15 insured that we weren't able to reach an agreement.

16 Q What happened after that?

17 A I'm not sure exactly what happened after that, but
18 they notified them. They send them a letter, and then Bob
19 submits another supplement, I guess.

20 Q As we're sitting here today, are you aware if the
21 recycled door ended up on the vehicle or different kind of
22 door?

23 A No. From what I am aware of, which I didn't handle
24 this, there was something wrong with the recycled door, and
25 we ended up putting a new door on the car.

kc

Direct by Mr. Tomsy - J. Rice

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1 Q So there was an issue with the recycled door, and
2 State Farm agreed to a new door; is that as far as you know?

3 A As far as I know, yes.

4 Q Going back to that first day when you provided Mr.
5 Jesberger with that estimate, did you have any conversation
6 with Mr. Jesberger that day about the labor rate on your
7 estimate?

8 A I do not recall that, no.

9 Q So that day you wrote the estimate for the entire
10 vehicle as well as the door?

11 A Yes.

12 Q Now, as you're aware, the estimates have -- there
13 were supplements on this case. As you're sitting here today
14 as a State Farm estimator, do you know why those supplements
15 were done on the State Farm level?

16 A When Bob tore down the vehicle, they exposed
17 additional damages and called us back and we came back seven
18 times before I came back again for the supplement No. 9.

19 Q Focusing just on that first day, do you know the
20 reason why you were unable to view the interior damage?

21 A The outer sheet metal is welded over the top of the
22 inner structure so I couldn't tell the extent of the inner
23 structure damage.

24 Q So is it fair to say as an estimator that that had
25 to be taken off before anyone from State Farm could have

kc

Direct by Mr. Tomsy - J. Rice

42

1 seen the final damage -- I'm sorry, the additional damages?

2 A Additional damages would need to be exposed to
3 determine how to go ahead with the repairs.

4 Q When was the last time that you went to Mid Island
5 Collision as it relates to this 2015 Nissan Armata?

6 A Sometime in early June for supplement No. 9.

7 Q Can you describe what happened, your interaction
8 with anyone from Mid Island Collision when you went back for
9 that final supplement?

10 A The car wasn't there initially. They told me it
11 was at the dealer and they would have to bring it, and I
12 received a stack of invoices, maybe ten pages of invoices,
13 so the car did arrive on a flatbed truck, and I went through
14 all the invoices and added what was appropriate and --

15 Q When you say added what's appropriate, what do you
16 mean?

17 A Sometimes there are parts that are not in our
18 database or other parts that may have not gotten on to the
19 estimate at some point that appeared necessary that I added
20 to the estimate. And then when I came back in, I was going
21 over the car with Brian, the shop manager, and Brian wasn't
22 available when I came back in, maybe an hour later, and I
23 spoke to Bob, and Bob said that you have to speak to Brian,
24 and Brian won't be back for a little while, and I told him I
25 couldn't wait any longer so he will have to submit another

kc

Cross by Mr. Klein- J. Rice

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1 supplement.

2 Q Did you actually speak to anyone on that last day
3 about labor rates at any time, either Bob, Brian or anybody
4 else at the shop?

5 A No.

6 Q Looking at your initial estimate and then your
7 final, what was the labor rate that you used for sheet
8 metal?

9 A I believe it was 49.

10 Q You can look. It's right in front of you. I'd
11 rather have you be sure as opposed to saying believed?

12 A The \$49 for body and 51 for frame.

13 Q Going one by one, sheet metal what number is that?

14 A \$49.

15 Q What about mechanical slash electric?

16 A \$49.

17 Q And frame?

18 A 51.

19 Q And refinish?

20 A \$49.

21 MR. TOMSKY: Nothing further.

22 THE COURT: Thank you. Mr. Klein?

23 CROSS-EXAMINATION

24 BY MR. KLEIN:

25 Q Good afternoon, Mr. Rice, how are you?

Cross by Mr. Klein- J. Rice

44

1 A Good.

2 Q Thanks for coming today.

3 Your services, to be clear, were deployed on,
4 quote-unquote, Nissan Armata -- 2015 Nissan Armata, correct?

5 A Yes.

6 Q Your first estimate was on March 31st you
7 testified?

8 A Yes.

9 Q \$10,082.70 right?

10 A Yes.

11 Q And you testified on direct, that you couldn't lay
12 down on the ground to get underneath the car --

13 A The ground was wet. The car was outside in the
14 rain, so I looked as best I could without laying down on the
15 ground.

16 Q Mr. Rice, if you could just let me finish my
17 question.

18 A I'm sorry, go ahead.

19 Q You testified that you couldn't lay down on the
20 ground to get underneath the car, correct?

21 A That's correct.

22 Q That was because you described it was misty,
23 correct?

24 A It had rained, so the ground was wet.

25 MR. KLEIN: I would like to show the witness

kc

Cross by Mr. Klein- J. Rice

45

1 what's been put in evidence as Exhibit T, like tango.

2 Here's a copy for the Court.

3 COURT OFFICER: Showing the witness

4 Defendant's T in evidence.

5 Q Mr. Rice, what is the date on the letter that is
6 before you?

7 A April 3rd, 2017.

8 Q To whom is the letter written?

9 A It's written to the Court knee pope.

10 Q Who wrote this -- what is the organization that
11 authored this letter?

12 A State Farm, somebody from the claims department.

13 Q And if you could just -- does it appear that this
14 letter was sent to Mid Island Collision care of Courtney
15 Pope or was it sent directly to Courtney Pope?

16 A It appears -- oh, I can't answer that question, I
17 don't know who it was sent to.

18 Q Do you know of any Mid Island Collision address on
19 Kraft Avenue in Rosedale?

20 A Oh, no, it appears it must have been sent to
21 Courtney Pope.

22 Q Directly?

23 A Yes.

24 Q And the second paragraph beginning the words our
25 offer, can you read that --

kc

Cross by Mr. Klein- J. Rice

46

1 A Yes.

2 Q -- into the record please?

3 A Our offer of \$9,082.70 plus your deductible of
4 \$1,000 is sufficient to repair your vehicle to its
5 pre-accident condition at a repair facility reasonably
6 convenient to you.

7 Q If you add a thousand dollars to the \$9,082.70,
8 that equals the exact figure that you had submitted the car
9 for, correct?

10 A Yes.

11 Q Please just let me finish the question so the
12 record is clear. I know it's natural --

13 A Sorry.

14 Q -- but she's writing this down.
15 Is that correct?

16 A Yes, that is correct.

17 Q And so it's fair to say that this letter was based
18 upon your work?

19 A It appears so, yes.

20 Q But that statement that you read into the record is
21 false, isn't it?

22 MR. TOMSKY: Objection to that.

23 THE COURT: Sustained.

24 MR. TOMSKY: Objection.

25 THE COURT: Sustained.

kc

Cross by Mr. Klein- J. Rice

47

1 Q Well, this letter says that the car could have been
2 repaired to pre loss condition to \$10,082.70, right?

3 A Yes, it does say that.

4 Q But that was not true, was it?

5 MR. TOMSKY: Objection again.

6 THE COURT: I'll allow it.

7 MR. TOMSKY: Whether it's true or not.

8 A Only the visible damage at the time of my
9 inspection was able to be written.

10 Q Mr. Rice, if you could just answer my question.

11 A I'm trying to.

12 THE COURT: Could the car be repaired for
13 \$10,082.70.

14 THE WITNESS: The visible damage at the time
15 of my inspection --

16 THE COURT: No, please listen to the question.

17 THE WITNESS: Okay.

18 THE COURT: Could the car be restored to its
19 pre-accident condition for that \$10,082.70?

20 THE WITNESS: No.

21 THE COURT: Okay, thank you. Proceed.

22 Q Now, the final bill --

23 I'm sorry, your initial estimate from March 31st,
24 2017, is that still in front of you?

25 A Yes, it is.

kc

Cross by Mr. Klein- J. Rice

48

1 Q How many items of work are on that bill?

2 A How many line items are on the estimate?

3 Q Yes.

4 A 120.

5 Q And so in other words, \$10,082.70 was connected to

6 120 line items as you described, right?

7 A That's correct, yes.

8 Q You came back to estimate the car in June, right?

9 A I did, yes.

10 Q Do you have that estimate in front of you?

11 A I may. I don't know what's in front of me.

12 Q Do you have Exhibit Y in front of you with the tab?

13 A Yes.

14 Q So your final estimate will be connected to the Tab

15 9?

16 A Yes, I do have it in front of me.

17 Q In your final estimate was for \$29,410, right?

18 A Yes.

19 Q Nearly three times your initial estimate, right?

20 A Yes.

21 Q And did you still think 120 line items were
22 necessary for repairing the car pre accident condition?

23 A Supplement No. 9 has 291 line items.

24 Q So it went from 120 to 291?

25 A Yes, it did.

kc

Cross by Mr. Klein- J. Rice

49

1 Q Same car?

2 A Yes.

3 Q Same estimator?

4 A Not the same estimator. I wrote the original
5 estimate.

6 Q And you wrote that one, didn't you?

7 A I wrote No. 9, but I only added a few line items on
8 No. 9.

9 Q But that was your estimate, right?

10 A It became my estimate, yes.

11 Q You thought 291 was necessary to repair the car to
12 pre loss condition, right?

13 A Yes.

14 Q Is it your contention that Mid Island spent more
15 time working on this car than what was necessary to repair
16 the car pre loss condition?

17 A No.

18 Q In fact, you wrote 244.8 hours of labor, right, on
19 your final estimate?

20 A I believe so, yes.

21 Q Would you like to check?

22 A Our labor gets put in several different columns. I
23 would have to add it up, but it sounds right.

24 THE COURT: I believe the parties have already
25 stipulated that we agree as to the amount of time.

kc

Cross by Mr. Klein- J. Rice

50

1 MR. KLEIN: Okay. So you don't need to do
2 that.

3 THE WITNESS: Okay.

4 MR. KLEIN: Sure.

5 Q Mr. Rice, Mid Island actually spent less time
6 working on the car than your final estimate bill, correct?

7 A I believe so, yes.

8 Q About fifty hours less?

9 A I can't answer that without seeing his final bill,
10 which I only saw when we had a meeting before this hearing.

11 Q Do you have a final bill in front of you?

12 A I'm not sure.

13 COURT OFFICER: I don't think so.

14 MR. KLEIN: If the witness can be shown
15 Exhibit E, like Edward, please.

16 COURT OFFICER: Showing the witness Exhibit E.

17 THE WITNESS: Thank you.

18 COURT OFFICER: You're welcome.

19 Q Mr. Rice, does that refresh your recollection as to
20 the number of hours that Mid Island had on their final bill?

21 A Yes.

22 Q And that was 194.5 hours, right?

23 A Yes.

24 Q Last month you approved an estimate for repairs at
25 Mid Island Collision for \$125 an hour, correct?

kc

Redirect by Mr. Tomsky - J. Rice 51

1 A You would have to refresh my memory. What car are
2 we talking about?

3 MR. KLEIN: Can we please show the witness
4 Exhibit XX?

5 COURT OFFICER: Which one?

6 MR. KLEIN: XX like X-ray X-ray.

7 COURT OFFICER: Showing the witness.

8 THE WITNESS: Thank you.

9 Q When you've had a chance to review that item, Mr.
10 Rice, would you just let me know.

11 A Yes, I recall it.

12 Q So last month you approved an estimate for repairs
13 at \$125 an hour, correct?

14 A Yes, that's correct.

15 Q That was for work performed at Mid Island
16 Collision, correct?

17 A Yes.

18 MR. KLEIN: No further questions, your Honor.

19 THE COURT: Thank you. Redirect?

20 MR. TOMSKY: A couple, very small.

21 REDIRECT EXAMINATION

22 BY MR. TOMSKY:

23 Q Mr. Rice, on the vehicle Mr. Klein is just
24 referring to on that other exhibit, is that a 2015 Nissan
25 Armata?

Redirect by Mr. Tomsy - J. Rice

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1 A No, it's not.

2 MR. TOMSKY: Thank you, nothing further.

3 THE COURT: Anything else?

4 MR. KLEIN: No further questions, Judge.

5 THE COURT: Thank you. You can step down.

6 Are you ready to call another witness?

7 MR. TOMSKY: I believe Mr. Wagner is outside.

8 He said he was going to be here about 12.

9 THE COURT: Why don't we get started, and
10 we'll go to about a quarter to one.

11 MR. TOMSKY: State Farm calls Mark Wagner to
12 the stand.

13 (Whereupon, Mark Wagner takes the witness
14 stand.)

15 THE CLERK: Do you swear or affirm that the
16 testimony you're about to give in this case on trial
17 shall be the truth, the whole truth and nothing but the
18 truth, so help you God?

19 THE WITNESS: I do.

20 THE CLERK: You can have a seat. Please state
21 and spell your first and last name and state your
22 address.

23 THE WITNESS: Mark Wagner, M A R K W A G N E
24 R, 21 Davenport Place, Bellmore, New York 11710.

25 THE COURT: All right. Mr. Tomsy?

kc

Direct by Mr. Tomsky - M. Wagner 53

1 MR. TOMSKY: Thank you. May I inquire?

2 DIRECT EXAMINATION

3 BY MR. TOMSKY:

4 Q Good afternoon, Mr. Wagner, how are you doing?

5 A Excellent. Yourself?

6 Q What company do you work for?

7 A State Farm Insurance.

8 Q How long have you worked for State Farm Insurance
9 for?

10 A Twenty-five years.

11 Q What is your current title?

12 A Estimatics team manager.

13 Q How long have you been the estimatics team manager
14 for?

15 A For this market area, approximately three years.

16 Q When you say market area, can you please elaborate?

17 A I've managed other market areas in the past,
18 upstate Westchester area.

19 Q What is the market area that you currently cover
20 now?

21 A It would be Queens and Nassau County.

22 Q Is it fair to say you're in management?

23 A Yes.

24 Q Do you know Michael Thiele?

25 A Yes.

Direct by Mr. Tomsy - M. Wagner

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1 Q Are you his supervisor?

2 A No.

3 Q Do you know James Rice?

4 A Yes.

5 Q Are you his supervisor?

6 A Yes.

7 Q You stated that you've worked for State Farm for
8 approximately twenty-five years?

9 A Um-hum.

10 Q Before becoming an estimatics team manager for this
11 region, can you go a little more into your background with
12 State Farm? You can either go backwards or forward, it's up
13 to you.

14 A I'll start at the beginning. I started at State
15 Farm as an appraiser. Held that position for approximately
16 six or seven years. I was promoted to property claim
17 trainer where I trained new hires and also managed to
18 maintain training for existing appraisers. I also, after
19 that, held a position as a reinspector, team manager of
20 property claim trainers and team manager, estimatics team
21 manager.

22 Q Can you go over your day-to-day a little bit for
23 us?

24 A I start my day the way everyone else probably does
25 in this type of business checking e-mails, you know,

kc

Direct by Mr. Tomsy - M. Wagner

55

1 catching up on the in box and, basically, complete a lot of
2 file reviews on a daily basis of my estimator's work
3 product. I am involved with discussing claims with the
4 claims department and just answering questions of my
5 appraisers while they're in the field.

6 Q Can you briefly discuss or describe the overwrite
7 process that State Farm employs?

8 A Basically we have a team of reinspectors or
9 reinspection group that's responsible for reviewing our
10 appraiser's work product for accuracy and to look for
11 training needs and trends in their estimating skills.

12 Q Are you aware of any post inspection overwrites
13 done for Ms. Pope's 2015 Nissan Armata we're here today to
14 discuss?

15 A Repeat the question.

16 Q Are you aware of any post inspection overwrites
17 done on any of the estimates --

18 A No.

19 Q -- done for Ms. Pope's car?

20 A No.

21 Q Move on to labor rates. Are you aware how the
22 labor rates State Farm uses is established or how it's come
23 up with?

24 A No.

25 Q As far as you know, does it change based on

Direct by Mr. Tomsy - M. Wagner

56

1 geographic?

2 A Yes.

3 Q On what part of the country?

4 A Yes.

5 Q Does it change on the type of car?

6 A Yes.

7 Q How about the type of damage that needs to be done
8 to repair the car?

9 A Well, it becomes more vehicle specific or the
10 technology in the vehicle potentially, yes.

11 Q Start with the vehicle specific. Can you explain
12 why certain vehicles would require a higher labor rate as
13 far as you know?

14 A If that vehicle held some sort of a certification
15 or special training required from the manufacturer to
16 complete those type of repairs.

17 Q What about type of damage?

18 A Again, it falls back on what's damaged and are
19 those repairs to repair that damage, is there special
20 training other than what is normally expected to fix the
21 average vehicle in place? If there is, then, yeah, we might
22 potentially negotiate a labor rate.

23 Q Now, what is your understanding of how State Farm
24 would handle the disagreement with an auto body shop
25 concerning labor rate?

kc

Direct by Mr. Tomsy - M. Wagner

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1 A Well, we obviously have our labor rate, and if
2 there is a difference in labor rate on a vehicle, let's say,
3 that doesn't require any specialty repairs, any specialty
4 certifications to do those repairs per the manufacturer's
5 recommendations, we would then obviously, if there's a
6 breakdown in an agreement, we notify the owner of the
7 vehicle, the name insured in this case and let them know of
8 their rights per regulation 64 and send them a notice of
9 rights letter.

10 Q What do you mean by that?

11 A We let the customer know that there's a difference
12 of opinion or a difference of price and that if they choose
13 to continue with their repairs at that particular facility,
14 which it's their right, they might be responsible for some
15 out-of-pocket expenses.

16 Q Sitting here today, are you aware of other disputes
17 involving State Farm and Mid Island Collision where labor
18 rate was a part or all of that dispute?

19 A Yes.

20 Q Approximately how many, as far as you know?

21 A Approximately 30 cases.

22 Q If you are aware, through your business or anything
23 else -- are you aware of other insurance companies that have
24 an issue, some kind of dispute with Mid Island Collision
25 over labor rate?

kc

Direct by Mr. Tomsy - M. Wagner

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1 A I've heard, yes.

2 MR. KLEIN: Objection as to having heard
3 statements out of court about what's going on.

4 THE COURT: I'll allow it in. I'm not sure
5 how relevant it is. I think the same thing I said
6 before. In fact, I understand at one point one of my
7 colleagues tried to get all of these cases consolidated
8 unsuccessfully, so we're given the fact that the
9 parties cannot agree to that, I'm constrained to focus
10 on this case.

11 Q When did you first get involved in this claim?

12 A I believe it was sometime towards the end of June,
13 it might have been around June 28th where I received a phone
14 call from a claim team manager asking to just review the
15 photographs that we had in the file, all of the
16 documentation in the file and the estimate to confirm that
17 it appeared that we had basically covered all of the damages
18 that were in our photographs and provided to us in invoices.

19 Q What was your opinion based on all of that that you
20 just mentioned?

21 A Based on the photos and the documentation in the
22 file, the estimate was complete to that point.

23 Q So by this time you said this is late June, I
24 believe?

25 A I think it was June 28th to be exact.

kc

Direct by Mr. Tomsky - M. Wagner

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1 Q Sitting here today and based upon your review of
2 the file and any other discussions, by that time, do you
3 know what the status of the vehicle was by June 28th, 2017,
4 the vehicle as well as any kind of repairs?

5 A I'm going off of memory here, but I believe the
6 vehicle was just about complete.

7 Q Sitting here today, are you aware that at some
8 point State Farm declared the vehicle a total loss?

9 A Yes.

10 Q Sitting here today, are you aware that prior to
11 that actually in April of 2017, Mid Island Collision had
12 told State Farm that they believed it was a total loss?

13 A I don't know that. I don't know that.

14 Q Are you aware that there were many estimates and
15 supplements for this claim?

16 A Am I aware that there were a lot of supplements?
17 Yes.

18 Q Were you involved in those supplements or estimates
19 and supplements while they were going on in this case?

20 A No.

21 Q So it's fair to say you came in after the fact?

22 A Correct.

23 Q What have you reviewed in terms of --

24 MR. TOMSKY: Withdrawn.

25 Q As far as your review of the photographs, claim

Direct by Mr. Tomsy - M. Wagner 60

1 file, anything that you looked at, do you believe there was
2 any need for specialized repairs for this Nissan?

3 A No.

4 Q And how did you come up with that opinion?

5 A I have -- I have a lot of appraisers that work for
6 me. Each one of them write five to six cars a day. We've
7 written many of these vehicles before. There's no
8 certifications required to fix this vehicle. There's no
9 special tools beyond what a licensed repair shop would need
10 to fix any other vehicle to fix it.

11 Q So as you're sitting here today, is there anything
12 involved with the work done by Mid Island Collision for this
13 vehicle that you believed required an increase in labor rate
14 from the 49 to 51 that the estimates that State Farm did?

15 A No.

16 Q As far as your experience in the field, what is a
17 repair shop supposed to do if they disagree with an
18 insurance company on a labor rate?

19 MR. KLEIN: Objection to calling for him to
20 make a legal conclusion as to what the obligation is.

21 THE COURT: No. I think he asked him what the
22 custom and practice was. I'm going to allow it.

23 Overruled.

24 A Contact the customer and advise them there's a
25 difference of opinion for the labor rate on the vehicle.

Direct by Mr. Tomsy - M. Wagner

61

1 Q As far as you know, is State Farm required to come
2 up to the labor rate that the repair shop is demanding?

3 A No.

4 Q Do you know what a certified collision repair
5 network is?

6 A Yes.

7 Q Can you please describe it for the Court?

8 A It's typically a network. A lot of manufacturers
9 have them. It's a network of body shops that are willing to
10 repair that particular manufacturer's vehicle. They need to
11 meet some pretty basic standards and have some -- the basic
12 tools to repair vehicles.

13 Q As far as you know, is Mid Island Collision part of
14 that network?

15 A Yes.

16 Q As far as you know, is it the only repair shop in
17 that network?

18 A No, it's definitely not.

19 Q How many, based on your knowledge, again, based on
20 your knowledge, how many are there in the Nassau slash
21 Suffolk part of the country?

22 A Thirty to 40 within a 25 mile radius.

23 Q And as a State Farm employee, what does that mean
24 to you that there are 30 to 40 other certified collision
25 repair network shops in that area?

kc

Direct by Mr. Tomsy - M. Wagner

62

1 A It means there's 30 to 40 other repair facilities
2 that have the ability to fix this vehicle.

3 Q When you say this vehicle, what do you mean?

4 A The Nissan Armata in question.

5 Q Are you aware if State Farm has dealt with repairs
6 involving Nissans from other certified collision repair
7 network shops in the Nassau Suffolk area in 2017 and '18?

8 A Yes, we have.

9 MR. KLEIN: I'm a little confused by the
10 question.

11 THE COURT: Can you please read it back,
12 Kelly?

13 (The requested portion was read back.)

14 THE COURT: Maybe you can --

15 MR. TOMSKY: I can rephrase it if you want,
16 your Honor.

17 THE COURT: Please, thank you.

18 Q You are a team manager, correct?

19 A Yes.

20 Q And you're team manager of estimatics, correct?

21 A Um-hum.

22 Q When a person from State Farm whether Mr. Rice, Mr.
23 Thiele or actually a member of your team, so I'll limit it
24 to that, when they do an estimate, do you end up seeing it
25 at any point either at the time or later on?

kc

Direct by Mr. Tomsky - M. Wagner

63

1 A Yeah, as I said earlier, I review their estimates.

2 Q As someone who reviewed certain estimates, are you
3 aware if State Farm or members of your team has gone to any
4 of these other shops that are part of the certified
5 collision repair network to repair a similar type car, a
6 2015 Nissan Armata in 2017 or '18?

7 A Yes.

8 Q To your knowledge, has State Farm been able to
9 reach an agreed upon price with these shops for those
10 repairs?

11 A Yes.

12 Q In general what were those rates reached in those
13 cases?

14 A They would be the Nassau rates of \$49 and 51
15 depending on what labor category.

16 Q Besides --

17 MR. TOMSKY: Withdrawn.

18 Q Now, did there come a time on a 2015 Nissan Armata
19 that you --

20 MR. TOMSKY: I'm actually going to withdraw
21 that your Honor, I apologize.

22 Now, counsel, through other witnesses, has
23 brought up other instances where State Farm estimators
24 have agreed to a higher labor rate at a sublet.

25 THE COURT: As a what?

Direct by Mr. Tomsky - M. Wagner

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1 MR. TOMSKY: As a sublet, that's what they
2 described it as.

3 MR. KLEIN: Objection.

4 THE COURT: As to what was adduced from other
5 witnesses, I'm going to sustain the objection.

6 MR. TOMSKY: I can put it in a different way.

7 Q Do you know what a sublet is, sub repair shop?

8 A Yes.

9 Q Can you please explain in your estimation what that
10 is?

11 A Sublet repair shop would be a shop that a repair
12 facility may send a vehicle to to have repairs done that
13 they're either not qualified to do or don't have the
14 technical ability to do.

15 Q Is it possible in those instances that State Farm
16 would issue a higher labor rate?

17 A Yes.

18 Q Why would, again, in general, why would that
19 happen?

20 A It goes back to what's required to fix that car and
21 what training is necessary and certifications might be
22 needed.

23 Q Sitting here today, do you believe that any work on
24 the Nissan, again the 2015 Nissan, required any of that
25 specialized work that was done at Mid Island Collision?

kc

Direct by Mr. Tomsky - M. Wagner

65

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A My review of the estimate, no.

MR. TOMSKY: Your Honor, can we break for one minute without the witness?

THE COURT: Off the record.

(A discussion was held off the record.)

THE COURT: We will break now for lunch. We will stand adjourned to approximately, let's say, 2:15. I made a 1 o'clock appointment assuming we were going to work through till 1, so I may be a little delayed coming back, but I will be here by 2:15.

MR. TOMSKY: I apologize.

THE COURT: Not necessary.

(Whereupon, a lunch recess was taken.)

Direct by Mr. Tomsky - M. Wagner 66

1 A F T E R N O O N S E S S I O N

2

3 (Plaintiff's Exhibit 15, a parts invoice from
4 Auto House Auto Repair, marked for identification.)

5 COURT OFFICER: Witness entering. You're
6 still under oath, I'm just reminding you.

7 THE COURT: You may continue.

8 MR. TOMSKY: Thank you your Honor.

9 CONTINUED DIRECT EXAMINATION

10 BY MR. TOMSKY:

11 Q Good afternoon, Mr. Wagner.

12 A How are you?

13 Q Only a couple of minor things.

14 MR. TOMSKY: If I can have the witness shown
15 Plaintiff's 15.

16 MR. TOMSKY: Your Honor, there is a copy for
17 you as well, and I gave a copy to counsel.

18 Q Do you have the document in front of you, Mr.
19 Wagner?

20 A Yes.

21 Q Looking at this, it is a parts invoice from Auto
22 House Auto Repair. You see how there's a column that says
23 net?

24 A Yes.

25 Q Can you explain, as far as you know, from reading

Direct by Mr. Tomsy - M. Wagner

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1 invoices as a State Farm employee, what does it mean net?

2 A The net price is the price that the repair facility
3 would pay.

4 Q Pay who?

5 A Pay the manufacturer of the part or in this case
6 the dealer that sold them the part.

7 Q In this case who would that be?

8 A They bought it from Rockaway Nissan.

9 Q I'm sorry, if I can direct your attention to the
10 top left part of it under customer number tax exempt, under
11 that.

12 A Auto House Auto Repair.

13 Q The column to the left says list. Again, in your
14 experience, what does list cost mean?

15 A That's the retail price. That's the price that the
16 customer would pay.

17 Q So, in general, what price does State Farm pay to a
18 repair shop?

19 A List.

20 Q The net or list?

21 A List.

22 Q Okay. So State Farm is paying the list price not
23 the net price; is that correct?

24 A Yes.

25 Q Have you seen the final bill in this case?

kc

Cross by Mr. Klein - M. Wagner

68

1 A I have, yes.

2 Q Do you recall as part of the final bill there's a
3 part that said markups?

4 A Yes.

5 Q As far as you know, is that a request for
6 additional money over the list price?

7 A The -- the list price on the final bill isn't
8 specific as to what it's for.

9 Q Okay.

10 A So I can come to some assumptions of what it's for,
11 but it's not itemized what that list -- what that markup is
12 for.

13 MR. TOMSKY: Thank you.

14 THE COURT: Ready to cross-examine?

15 MR. KLEIN: Yes.

16 THE COURT: Please.

17 CROSS-EXAMINATION

18 BY MR. KLEIN:

19 Q Good afternoon, Mr. Wagner.

20 A Good afternoon.

21 Q How are you?

22 A Good.

23 Q Who's the authority to determine where to bring a
24 car in for repairs? Is it the insured or the insurance
25 company?

Cross by Mr. Klein - M. Wagner

69

1 A The insured.

2 Q Only the insured, correct?

3 A It's their vehicle.

4 Q Correct?

5 A Yes.

6 Q Who has the authority to tell the auto body shop to
7 cease repairs on a vehicle, the insured or the insurance
8 company?

9 A That would be the insured.

10 Q Not the insurance company, correct?

11 A That would be dependent upon if we have a
12 designated representative form. If we have a designated
13 representative form from the body shop, then we would direct
14 that information to the body shop.

15 Q No, no. The question is who has the authority to
16 tell the auto body shop to cease repairs? Is it the insured
17 or the insurance company?

18 A If we deem the vehicle a total loss, we will ask
19 the body shop or advise the body shop that we have reached a
20 point at which it's not repairable and then contact the
21 owner of the vehicle advising them of the same.

22 Q Right. But who has the authority to order the auto
23 body shop to cease repairs?

24 A The owner of the vehicle, the insured.

25 Q You testified on direct examination that in certain

Cross by Mr. Klein - M. Wagner

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1 circumstances, if work continues beyond the authorization
2 from the insurance company, that the insured person, in this
3 case Courtney Pope, might face out-of-pocket expenses,
4 correct?

5 A Yes.

6 Q And that's because the relationship between the
7 insured and the auto body shop is separate from the
8 relationship between the insured and the insurance company,
9 correct?

10 A It would be because we couldn't come to an agreed
11 price with the body shop.

12 Q Right. Could I have my --

13 MR. KLEIN: Your Honor, can I have my last
14 question read back to see if he can answer that?

15 THE COURT: Kelly, would you, please.

16 (The requested portion was read back.)

17 THE WITNESS: One more time.

18 THE COURT: Please.

19 (The requested portion was read back.)

20 A Yes.

21 Q Correct?

22 A Yes.

23 Q How long have you been working in Long Island in
24 the auto body or automotive or insurance industry?

25 A In one way, shape or form, for 25 years.

Cross by Mr. Klein - M. Wagner

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1 Q How many auto body shops are there in Nassau
2 County?

3 A Hundreds. Couldn't give you an exact number, but
4 hundreds.

5 Q Is it possibly thousands?

6 A Possibly. It could reach a thousand, probably.

7 Q What would be -- understanding that it's an
8 estimate, what would be your estimate of how many there are
9 in Nassau County?

10 A Anywhere between 800 and 1,200.

11 Q You testified that you're a team manager?

12 A Correct.

13 Q And one of the responsibilities -- one of your
14 responsibilities is to manage estimators, correct?

15 A Um-hum, yes.

16 Q One of the people that you manage is Mr. Rice,
17 correct?

18 A Correct.

19 Q What percentage in 2017 --

20 MR. TOMSKY: Let me rephrase.

21 Q In 2017, what percentage of Mr. Rice's estimates
22 were overwrites?

23 A Couldn't tell you that. I don't keep track of that
24 number.

25 Q Would you be able to ballpark it?

Cross by Mr. Klein - M. Wagner

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1 A No. Because I don't -- I don't count how many
2 reinspections are done on him every year.

3 Q Right. But so you don't keep track of the --

4 A You asked me what percentage of his work --
5 Sorry.

6 Q Can I ask the question?

7 A Sure.

8 Q Correct me if I'm wrong, but it's not every
9 estimate that gets reviewed, right?

10 A That's correct.

11 Q And there's some equation or random equation where
12 there's an estimate that gets reviewed where the estimator
13 doesn't know when that's going to happen, correct?

14 A That's correct.

15 Q And is it your testimony that State Farm or that
16 you do not keep track of the percentage of reviews that lead
17 to determinations of overwrites; is that your testimony?

18 A The way you're phrasing the question, I can't
19 answer it.

20 THE COURT: It's a compound question. You
21 asked if State Farm or him keeps track of it. So break
22 it up.

23 Q Does State Farm keep track?

24 A Yep.

25 Q Do you keep track?

Cross by Mr. Klein - M. Wagner

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1 A I review some of the work from our reinspection
2 department. Not all of it.

3 Q But you're not familiar with what the percentage is
4 for Mr. Rice that State Farm keeps?

5 A I could not tell you that number, no, I could not.

6 Q Could you tell me if it was less than 10 percent?

7 A I couldn't tell you that.

8 Q Could you tell me if it was less than one percent?

9 A I can't answer the question.

10 Q Meaning you don't know the answer?

11 A Meaning it varies from month to month.

12 Q Okay. So in --

13 A Depending on the work that's reviewed.

14 Q In 2017, could you tell me if it was less than one
15 percent?

16 A I couldn't tell you that.

17 Q And that is because you don't know?

18 A It is because I don't follow it for a year. I
19 follow it on a month to month basis.

20 Q Okay. So you do follow it?

21 A I review the material, the percentage, as you call
22 it, and then determine what I'm going to review beyond that
23 based on that.

24 Q Do you happen to know what Jim Rice's percentage
25 was in March of 2017?

kc

Cross by Mr. Klein - M. Wagner

74

1 A I do not.

2 Q Do you happen to know what his percentage was in
3 April of 2017?

4 A I do not.

5 Q May of 2017?

6 A Totally impossible for me to remember those
7 numbers.

8 Q June 2017?

9 A Nope.

10 Q No, do not remember?

11 A I do not remember.

12 Q Do you remember whether it was less than one
13 percent?

14 A Do not remember.

15 MR. TOMSKY: Objection, your Honor. He's
16 answered that he does not remember.

17 A I mean, how many times --

18 THE COURT: All right. It's time to move on.

19 MR. KLEIN: No further questions, your Honor.

20 MR. TOMSKY: No redirect, your Honor.

21 THE COURT: Okay, thank you, you're excused.
22 Ready to call your next witness?

23 MR. TOMSKY: Yes, call Mr. Jesberger.

24 THE COURT: All right.

25 (Whereupon, Robert Jesberger took the witness

Direct by Mr. Tomsy - R. Jesberger

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1 stand.)

2 THE CLERK: Do you swear or affirm that the
3 testimony you're about to give in this case on trial
4 shall be the truth, the whole truth and nothing but the
5 truth, so help you God?

6 THE WITNESS: I do.

7 THE CLERK: Please have a seat. Need you to
8 state and spell your first and last name, please.

9 THE WITNESS: First name is Robert. Last name
10 is Jesberger, J E S B E R G E R. My address is 20
11 Lakeview Avenue, Rockville Centre 11570.

12 THE COURT: You may inquire.

13 DIRECT EXAMINATION

14 BY MR. TOMSKY:

15 Q Good afternoon, Mr. Jesberger.

16 A How are you?

17 Q I'm doing great.

18 A Okay.

19 Q Just a couple of background things about Mid Island
20 Collision.

21 Are you the sole owner of Mid Island Collision or
22 do you have other partners?

23 A Sole owner.

24 Q And when did you form Mid Island Collision?

25 A I believe it was 1987.

Direct by Mr. Tomsy - R. Jesberger

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1 Q Do you own any other companies related to the
2 automobile repair or mechanic business?

3 A I do.

4 Q And how many others besides Mid Island Collision?

5 A Quite a few.

6 Q Focusing just on Nassau County, is it true you own
7 Auto House Auto Repair as well?

8 A I do, sir.

9 Q Now, are you aware as the owner of Mid Island
10 Collision that State Farm and Mid Island Collision or M.V.B.
11 are involved in multiple disputes litigation involving other
12 disputes for other cars?

13 A We have disputes.

14 Q Do you know if those disputes have turned into
15 litigation? I'm not going to talk about any facts of those
16 cases. Are you aware that those disputes have turned into
17 litigations like this one?

18 A Not at this point.

19 Q So you're saying you're not sure if other disputes
20 have turned into litigations?

21 A Could you ask the question again?

22 Q Sure. What we're doing here today is a litigation.
23 But it started as a dispute between Mid Island Collision and
24 State Farm about how much to pay you for repairs, correct?

25 A Correct.

Direct by Mr. Tomsy - R. Jesberger

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1 Q And this has now turned into a litigation, correct?

2 A Yes.

3 Q Have other disputes like what this started as
4 turned into litigations involving State Farm and Mid Island
5 Collision?

6 A Yes.

7 Q As we sit here today, do you know approximately how
8 many of those disputes have turned into litigations?

9 A I don't.

10 Q Would you say it's more than ten?

11 A I don't know.

12 Q How about more than five?

13 A Yes.

14 Q So more than five, maybe more than ten, but you're
15 not sure, is that right?

16 A Don't recall.

17 Q Is Mid Island Collision -- again, not talking about
18 the facts of any cases. Is Mid Island Collision involved in
19 disputes with other insurance companies about how much to
20 pay you on repairs?

21 A Yes, some.

22 Q Have some of those turned into litigations?

23 A Yes.

24 Q Are you involved in any litigations with Allstate
25 Insurance Company?

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1 A Yes, I am.

2 Q Would you say more than five?

3 A Yes.

4 Q Would you say more than ten?

5 A Yes.

6 Q Would you say more than twenty?

7 A Yes.

8 Q Instead of me guessing, why don't you just tell me
9 how many?

10 A I don't have an answer.

11 Q Would you say over a hundred?

12 A I wouldn't know.

13 Q So more than twenty and we're not sure how much
14 higher it goes than that; is that correct?

15 A Don't recall.

16 Q You said it was at least twenty, correct?

17 A Yes.

18 Q How about USAA Insurance Company, any litigations
19 form out of disputes between Mid Island Collision and USAA?

20 A Don't recall.

21 Q Do you recall there's, at least as of the time that
22 you gave your deposition testimony in October 2018, would
23 you say there's at least one with USAA?

24 A They're very well could be.

25 Q So it's fair to say that State Farm is not the only

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1 insurance company that Mid Island Collision has failed to
2 reach an agreement with on prices before it turns into a
3 litigation, correct?

4 A Well, out of a hundred, I would say a few.

5 MR. TOMSKY: Your Honor, I believe that was
6 unresponsive to my question.

7 THE COURT: Would you read the question back,
8 please, Kelly?

9 (The requested portion was read back.)

10 A I said out of a hundred, there's a few -- four,
11 five maybe.

12 Q You mean out of a hundred insurance companies, four
13 or five insurance companies?

14 A Yes.

15 Q That's fair to say that State Farm is not the
16 openly insurance company?

17 A You're the big player, yes.

18 Q Again it's fair to say that State Farm is not the
19 only one that you have disputes with concerning repairs that
20 end up in litigation, correct?

21 A Not the only one.

22 Q Now, while Mr. McGavin ** had testified, he
23 indicated that the posted labor rate was 120 for Mid Island
24 Collision, correct?

25 A Are you asking me or are you telling me? I don't

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1 quite understand.

2 THE COURT: Please listen to the question. He
3 asked you if that was correct. That's a question.

4 THE WITNESS: Could you --

5 THE COURT: Kelly, would you read that back,
6 please.

7 (The requested portion was read back.)

8 A Not correct.

9 Q How so?

10 A It's one seventy-five.

11 Q So you're saying the posted labor rate is a hundred
12 seventy-five.

13 A Yes, I am.

14 Q Even though the general manager who runs the
15 store -- runs the shop says 120?

16 A It's 175, sir.

17 Q But isn't it true that in this case the labor
18 charged for the 2015 Nissan Armata was 120, correct?

19 A That's right.

20 Q Were you present when Jim Rice was at M.V.B. for
21 his initial estimate?

22 A I was.

23 Q Do you recall if Mr. Rice handed you an estimate or
24 if you received it a different way?

25 A Received it in a different way.

kc

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1 Q What was that way? Electronic?

2 A No.

3 Q Can you please explain how you received it?

4 A I believe at the time that he produced it and gave
5 it to Nicky, I believe.

6 Q Nicky works for you at Mid Island?

7 A Yes.

8 Q Do you remember -- isn't it true that you had no
9 conversation with Mr. Rice on that first date concerning
10 labor rate, correct?

11 A Not correct.

12 Q Please. Can you explain? So you're saying you had
13 a conversation with Mr. Rice on that first time about labor
14 rate?

15 A Absolutely.

16 Q Do you recall what was said?

17 A Absolutely.

18 Q Can you please tell me what was said?

19 A Showed him above my head where he came in to see me
20 to greet me. He had two cars. I said my labor rate is 175.
21 This is a unibody over frame car. I said it's a highly
22 constructed car. I have a posted labor rate of 175 and I
23 said I would take 120.

24 Q So you're saying that when my witnesses came in and
25 said there was no conversation, they're blatantly lying?

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1 A Lying.

2 Q Even though they admitted that the repairs that
3 were done except for one thing it was all valid, but they're
4 lying about the labor rate?

5 MR. KEARON: Objection.

6 THE COURT: Overruled. You can answer it.

7 Kelly, could you read the question back,
8 please.

9 (The requested portion was read back.)

10 MR. TOMSKY: I want to make sure I got this
11 right.

12 THE COURT: I'm sorry, I am going to sustain
13 the objection. I didn't quite hear the question.

14 MR. TOMSKY: Okay.

15 Q Had you already made up your mind that you were
16 gonna go from 175 to 120 on this car or did you know at that
17 time?

18 A If I can speak without getting into trouble.

19 THE COURT: If you can, answer the question,
20 if you can. If you can't --

21 A We have an agreement not to get into certain
22 conversations. We have a posted labor rate of 175 and I
23 move off of it. That's the conversation. They know what my
24 labor rates are. They don't want to get into circle of
25 conversations because they are underneath the time

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1 constraint of forty-five minutes to look at a car. And
2 multiple times, a lot of times they have multiple cars, I'm
3 sorry, to look at four or five cars in one day and they
4 don't have the time.

5 Q He said he had two cars to look at that day,
6 correct?

7 A He had said cars.

8 Q At your shop?

9 A Yes.

10 Q I want to make sure I got this straight. So you
11 have a posted labor rate of 175 in the shop?

12 A Yes, I do.

13 Q Was there an understanding with State Farm that you
14 would go down to 120 and they refused to come up or you had
15 a posted labor rate of 175, and you told them on this
16 occasion we'll go down to 120?

17 A I'm always negotiable. I start at 175, and I
18 negotiate.

19 Q But isn't it true, and you were sitting here, that
20 Ms. Pope on March 28, 2017, before anyone even came in and
21 estimated the car, and already agreed to a hundred 20 dollar
22 labor rate?

23 A I do not do the paperwork. That's McGavin.

24 MR. TOMSKY: Can I have the witness shown
25 Exhibit A, please?

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1 A I've heard it and I have seen it.

2 THE COURT: Please wait until you're asked a
3 question.

4 THE WITNESS: I'm sorry.

5 COURT OFFICER: Showing the witness defense A.

6 THE WITNESS: Sorry.

7 Q Looking at Exhibit A, do you see Ms. Post's
8 signature next to a line that says the labor rate would be
9 120 for these repairs?

10 A I do.

11 Q So she signed that before there was any
12 conversation with Mr. Rice, correct?

13 A I wasn't there when she signed the paper.

14 Q Do you think that the paperwork was forged later on
15 or do you think it was done --

16 A I wasn't there, so I don't think it was forged, no.

17 Q Is it fair to say this was signed on March 28,
18 2017?

19 A Yes.

20 Q Which would be before Mr. Rice ever walked into the
21 shop?

22 A Yes.

23 THE COURT: While you're looking through your
24 notes, I have a question.

25 What do you mean by posted labor rate?

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1 THE WITNESS: We have a posted labor rate
2 that's up on the wall that's computed through the
3 experts of accountants and a team of people.

4 THE COURT: But by posted, there's actually a
5 sign that says this is what the labor rate is?

6 THE WITNESS: Big sign, sir.

7 THE COURT: Okay, thank you.

8 Q As you're sitting here today, you've heard all of
9 the testimony, you're aware that what you said is your
10 posted labor rate is different than the posted labor rate
11 your general manager said was the posted labor rate,
12 correct?

13 A It's written right here 175 and I see 120.

14 Q But I'm asking you is whether sitting here do you
15 recall Mr. McGavin, who is your general manager, say the
16 posted labor rate was 120?

17 A I heard him say that. I'm not too sure I heard it
18 right, but if you say so, I'll have to say okay, but it's
19 175.

20 Q I'm saying according to the Court testimony, you
21 and the general manager have offered different testimony as
22 to the posted labor rate of the shop?

23 A No, we have not.

24 Q Well, all right.

25 MR. TOMSKY: If I can actually have this

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1 marked as Exhibit 16. I wasn't sure if I was going to
2 use this, so I didn't premark it. I have given a copy
3 to counsel and there is a copy for the Judge.

4 COURT OFFICER: This is for the Judge here?

5 MR. TOMSKY: Yes.

6 MR. KEARON: Is this in evidence?

7 (Plaintiff's Exhibit 16, preliminary estimate,
8 marked for identification.)

9 COURT OFFICER: Showing the witness.

10 Q I would like to direct your attention to what's
11 been marked as 16 for identification. Do you recognize the
12 piece of paper that you are looking at right now?

13 A Yes, I do recognize it.

14 Q Is that your handwriting on it?

15 A That is my handwriting.

16 Q Is that -- without going into what's actually
17 written on there, was that written to Mr. Jim Rice?

18 A To State Farm.

19 Q So this is a preliminary estimate and then you've
20 marked it up with your own handwriting, correct?

21 A I did.

22 MR. TOMSKY: I would like to introduce this as
23 Plaintiff's 16.

24 MR. KEARON: No objection, your Honor.

25 THE COURT: Let's mark it in.

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1 (Plaintiff's Exhibit 16, previously marked for
2 identification, moved into evidence.)

3 Q Look at what's now been introduced as Plaintiff's
4 16, is it true that this document says, Morning, Jim, you
5 are a cheat --

6 Is it correct that what you wrote to State Farm,
7 Morning, Jim, you are a cheat on your preliminary estimate?

8 A I said it a little more than that. I called him a
9 fraudster, yes, and some other words.

10 MR. TOMSKY: Nothing further, your Honor.

11 THE COURT: All righty.

12 MR. KEARON: No questions, your Honor.

13 THE COURT: Thank you.

14 THE WITNESS: Merry Christmas, sir.

15 THE COURT: There's no redirect. Thank you,
16 happy holiday.

17 MR. TOMSKY: My last witness, Mr. Scott, is
18 outside, and I'm ready to call him.

19 (Whereupon, Mr. Scott Richer, takes the
20 witness stand.)

21 THE CLERK: Do you swear or affirm that the
22 testimony you're about to give in this case on trial
23 shall be the truth, the whole truth and nothing but the
24 truth, so help you God?

25 THE WITNESS: Yes, I do.

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1 THE CLERK: You can have a seat. Can you
2 please state and spell your first and last name?

3 THE WITNESS: Scott, S C O T T, Richer, R I C
4 H E R.

5 THE CLERK: And your address, please?

6 THE WITNESS: Fifty Forresta, F O R R E S T A,
7 Drive, Manor Park, New York 11950.

8 MR. TOMSKY: May I inquire, your Honor?

9 THE COURT: You may.

10 DIRECT EXAMINATION

11 BY MR. TOMSKY:

12 Q Good afternoon, how are you doing?

13 A Good.

14 Q How long have you worked for State Farm for?

15 A It will be 24 years in July.

16 Q What is your current job title?

17 A I'm a claims specialist.

18 Q Can you briefly explain your role as a claims
19 specialist?

20 A As a claims specialist, I would investigate,
21 negotiate and settle claims.

22 Q A more general question: How do certain cases or
23 claims get assigned to you as a claims specialist?

24 A Right now the position I'm in I would handle any
25 kind of face-to-face contact or claim handling that needs to

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1 be done in the field in Suffolk and Nassau County and it
2 would be done over the computer.

3 Q What do you mean by that face-to-face field?

4 A So I handle claims -- so let's say there was
5 someone in Suffolk County, let's say, in my town that needed
6 to settle a total loss claim and they're waiting for a
7 check. They need it delivered. I would go get the document
8 and issue a payment in person.

9 Q Are you familiar with this claim involving Courtney
10 Pope's 2015 Nissan Armata?

11 A Yes.

12 Q When was your first involvement in this claim?

13 A I think I got the assignment on June 22 of this
14 year.

15 Q 2018?

16 A 2018.

17 Q Just going back, does each claim get its own claim
18 specialist or claim handler?

19 A Under certain circumstances. We have a team
20 environment and then we have what we call stewardship or
21 ownership.

22 Q Why would a case have an ownership as opposed to
23 not?

24 A Usually the ownership claims involves complex
25 liability issues, who's at fault, you know, more involved

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1 investigation.

2 Q It's pretty clear given the date you came in on
3 this -- were you the original claims handler on this matter?

4 A I was not.

5 Q Why did you get involved at the time you did?

6 A They needed someone to review the file in regard to
7 litigation that was being handled here in Nassau County and
8 that would be what I would handle.

9 Q Given your late introduction into the file, were
10 you able to get acclimated with the claim and what happened?

11 A Yeah, I read through the file and saw -- reviewed
12 the pertinent information for the case.

13 Q Now when you say reviewed the file, is there a
14 particular claim file that -- like an internal claim file
15 that State Farm creates for each case?

16 A Yes.

17 Q Moving on to total loss situations, what are your
18 functions with dealing with a total loss claim?

19 A Currently, it's basically settling claims.
20 Obtaining the total loss, settlement documents from the
21 person who is making the claim.

22 Q Okay.

23 A Whether it be an insured or a third party,
24 obtaining the documents to be able to issue a payment.

25 Q All right. Now, you mentioned total loss. Is

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1 there a State Farm way of declaring something a total loss
2 in terms of value?

3 A Yes.

4 Q What is that value?

5 A We use a company called Auto Source. So when a
6 vehicle is declared a total loss, we turn the information
7 over to them to come up with a value for us.

8 Q Okay. Now, are you involved in deciding what the
9 market rates gonna be on a payment?

10 A For the value of the vehicle?

11 Q Correct.

12 A No.

13 Q So you get that from a third party?

14 A Correct.

15 Q Do you have any particular one that you use or is
16 it a number of different places?

17 A Typically in this area it's Auto Source.

18 Q It is Auto Source?

19 A Yeah.

20 Q Okay. So please describe again in general how it
21 works. You decide you're gonna settle a claim with an
22 insured or whoever, how -- what do you go about doing?

23 A Once the vehicle's declared a total loss or we make
24 the decision that it is a total loss, we contact the owner
25 of the vehicle, whether it be the insured or a third party,

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1 go over the value of the vehicle so that we have an
2 agreement that that is the value we're gonna settle the
3 claim at. Give them the documents -- the Auto Source
4 document is the value, so they get to see that. And then
5 from there, it's a matter of getting the title to the
6 vehicle. If there's a loan on the vehicle, we're going to
7 need the information regarding the loan, so that we can go
8 to the bank and get the payoff value, meaning the amount
9 that either we're gonna pay them for the vehicle, or if the
10 value is less than the payoff of the loan, work out that
11 we're going to be able to get lien release for the amount
12 that we're going to pay.

13 Q What's a lien release?

14 A The lien release, on a title, if there's a loan to
15 a vehicle, on the New York title it will say lienholder, so
16 the bank is the lienholder. They're holding the car as
17 collateral, so they're the lienholder.

18 Q Going back to total loss, is there a percentage of
19 the car's value that when it's reached, a total loss is
20 declared?

21 A I believe it's 70 percent, for the most part. I
22 don't know if it's changed. It might be 75 percent.
23 Basically that's just the -- what's the word I'm looking
24 for? The estimator's kind of flag, and then they turn it
25 back over to total loss to kind of make the declaration

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1 whether it is or isn't a total loss.

2 Q In general is that market value number the 75
3 percent number or the full market value?

4 A The 75 percent of the value of the vehicle.

5 Q That's for the total loss. I'm saying the market
6 value you use --

7 A Yes.

8 Q -- in your final determinations, you're going to
9 pay somebody the market value, is that the 75 percent or the
10 full market value?

11 A They get the full market value. As long as it's
12 the insured. Sometimes if someone's at fault, obviously it
13 can be less.

14 Q Why would that be the case?

15 A Let's just say there was an accident and someone's
16 not a hundred percent at fault, let's say our insured that
17 caused the accident and it was agreed that we're only going
18 to pay 75 percent because they were only 75 percent at
19 fault, then we wouldn't pay the full value. We're only
20 going to pay what we're responsible for.

21 Q I kind of danced around it. In a scenario where
22 you deem, State Farm deems a loss, a legitimate loss by the
23 insured and you're gonna pay the insured, what are the steps
24 that you have to do from State Farm to get title to the car?

25 A So the first thing would be obviously to make the

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1 phone call to the insured. Let them know what the vehicle
2 was a total loss. Offer them what the market value is minus
3 their deductible, if it's the insured. If the car has a
4 lienholder, meaning we know the car is financed, then we
5 need to get their bank information so we can call the bank.
6 Once we call the bank, we tell them -- we have to advise
7 them the vehicle was a total loss and confirm that we're
8 going to be able to get a lien release for that dollar
9 amount.

10 It doesn't mean that we're paying off the loan
11 because it could be over-financed or it might not cover the
12 full amount of the loan, but we need to know they're gonna
13 give us the lien release so we can go ahead now and go back
14 to the insured or the owner of the vehicle get the title
15 signed over as the seller to State Farm, then we can issue
16 the payment.

17 Q Now, are you aware what happens if you declare
18 something a total loss and want to settle the claim with the
19 insured, but there's an unresolved issue with the repair
20 shop, is that part of your duties?

21 A If I was in the office and the total loss scenario,
22 yes. Currently, I'm not, but if there was an issue with the
23 shop, then yes, we would call the shop also.

24 Q Did you in this case have any involvement with
25 calling the shop?

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1 A No.

2 Q In terms of State Farm file management, what does
3 the term own it, mean?

4 A Own it means that we're gonna take ownership of the
5 vehicle.

6 Q Is it after you've dealt with the insured,
7 et cetera?

8 A In other words, we're gonna buy the vehicle. We're
9 gonna settle the total loss. We're gonna own the vehicle.

10 Q What about the term sell it?

11 A We're gonna actually sell the piece of salvage, S E
12 L L I T, sell it. That means we're going to sell the
13 salvage.

14 Q What's a salvage vehicle?

15 A That would be the vehicle, once it's owned by State
16 Farm, we would salvage it. We have -- we go through a
17 vendor, but it gets sold to a certified salvage dealer.

18 Q And what is a total loss package?

19 A Total loss package is the actual letters that we
20 send to the insured or the owner of the vehicle advising
21 them that their vehicle is a total loss, what the value of
22 the vehicle -- it breaks down the market value. It would
23 add the tax. It would take out the deductible. If there
24 was some sort of -- what's the word I'm looking for? Damage
25 to the vehicle that's not related to the accident. If there

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1 was a deduction, it would basically break down how we're
2 getting to the value of the settlement. And it's the
3 letters.

4 Q Once you come up with a total loss package, what do
5 you do with the insured?

6 A That gets mailed to the insured or e-mailed to the
7 insured depending upon their preference, but it also
8 includes that Auto Source valuation.

9 Q So they will receive -- in general, they will
10 receive the Auto Source report that you guys relied on to
11 come up with the number?

12 A It will be the Auto Source, the offer letter,
13 usually there's a prepaid UPS envelope so that they can
14 return the title to us.

15 Q Okay. Now moving on to this claim on Ms. Pope's
16 2015 Nissan Armata. Was there a decision made eventually to
17 declare it a total also?

18 A Yes.

19 Q Again, I know you were not involved at the time,
20 but when was the total loss determination?

21 A If you have the claim file, I can give you the
22 exact date. I'm pretty sure it was June 5th, 2017.

23 Q I do have the claim file. It is marked Exhibit 12.

24 COURT OFFICER: Showing the witness Exhibit 12
25 in evidence.

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1 A June 5th, 2017.

2 Q Okay, thank you. You mentioned a more general
3 aspect of your direct examination what gets done in general
4 when a total loss is determined and you're gonna pay the
5 insured. As far as you know, was that done in this case?

6 A Yes.

7 MR. TOMSKY: Can I have the witness shown
8 Exhibit 8, please?

9 COURT OFFICER: Judge, do you have 8 up there?
10 Showing the witness Exhibit 8.

11 Q Looking at that document, can you please tell the
12 Court what this document is?

13 A This is the cover letter that went out with the
14 draft to TD Bank which was the lienholder at the time of the
15 claim that our insured Courtney Pope had a loan with for the
16 payment of the -- to basically get the lien released from TD
17 Bank.

18 MR. TOMSKY: And if I can have the witness
19 shown Exhibit 9?

20 COURT OFFICER: Nine?

21 MR. TOMSKY: Yes.

22 Q Looking at Exhibit 9, can you explain to the Court
23 what this is?

24 A So when we make the original phone call -- when we
25 made the original phone call to TD Bank and we told them how

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1 much we were going to settle the claim for, we asked them if
2 we paid this amount of money, the \$40,306.09, if they would
3 basically release the lien so that we can get title to the
4 vehicle.

5 Q What was their -- sorry.

6 A This is the letter telling us that they will accept
7 that and provide the lien release.

8 Q So that's basically an acceptance of your offer to
9 the lien company?

10 A To the lien company, yep.

11 Q And you mentioned a number. What was that number?

12 A \$40,306.09.

13 MR. TOMSKY: If I can have the witness shown
14 Exhibit 10, please.

15 COURT OFFICER: Showing the witness Exhibit 10
16 in evidence.

17 Q Looking at what's been marked or premarked as
18 Exhibit 10. What are you looking at now?

19 A This is the Auto Source evaluation. This basically
20 is the company that provided us the evaluation of how much
21 the car was worth at the time of the accident.

22 Q So is that the exact same number as what you sent
23 over to the lien company?

24 A Yes.

25 Q So you received a lien release from TD Bank,

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1 correct?

2 A Yes.

3 Q When was that dated, I don't think I asked you
4 that?

5 A You want to know when we actually received it in
6 the office, right?

7 Q Either that or what it's actually dated on the
8 actual form?

9 A I don't see a date on there, but I can go ahead and
10 look at my file note to see when it was actually received.
11 I'll just check one more time for a date. There's dates of
12 the fax, which is June 12th, 2017 on the top of this, so
13 this might have been like a courtesy copy that they faxed us
14 because it's not stamped complete. So we would wait for the
15 original before we would release a payment.

16 Q It's fair to say it's around the time of June 12,
17 2017 that this all started getting taken care of?

18 A Yes.

19 Q When you talk about paying the lien company, as far
20 as you know, is Ms. Pope then not paid directly?

21 A Correct. We would pay the bank directly.

22 Q Now, again, this is more general, could there be a
23 scenario, and I think you mentioned there could be, where a
24 person might owe more on a lien than they would get from the
25 loss package?

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1 A Absolutely.

2 Q Why would that be the case?

3 A Sorry. The vehicles can be over-financed. For
4 instance, someone might trade in a car and get a credit for
5 the purchase, but they still own a loan on that vehicle so
6 that amount of loan gets rolled into the next loan. So now
7 you've got the new car loan plus the existing loan added
8 together for the total loan but they only own one car that's
9 worth the value of only a portion of that loan.

10 Q So in State Farm's opinion, it's not their
11 responsibility to pay off everything, just the market value
12 of the car plus taxes, et cetera?

13 A Correct.

14 Q Are you aware in this case if Ms. Pope owed
15 additional money besides the amount that the lien would pay
16 off?

17 A She was over-financed.

18 Q But that's not State Farm's responsibility to pay
19 her debt, correct?

20 A No.

21 Q So State Farm sends over a check to TD Bank,
22 correct?

23 A Correct.

24 Q And then they get the lien release, correct?

25 A Correct.

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1 Q That happened in this case?

2 A Yes.

3 Q What happens next from State Farm in order to
4 actually then gain possession of the vehicle and the title?

5 A So we use insurance auto auctions as our vendor in
6 this particular case to process the titling aspect of the
7 claim. So TD Bank sent the lien release directly to
8 Insurance Auto Auctions, and Courtney Pope sent her signed
9 title directly to Insurance Auto Auctions and that's what
10 basically gets us the title.

11 Q Now, do you actually have the actual title?

12 A Physical title?

13 Q Physical title.

14 A State Farm would not hold a physical title.
15 Insurance Auto Auctions would take the lien release and the
16 signed title and process it with the Department of Motor
17 Vehicles. And in this particular case, there's no car that
18 we have in our possession, so it would just be paperwork.

19 Q What is a salvage certificate?

20 A Salvage certificate is, in this case, once the car
21 is sold for salvage, that title needs to be branded as a
22 total loss, and in order to get that title branded, there's
23 a salvage certificate and that would be 907A. It's a form
24 that the Department of Motor Vehicles makes us adhere to for
25 processing the title properly.

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1 MR. TOMSKY: And if I can have -- I think
2 Exhibit O, defense Exhibit O is already in evidence.
3 It's a salvage certificate.

4 COURT OFFICER: Showing the witness
5 Defendant's O in evidence.

6 Q Take your time take a look at it, and let me know
7 when you're done looking at that. Before I actually ask you
8 about that document, what is the application process for
9 getting the salvage certificate?

10 A To get this actual salvage certificate, Insurance
11 Auto Auctions actually has -- it's basically a book that the
12 DMV tracks so it's -- it's a secure document.

13 Q Okay.

14 A So Insurance Auto Auctions would have this
15 document. Those numbers that are on the document which are
16 stamped on each, you know, it's like -- I think it's a
17 triplicate form, if I'm correct, they would process this to
18 the Department of Motor Vehicles to get a salvage title.

19 Q All right. Now, taking a look at the salvage
20 certificate under vehicle -- I'm sorry, vehicle acquisition
21 subsection 3, it's a little -- it's hard to read, but does
22 it say who the salvage vehicle was acquired by?

23 A State Farm Mutual looks like Auto Insurance
24 Company.

25 Q And does that document also show the former owner

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1 of the car?

2 A Yes.

3 MR. KLEIN: Objection. Maybe it is not an
4 objection. Can you point me to where you're referring
5 to, where it says State Farm?

6 MR. TOMSKY: I said it's a little harder to
7 read.

8 MR. KLEIN: Paragraph 3?

9 MR. TOMSKY: Yeah.

10 THE COURT: I have a question, maybe I'm
11 misunderstanding something. It's for counsel really.
12 This salvage certificate, is this an exemplar or is
13 this on this specific car?

14 MR. KLEIN: It's for this specific car.

15 THE COURT: Because I'm looking at, for
16 instance, the certified towing service bill which is
17 Exhibit P, and it has a different VIN number, and this
18 is for a Nissan Armata and this certificate is for a
19 Nissan S E N, which I assume is Sentra.

20 MR. TOMSKY: Your Honor, you're absolutely
21 right. There was an issue before this where the wrong
22 one was put in and it must be the wrong printout, so I
23 apologize. And it is for a different vehicle, I
24 apologize.

25 MR. KLEIN: Wait.

kc

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1 MR. TOMSKY: This is the one that you put in.

2 MR. KLEIN: You have a copy of the salvage
3 certificate?

4 MR. TOMSKY: Yeah.

5 THE WITNESS: This is a different vehicle
6 actually, yep. This is a Nissan Sentra, this one.

7 MR. KLEIN: I think what happened was --

8 THE COURT: Off the record.

9 (A discussion was held off the record.)

10 THE COURT: In the course of the examination
11 concerning this, what was marked as defense O it came
12 to my attention that this is a certificate for a
13 salvage vehicle other than the one that is the subject
14 of this case. So upon the agreement of counsel, we're
15 going to remove the erroneously submitted document and
16 substitute the new one, which will become Exhibit O; is
17 that right, Mr. Tomsy?

18 MR. TOMSKY: That is correct, your Honor.

19 THE COURT: Mr. Klein?

20 MR. KLEIN: Thank you, your Honor, for the
21 correction.

22 THE COURT: Okay.

23 COURT OFFICER: This initial has two pages
24 though.

25 THE COURT: Now it's going to be only one.

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1 THE WITNESS: It is just a duplicate.

2 (Defendant's Exhibit O, previously marked for
3 identification, moved into evidence.)

4 MR. KLEIN: One thing I would point out is
5 this copy isn't quite as good as the actual copy of the
6 erroneous salvage certificate.

7 THE COURT: Well, the copy of the erroneous
8 salvage certificate wasn't great either, but is there
9 some portion you're concerned about?

10 MR. KLEIN: There is one portion which I hope
11 we can stipulate to, which is some of the language,
12 you -- you know what, if it comes up maybe during
13 cross, I'll ask.

14 THE COURT: All right. You can continue.

15 THE WITNESS: I don't have the document.

16 MR. TOMSKY: I apologize for the confusion.

17 Q So now looking at vehicle acquisition for the
18 salvage certificate in Exhibit O, who does it say acquired
19 the vehicle in this case?

20 A State Farm Mutual Automobile Insurance Company.

21 Q And then a little below that, former owner of
22 vehicle, who does that indicate?

23 A Pope Courtney.

24 Q Going down to No. 5, it's a little hard to see on
25 the right side, it says name of seller Lisa McMann, do you

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1 see that?

2 A Yes.

3 Q Who is Lisa McMann?

4 A I believe she is in our Raleigh office. She is
5 what we call our salvage department.

6 Q So she is a State Farm employee?

7 A Yeah. She's State Farm Mutual. She is in our
8 total loss department.

9 Q Looking to the left of that, it's print name of
10 signature and -- I'm sorry, print name of purchaser and
11 signature of purchaser, and it appears to be blank. Do you
12 know why that is?

13 A We haven't sold the vehicle yet.

14 Q Why is that?

15 A We don't own the vehicle yet. We don't have the
16 vehicle yet.

17 Q You don't have it because of what?

18 A Because of this litigation we haven't been able to
19 obtain the vehicle.

20 Q Is there a specific difference between something
21 being branded a salvaged vehicle versus a regular vehicle in
22 terms of when State Farm -- once they get it and what
23 they're gonna do next with it?

24 A Just repeat that question again.

25 Q Sure. Is there a difference, you say it's the

kc

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1 salvage certificate, does it become a salvaged vehicle?

2 A The salvage certificate leads to the -- well, when
3 the new purchaser gets the vehicle, it's going to be a
4 branded title. It's going to say salvaged vehicle on it.

5 Q Is that different when somebody buys a new car or a
6 non salvaged used car?

7 A A new car wouldn't have any kind of branding on it.

8 Q Okay. Are you aware in this matter if Mid Island
9 Collision was paid by State Farm any amount of money for
10 repairs?

11 A They were.

12 Q Do you know, to date at least, how much State Farm
13 has paid Mid Island Collision for the repairs made Ms.
14 Pope's vehicle?

15 A I can look in the file.

16 Q Please do.

17 A So it looks like there were multiple payments made.
18 Do you want me to just read you the dollar amounts?

19 THE COURT: Before we do that, didn't we have
20 a stipulated amount here? Is there some disagreement
21 as to the amount?

22 MR. KLEIN: The amount in controversy, your
23 Honor, 21,000 --

24 THE COURT: I'm talking about the amount that
25 was paid. The amount in controversy is a difference.

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1 But is there a disagreement as to how much was paid?

2 MR. TOMSKY: If we agree that that amount was
3 paid, I can stop this line of inquiry.

4 THE COURT: And that amount was 30.

5 MR. TOMSKY: It was a little less than 30,000,
6 29 something.

7 MR. KLEIN: 29 and change your Honor, and I'm
8 happy to stipulate that.

9 THE COURT: Let's move on. I've understood
10 that throughout.

11 Q Okay. Now in terms of that actual money being
12 paid, how is that money actually paid from State Farm to Mid
13 Island Collision?

14 A By draft.

15 Q When you say draft?

16 A It's produced in the office, and then put in the
17 mail and sent to the shop.

18 Q When you say produced, what is actually given to
19 them? Cash?

20 THE COURT: It's a check.

21 A A draft, a check. We call it a draft because it is
22 an insurance draft as opposed to a check. It's an insurance
23 draft.

24 MR. TOMSKY: If I can have -- it's already in
25 evidence, Exhibit 7 is the different drafts payments.

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1 We don't have to talk about it if you don't want, your
2 Honor.

3 THE COURT: All right, again, Mr. Klein, you
4 acknowledge that those drafts are the drafts which were
5 sent by State Farm and received by Mid Island --

6 MR. KLEIN: Yes.

7 THE COURT: -- totaling approximately \$29,000?

8 MR. KLEIN: Yes.

9 MR. TOMSKY: Then I'll move on.

10 THE COURT: Thank you.

11 Q At any time to your knowledge, did Mid Island
12 Collision stop payment -- asked to stop payment on these
13 checks and refuse that money?

14 A No.

15 Q Is there any subrogation in this claim as far as
16 you know?

17 A We can't subrogate because we haven't even sold the
18 vehicle yet. We don't know what our net payout is going to
19 be, so we can't settle a claim. We haven't even sold the
20 salvage or obtained the salvage.

21 MR. TOMSKY: Nothing further, your Honor,
22 thank you.

23 THE COURT: Thank you. Mr. Klein?

24 CROSS-EXAMINATION

25 BY MR. KLEIN:

Cross by Mr. Klein - S. Richer

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1 Q Good afternoon, is it Richer?

2 A Richer.

3 Q Thank you for being here today.

4 A Thank you.

5 Q A moment ago you were testifying about the salvage
6 certificate in this case --

7 A Okay.

8 Q -- right? It's been marked -- it's been put in
9 evidence as Exhibit O. Do you still have a copy of that in
10 front of you?

11 A Yes.

12 Q Is there a section on that salvage certificate that
13 states date of acquisition?

14 A Date of acquisition 8/2 --

15 Q I'm sorry, just when I ask you a question --

16 A Yes, I'm sorry, yes.

17 Q -- just please answer the question.

18 MR. KLEIN: Can I have the question read back,
19 your Honor?

20 THE COURT: He answered yes. You asked the
21 date of acquisition and he said yes.

22 Q Is the date of acquisition is August 2, 2017,
23 correct?

24 A Correct.

25 Q And salvage certificate is a document that would be

kc

Cross by Mr. Klein - S. Richer

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1 sent to the Department of Motor Vehicles requesting title to
2 a totaled vehicle, right?

3 A Correct.

4 Q Requesting title, correct?

5 A Yes.

6 Q So by definition, the submission of a salvage
7 certificate means you don't have title yet, correct?

8 A That we don't own the vehicle yet, yes.

9 Q Correct?

10 A Correct.

11 Q It's part of the application to own the vehicle,
12 correct?

13 A Yes.

14 Q The lawsuit in this case was filed July 2017,
15 wasn't it?

16 A I don't know. I can look in the file probably and
17 see if there's a note in there.

18 THE COURT: Just answer the question. If you
19 don't know, you don't know.

20 A I don't know.

21 Q Is the lawsuit in the this case was actually filed
22 before the acquisition date listed on the salvage
23 certificate, correct?

24 A I don't know.

25 MR. KLEIN: Is it okay if I show him a Court

kc

Cross by Mr. Klein - S. Richer

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1 exhibit?

2 THE COURT: Yes.

3 MR. TOMSKY: We have a copy of the complaint.

4 THE COURT: Off for a minute.

5 (A discussion was held off the record.)

6 COURT OFFICER: Showing the witness Court

7 Exhibit I.

8 Q Mr. Richard, does the document in front of you say
9 summons?

10 A Yes.

11 Q And if you flip through it, can you find a document
12 that says complaint or verified complaint?

13 A Okay, got it.

14 Q Does it say that?

15 A Yes.

16 Q On the upper right-hand corner of those documents,
17 is there a date?

18 A Yes.

19 Q Is the date -- what is the date?

20 A 7/12/17.

21 Q Okay. So that -- 7/12/17. And the date that State
22 Farm claims to have acquired the vehicle was August 2nd,
23 2017, correct?

24 A I don't believe that was acquiring the vehicle.

25 Q Okay, date of acquisition means?

kc

Cross by Mr. Klein - S. Richer

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1 A I think that was the date -- I'm just going by what
2 the title clerk would be filling out. You're asking me to
3 answer for the title clerk.

4 Q No, I'm not asking you to answer for the title
5 clerk.

6 A But that's who filled this out.

7 Q But you were asked questions about that document,
8 right?

9 A Right.

10 Q And there's a section on that document that says
11 date of acquisition, correct?

12 A Correct.

13 Q And it's referring to the Nissan in issue in this
14 case, correct?

15 A Correct.

16 Q And the date of acquisition listed is August 2nd,
17 2017, correct?

18 A Correct.

19 Q After the date of the summons and complaint in this
20 case?

21 A That would be after the date.

22 Q So State Farm, if those documents are correct, did
23 not have title when it filed this action, correct?

24 A I'm not -- so you're asking me if we actually had a
25 title that was issued in State Farm's name prior to this

kc

Cross by Mr. Klein - S. Richer

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1 lawsuit?

2 Q Correct.

3 A I'd say no.

4 Q In fact, it doesn't even claim to have,
5 quote-unquote, acquired the vehicle until weeks after filing
6 this lawsuit, correct?

7 A I would say yes.

8 Q You reviewed the claim file in advance of your
9 testimony today?

10 A Yes.

11 Q Did you observe any appraisal reports submitted to
12 DMV in that file?

13 A I did not.

14 Q Did you observe pictures taken from two different
15 angles of the car submitted to the DMV?

16 A I do not know. I have seen photos, but I don't
17 know what ones were submitted to the DMV.

18 Q Are you aware of the requirements for obtaining
19 title to salvage?

20 A For the most part yeah. We do have to send in
21 photos.

22 Q And in your review of the claim file, you cannot
23 testify whether those were sent?

24 A I cannot testify whether those were sent.

25 Q When State Farm declares a car to be a total loss,

kc

Cross by Mr. Klein - S. Richer

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1 does it request that the auto body shop cease further
2 repairs?

3 A If it's in the middle of repair, we would tell the
4 shop to cease repairs.

5 Q So, generally, work performed before the total loss
6 will be considered for coverage, but work performed after
7 the total loss, generally, will not be considered for
8 coverage; is that right?

9 A Yep.

10 Q And so the date of the total loss declaration is
11 important, right?

12 A Yes.

13 Q And it's not just the date that State Farm declares
14 the car a total loss, but it's actually the date that it
15 notifies the auto body shop that it has declared the car a
16 total loss, right?

17 A From the standpoint of stopping repairs?

18 Q Well, from the standpoint that the date of a total
19 loss declaration is important.

20 A Yes.

21 Q What's really important is the date that notice is
22 given to the auto body shop, correct?

23 A Actually, from a total loss standpoint, it's
24 important we declare the total loss and speak to the owner.

25 Q And that's because if State Farm just declares a

kc

Cross by Mr. Klein - S. Richer

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1 total loss in the mirror with nobody else to hear about it,
2 nobody can expect them to know that there should be a work
3 stoppage, right?

4 A Right.

5 Q So in your review of the file, Mr. Richer, did you
6 see a total loss declaration served in writing on Ms. Pope?

7 A A declaration meaning saying, hey, your car's a
8 total loss?

9 Q Yes.

10 MR. TOMSKY: Again, where's not alleging any
11 work was done after the total loss, whether it was June
12 5th or whatever other date. We're not alleging any
13 work was done. So when it was declared a total loss,
14 doesn't seem relevant anymore based on the stipulation
15 that we have.

16 THE COURT: Mr. Klein?

17 MR. KLEIN: It is quite important the date --
18 if I can have a little bit of leeway.

19 THE COURT: I think he's going somewhere else.
20 I understand your point, but I think he's going
21 somewhere else.

22 MR. KLEIN: Yes.

23 MR. TOMSKY: Thank you.

24 A So to answer your question --

25 MR. KLEIN: I'm sorry, I don't quite remember

kc

Cross by Mr. Klein - S. Richer

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1 what the question was.

2 THE COURT: Kelly, would you please.

3 (The requested portion was read back.)

4 A No.

5 Q Same question with regard to Mid Island, did they,
6 given the importance of this notice, hire someone to serve
7 Mid Island Collision in writing that said this is a total
8 loss, stop work?

9 A We did not.

10 Q I'm sorry?

11 A We did not.

12 Q Instead, short of that, did State Farm send Mid
13 Island Collision a notice of total loss by certified mail?

14 A Nope.

15 Q I'm sorry?

16 A Nope.

17 Q In fact, State Farm didn't provide any written
18 notice of its total loss declaration at all, did it?

19 A There was no written notice.

20 Q So that was correct?

21 A Correct.

22 Q In fact, State Farm claims it delivered this
23 message through an after hours answering service; is that
24 right?

25 A I'd have to look at the file.

kc

Cross by Mr. Klein - S. Richer 118

1 THE COURT: All right. I think I am going to
2 stop you here. Is there any issue about that? Has
3 anybody --

4 MR. KLEIN: Yes.

5 THE COURT: -- Mr. Tomsky, asserted it was
6 done in any other way other than leaving the message?

7 MR. TOMSKY: No. I believe Mr. McGavin
8 indicated they were called. He wasn't sure if it was
9 June 5th or June 7. Again, we're not alleging that any
10 work is being refused to be paid for being after the
11 total loss. Declaration was made, and there's been no
12 dispute that a total loss allegation was made.

13 THE COURT: What I would like to do is have a
14 little bench conference on this. I'm going to need you
15 to step out.

16 COURT OFFICER: Out this way?

17 THE COURT: Yes, we won't be long. Trying to
18 sort this out and save some time.

19 (A discussion was held off the record.)

20 MR. KLEIN: If I can show the witness Exhibit
21 R. Here's a copy for the Court.

22 MR. TOMSKY: Is there a specific page number
23 on the bottom?

24 COURT OFFICER: Showing the witness Exhibit R.

25 Q So Mr. Richer, I draw your attention to an entry

Cross by Mr. Klein - S. Richer

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1 under 6/5/2017. I know there's a few entries for that date.

2 The one I'm drawing your attention to begins with the words

3 call to VW shop, comma, do you see that?

4 MR. TOMSKY: V one?

5 MR. KLEIN: What did I say?

6 MR. TOMSKY: VW.

7 Q Oh, call to V1 shop. The performer is Erobollo

8 [phonetic], comma, Joe. Do you see that?

9 A Okay, so it's 3:53?

10 Q Yes.

11 A Okay.

12 Q 3:53 performer Erobollo Joe, do you see that, Mr.

13 Richer?

14 A Um-hum.

15 Q It's 3:53, whose time?

16 A Mountain time.

17 Q And how many -- what is the difference between

18 mountain time and our time in New York?

19 A I believe it's two hours.

20 Q So if this was entered at 3:53 mountain time, that

21 would have been 5:53 eastern time, correct?

22 A If it's two hours, yes.

23 Q And do you mind reading for the record the entry

24 that says call to V1 shop, just read those two sentences,

25 please.

kc

Cross by Mr. Klein - S. Richer

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1 A All the sentences?

2 THE COURT: The last line says call to V1
3 shop. Answering service for shop, advised repairs are
4 to stop and vehicle is now total loss, provided CB
5 number.

6 A Call back number, yep.

7 Q That message to an answering service at 5:53 was
8 how State Farm decided to notify Mid Island to cease
9 repairs?

10 A That was our first attempt.

11 Q Well, do you see another attempt?

12 A So the next one would have been -- again, this is
13 just a piece. I don't have the whole file, so I don't know
14 what happened before or after that. This is only covering
15 from 6/5 at 3:55 P.M. is the last one. I don't know what
16 happened the next day.

17 Because normally we would set a calendar to call
18 the next day during business hours. It was basically
19 someone picked up the file, was working it, made their phone
20 call because that's their job, and they will set a calendar
21 for the next day for the next person to pick it up and
22 follow up with the shop again.

23 Q As you sit here, do you recall any entries like
24 that in this case?

25 A I'm only looking at this one page.

kc

Cross by Mr. Klein - S. Richer

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1 THE COURT: The question was do you recall
2 anything else in the file to that effect?

3 THE WITNESS: I do recall that there was
4 contact with the shop after this point.

5 Q Do you recall the day?

6 A I could look in the file notes. I don't know
7 offhand.

8 THE COURT: Why don't you tell him so we can
9 save some time?

10 THE WITNESS: Am I allowed to look at the
11 other evidence?

12 THE COURT: Just wait a moment.

13 Q In your review of the claim file, Mr. Richer, did
14 you come across a submission or a reference to a submission
15 to Courtney Pope that was ostensibly a condolences letter?

16 MR. TOMSKY: Objection.

17 THE COURT: Sustained.

18 Q You were shown what's been marked Plaintiff's
19 Exhibit 9. Do you still have a copy of that Mr. Richer?

20 COURT OFFICER: I don't know if you do. I'm
21 going to check for you. Yes, it's up there. The
22 numbers are at the top right.

23 A I have the document.

24 Q You testified that this document reflects that TD
25 had released its lien on the vehicle, right?

kc

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1 A They're agreeing to once they get the money.

2 Q And so this fax is dated June 12, 2017, right?

3 A Yes.

4 Q You said once they get the money, right?

5 A Once they receive the payment, yep.

6 Q So is it your understanding that they had not
7 received the payment yet on June 12, 2017?

8 A Again, I would have to -- I said earlier this is
9 like a fax date, so I don't know if this is the date of the
10 document or the date that someone faxed this to someone
11 since then.

12 Q Okay.

13 A I can look through the file again. You guys gave
14 me the file notes. I can tell you when, I can give you more
15 accurate dates.

16 Q What this says is that they would release the lien
17 if received by July 12, 2017, right?

18 A Correct.

19 Q And this fax is dated June 12, 2017?

20 A Correct.

21 Q The next paragraph, though, indicates that that may
22 not be equal to the full amount due, correct?

23 A Yes, that's what it says here.

24 Q And that refers to the amount due by whom?

25 A Their customer Courtney Pope.

kc

Redirect by Mr. Tomsky - S. Richer 123

1 Q So releasing the lien wouldn't necessarily release
2 Pope's obligation on the car, correct?

3 A Correct.

4 Q In fact, Ms. Pope, your understanding is, was
5 over-financed, correct?

6 A Correct.

7 MR. KLEIN: No further questions.

8 THE COURT: Redirect?

9 MR. TOMSKY: Two very minor.

10 REDIRECT EXAMINATION

11 BY MR. TOMSKY:

12 Q If you want to take a look at your entire claim
13 file, page 19, please. Tell me when you're done looking at
14 it.

15 A I'm done.

16 Q Directing your attention to the first full entry
17 starting from the top. Starting from the top, what is the
18 date of that entry?

19 A June 7, 2017.

20 Q What time?

21 A 11:09 a.m. central time.

22 Q So around 12 o'clock?

23 A 12 p.m., 12:09 p.m.

24 Q Now, in that claim note starting with the first
25 one, does it show communication, successful communication

Redirect by Mr. Tomsy - S. Richer 124

1 with Ms. Pope on 6/7?

2 A Yes.

3 Q On the fifth -- I guess fifth paragraph, does that
4 show a successful communication with Mid Island Collision?

5 A With the sentence that says, I conference call to
6 Mid Island Collision?

7 Q Correct. Can you just read the first sentence of
8 that entry?

9 A I conference called to Mid Island Collision with
10 the phone number 516-766-0101. I spoke with John. I
11 explained vehicle was a total loss. He states that vehicle
12 one is not there as it is at the dealership having some
13 items finished up on it.

14 Q You can stop, thank you.

15 MR. TOMSKY: Your Honor, there is one
16 additional document, again, I thought there was copies
17 already made and it looks like there wasn't. Just a
18 letter to Ms. Pope.

19 THE COURT: All right.

20 COURT OFFICER: Does it need to be marked?

21 THE COURT: Did you give a copy to Mr. Klein?

22 MR. TOMSKY: He has it.

23 MR. KLEIN: I would like a copy.

24 MR. TOMSKY: I apologize.

25 THE COURT: There's no need to apologize, but

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1 in order to get this done, we're going to have to come
2 back tomorrow at 2 o'clock.

3 MR. TOMSKY: I'm done after this.

4 THE COURT: I understand I have to get the
5 courtroom closed up. It's not me. I have the
6 courtroom --

7 MR. TOMSKY: I would hate to have to come back
8 on Wednesday or Thursday because of this. All right.
9 I'll take it. I don't think it's important.

10 Q You indicated that there's a letter written to the
11 insured when you have a total loss determination?

12 A Yes. Basically the offer letter and the amount of
13 the breakdown of the value.

14 Q Are you aware if that was done in this case?

15 A Yes.

16 Q Do you recall the date?

17 A I can look at the claim file and see when it was.

18 Q Please.

19 A So on June 7th they sent the instructions to do the
20 letter and the letter went out June 7th.

21 MR. TOMSKY: Thank you, no further questions.

22 THE COURT: Okay, thank you. Anything else?

23 MR. KLEIN: No questions.

24 THE COURT: You may step down, thank you.

25 You rest?

Proceedings

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1 MR. TOMSKY: I guess we do.

2 THE COURT: I'm going to -- I'll take the
3 motions and reserve decision on them, if you have any.

4 MR. KLEIN: We're going to move for a directed
5 finding in favor of Mid Island Collision to the extent
6 of \$20,042.68 as a price that reflects an agreement
7 between Mid Island Collision and their insured, and
8 even if there were no agreement, that it reflects a
9 reasonable price for the services that were performed
10 given Mid Island Collision's role in this industry,
11 prices that have been paid in other context for Nissans
12 and to dealers and by State Farm.

13 Because there has been no evidence describing
14 even the mechanism by which State Farm determined its
15 labor rate, we would argue that there is simply no
16 basis to claim that its rationale in arriving at a
17 labor rate is reasonable if there, has been no evidence
18 presented as to how they arrived at that labor rate.

19 THE COURT: Other than the 8 to 1,200 shops
20 that accept that labor rate?

21 MR. KLEIN: Correct. There's been no
22 testimony as to how that labor rate is determined.

23 THE COURT: All right. As I said, I'm going
24 to reserve on that motion. Mr. Tomsy, I assume you're
25 renewing the same motion, which I'm going to reserve on

kc

Proceedings

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1 as well.

2 MR. TOMSKY: Okay.

3 THE COURT: I would like post trial memoranda
4 submitted. We'll go off to set the schedule for it.

5 (Off the record discussion was had.)

6 THE COURT: To go back again, in addition to
7 those portions of the transcript that you want to
8 argue, I would like you both to address in brief
9 insurance regulation -- I'm sorry, State Insurance
10 Department Regulation 64, with respect, in particular
11 to the application of this negotiation that is supposed
12 to take place in the event there's a disagreement
13 between the body shop and the insured.

14 I would also ask that you address the issue
15 which was raised a couple of times about the
16 relationship between the insurer, the body shop and the
17 insured and that is the respective collective
18 relationship, if there is one, or, if not, the
19 respective separate relationships, if they exist. All
20 right.

21 And now let's go off and talk about dates.

22 (Discussion was held off the record.)

23 (Continued on the next page to include the
24 certification.)

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THE COURT: February 15, both sides submit by
February 15, does that work? We stand adjourned have a
good holiday everybody.

* * * * *

C E R T I F I C A T I O N

I, KELLY CULEN, an Official Court
Reporter do hereby certify this transcript to be a true
and accurate stenographic transcription of the
proceedings.

KELLY CULEN
Official Court Reporter