No. 01-1289

IN THE
Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

CURTIS B. CAMPBELL and INEZ PREECE CAMPBELL,

Respondents.

ON WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

JOINT APPENDIX
Volume VII of VII (pp. 2881a-3374a)

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EXCERPTS OF TRIAL TESTIMONY OF V. RAY SUMMERS, JUNE 21 & 25, 1996

[Vol. 12, R. 10267, commencing at p. 125]

V. RAY SUMMERS called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. HUMPHERYS:

Q Would you state your full name, please.

A V. Ray Summers.

Q And are you currently retired?

A I'm more expired than I am retired.

Q Would you give us your age, please.

A Pardon?

Q Would you give us your age, please?

A Seventy.

Q And are you currently subpoenaed to come here and testify?

A Yes.

Q Where do you live?

A In Hyrum, Utah.

Q Have you spent most of your adult life in the Cache County area?

A Just the past thirty-five years.

Q And generally speaking, have you worked for State Farm for a period of those thirty-five years?

A Yes, I did.

[126] Q During, for what period of time were you an employee of State Farm?

A For nearly twenty years.

Q Approximately what time period?

A It would have been from 1963, on through to 1982.

Q And during that time period when you worked for State Farm, what position did you hold?

A I was a claims specialist assigned to bodily injury and property claims, and for a period of time I was involved in fire claims, as well.

* * *

Q All right, Mr. Summers, during the course of time that you worked for State Farm, were you educated and trained through State Farm training programs?

A Yes, I was.

Q Just generally speaking, tell the jury [127] briefly the kind of training courses that you attended and were involved in.

A I initially attended and completed the claims school for State Farm, and subsequent to that, an augmented schooling for property damage sponsored by State Farm. During the interim of this time I completed the LaSalle University Law for the Claimsman, as well as completed several company-sponsored courses that resulted in a promotion and classification as a claims specialist.

Q Now, generally speaking, we have a lot of technical names for people, and I want to try and use names which we have been familiar with. Was your job essentially the claims representative, or the individual that adjusted these kinds of claims?

A Yes, sir.

Q Were you the front line, meaning you're the one that deals with the people in settling the claims?

A Yes, sir.

* * *

[128] * * *

Q Now, during the time period of the Campbell file, was it Mr. Noxon who was your immediate superintendent?

A Yes.

Q And Bill Brown, who used to be -- What position did he hold?

A He was initially my resident superintendent, he was promoted and was divisional claims superintendent over all of the state of Utah.

Q And he was at that position at the Campbell file, or when the Campbell file was taking place?

A Yes, sir.

Q All right. Now, I'd like to ask you, were you assigned by State Farm to handle the Campbell claims, or the claims associated with the Campbell accident?

A Yes, sir, I was.

[129] Q Let me back up with one additional part. During the twenty or so years that you worked for State Farm, were you asked to speak at various claims conferences in behalf of State Farm?

A Yes, I was.

* * *

[130] * * *

Q When were you assigned to work on the Campbell file?

A As I recall, the first assignment came on the 17th of July, 1981.

Q And generally what did you do when you received word of the accident and the possible claims?

A Well, the fact that there was an identification of a fatality involved with the accident, there was also the identification that there was counsel already involved with the case, I made a phone call to my superintendent, Mr. Noxon, who was in Ogden, our office was in Logan. I apprised him of the initial report, and identified that I was in the process of opening the file and investigating the accident.

Q Typically speaking, as an adjuster, do you commence research to try and find out where the parties' fault would be, in determining whether a case should be settled or not?

A Yes, sir.

Q All right. And did you proceed in a normal [131] fashion to perform your discovery?

A I did.

Q And did you initially obtain a police report, a two-page police report?

A Yes, I did.

* * *

[133] * * *

Q And this was as of the 20th of July, 1981. Now, do you initially prepare what's called a BI preliminary report with your findings?

A Yes, sir.

Q And did you prepare one in this case?

A I did.

Q I want to show what's previously been entered into, or introduced into evidence as Exhibit 7, Bates stamp 400003, and have you look now at your BI preliminary report. Is this the report you just referred to?

A It appears to be, sir.

Q And are you the one that prepared this?

A I did.

Q I'll come down here a little lower. Is this your signature at the bottom?

A Yes, sir.

Q And the date is the 18th of July, 1981?

[134] A Yes, sir.

Q All right. Now, would you please read to the jury your description, or brief facts of the accident.

A "Allegedly, the named insured driver, going north on US 89-91 -- "

Q Who is the named insured?

A Curtis Campbell.

Q All right, go ahead.

A " -- passed a line of several vehicles also northbound on US 89-91. Apparently had to cut into the lane of traffic due to the approaching southbound claimant, 1, vehicle."

Q And who is claimant number 1?

A That was Mr. Ospital.

Q All right, you've got him listed right here as number 1.

A Yes, sir.

Q Okay, go ahead.

A "Which vehicle, because of the hazard, pulled to the right, hit a soft shoulder, lost control, traveled across center, and hit claimant number 2 head on, no contact with the insured vehicle."

Q And claimant number 2 is Robert Slusher?

A Yes, sir.

Q Now, had you reached an initial opinion [135] regarding fault at the time you prepared this report?

A Yes, I formed a basic opinion as to the involvement of the accident.

Q All right. And at this early stage, tell us, were you finding, in your mind, or evaluating any fault on the part of Mr. Campbell?

A Yes, I felt that there was negligence that was manifest, in that there was an apparent critical curve, and an effort to avoid a head-on collision with Mr. Campbell, wherein Mr. Ospital swerved to avoid that head-on collision.

Q Did you go back to the scene as part of your investigation, really early on, within a day or two after you were assigned the file?

A The very day that I received the file I went to the accident scene.

Q Were you able to see any of the tire marks at that time?

A Yes, sir. There were --

Q Did you take pictures of them?

A I did.

Q Did you do any investigation regarding trying to determine in your own mind what had happened?

A Yes, I did.

Q And what initially did you conclude, based [136] upon your review of the scene and what you observed, as well as the other information you had at the time of this report regarding that, the critical scuff, curve, and the other information that you found?

A It was my considered opinion that there was possible negligence that would be an exposure to Mr. Campbell.

Q Now, this was before you had the police, the full police report with all of the adverse testimony, the witness statements and so forth?

A Yes, sir.

Q Okay. Now, as part of your responsibilties, did you prepare a report, now, to your superintendent?

A Yes, sir.

Q And what is that report called?

A It's called a CLR, or a combined liability report.

Q Is that a lengthy report where you compile all of the information that you have?

A Yes, sir, it is.

Q And about how many pages was it?

A I would say perhaps about fifteen or twenty pages.

Q Single space most of the way?

A Yes, sir.

[137] Q Typewritten.

A Yes, sir.

Q And the purpose of this report was what?

A To apprise the company, and specifically the superintendent handling and administering the file, of the facts of the involvement, and the exposures that were apparent, and from that, his effort to assign a reserve if the file had an exposure, and if not, then to advise me as to what other course of action would be required.

Q As part of that report, did you make a determination and evaluation of fault?

A I did.

Q And tell us what your findings were at the time you prepared the CLR.

A My findings were that there was comparative negligence imputable to Mr. Campbell, and that there was apparent negligence also involving the Ospital vehicle.

Q Now, if there was any negligence assessed to Mr. Campbell at all, would that, then, make him liable? What is your understanding whether or not that would make him liable for the full damages that may be claimed?

A I realized, with the effect of a fatality, and the ensuing severe injuries that the driver of the [138] second car received, yes, we had a liability exposure, and there was definitely cause for consideration.

Q Were you familiar with the law of joint and several liability?

A Yes, sir.

Q And again, since we haven't talked about it for a few days, just briefly describe what that was, based on your understanding.

A It was that there is comparative negligence, and as such, then there would be an exposure to the individual who would be involved. And as insureds, they were entitled to the benefits of the provisions of their policy of insurance for which they paid a premium.

Q Did you make a recommendation that State Farm go ahead and settle the claims for the policy limits of $25,000?

A I did not at that time.

Q All right. Did you set forth in the CLR, or did you recommend not paying the $25,000?

A No. We were never given that prerogative, really, of making a recommendation, because that did not originate with us.

Q All right. Now, you've described that you found that there was evidence of fault on the part of Mr. Campbell, that there was exposure on his part, and [139] there was evidence of fault on Mr. Ospital. Did you send that report in, now, to your superintendent?

A I did.

Q Now, does that report also go to anyone else?

A Yes, sir.

Q Who would also receive a copy of that report?

A The divisional claims superintendent, Mr. Brown.

Q And your immediate supervisor was Mr. Noxon?

A Yes, sir.

Q Why would it have gone clear up to the divisional level?

A Because of the nature of the exposure, fatality, and of the high probability of a high settlement value.

Q Does each level have different settlement authority?

A Yes, sir.

Q And before $50,000 could be paid, who would have to approve that?

A My authority was only $3,000 on a file.

Q So you could settle any file for $3,000?

A If I had my sanction of my superintendent.

Q All right. If you were to settle more than $3,000, who had to give the authority?

[140] A I had to submit any requests for authority above and beyond mine to my superintendent. If it was above his authority --

Q What was his authority at the time?

A I don't know for certainty. It appears that there was either a five or a $10,000 authority.

Q And there, if the possible claims exceeded that five or $10,000 authority, who would then have to approve it?

A It would go to the divisional claims superintendent.

Q And that would be Bill Brown?

A Yes, sir.

Q Now, I'll represent to you that Mr. Brown has testified that he had authority up to about $50,000 for purposes of this discussion. Do you have any -- Does that sound right to you?

A We never knew the extent of his authority. It was never disclosed to us.

Q All right. I believe, if my memory's right, that's what he said. We'll hear from him later to verify that. All right, now, at that point in time, what happened as it related to your CLR report?

A My report was directed from the pool at the service center in Murray, Utah, the transcription pool. [141] Mine was a recorded record, directed to the transcription pool.

Q So you dictated the report and sent it to the typing pool in Salt Lake.

A I did. They completed it, I received a copy, a copy went to the superintendent, as well as to Bill Brown.

Q All right. Then what happened?

A The morning that I received a notice from my superintendent, Mr. Noxon, the memo complimented me on the rapid rate at which I had moved onto the file, and basically agreed with my analysis of liability. That was on a single-page memo received about 10:00 a.m. with the morning mail.

Q Now, when you say "agreed with your analysis of liability," are we talking fault?

A Yes, sir.

Q All right. So Mr. Noxon agreed. Now, then what happened?

A Very shortly after my receipt of that memo, I received a telephone call from divisional superintendent Bill Brown, and in that telephone call I was instructed to alter and change paragraph 5 and paragraph 16 of the report. Paragraph 5 was an identification of the basic facts of the accident. Paragraph 16 was a basic [142] analysis of liability.

And in the instruction that he gave was to alter and change and delete some of the information from the facts of the accident, as also I received instruction to alter and change the paragraph 16 citing the analysis of liability wherein I had indicated an exposure, and that there could be a high settlement value on it.

Q Exposure to whom?

A Exposure to the insured, Mr. Campbell.

Q What other instructions did he give you, if any, regarding the information in your file which indicated that Mr. Campbell was at fault?

A I objected to the inference of changing, and I was told, "Summers, do what you're told." And with that, I --

Q Let me back up to that conversation. Were there any discussions about whether or not you should take information out of the file?

A Yes. Well, it was -- Well, yes. I was to alter those two paragraphs, and delete information from that, those two.

Q All right. Then what next happened?

A It was a matter of minutes after that phone call, and I received a phone call from superintendent [143] Noxon, and, "Summers, I screwed up. Did you receive my memo?"

I said, "Yes, and it's already been taken care of. I had a call from Bill Brown."

He said, "I want you to take that memo and put it in an envelope, mark it personal and confidential, and I want it mailed today."

I said, "I will."

Q Mailed to whom?

A Mailed to Mr. Noxon, to return to him.

Q Now, we're talking about the memo where he said --

A He agreed with the analysis.

Q He agreed with your analysis of fault on Mr. Campbell.

A Yes, sir.

Q All right. Then what happened?

A I redictated the information to the, and by telephone, I went, recorded to Murray, and redictated the information as I was instructed. And that was, I believe, two days later, before those corrected copies were returned and inserted with the file.

Q In your amended, we can call it the amended CLR, did you assign any fault to Mr. Campbell?

A Yes, sir, I did.

[144] Q Mr. Campbell -- You went ahead and evaluated fault on Mr. Campbell after changing it?

A Only to the extent that, "It appears there is liability." But I did not actually cite the instance of what the real contributing factors were for that liability.

Q Did you refer to the Chipman statements, the Gerber statements, and some of the other adverse evidence, or were you ordered to take that out?

A I was ordered to ignore those. I was also, prior to the submission of my CLR, I had completed a diagram of the accident scene. And this was in a personal review with the superintendent McGlinn, wherein I had the Campbell vehicle on that diagram at a point adjacent to the lead vehicle's, or the lead vehicle in the line of vehicles that were northbound on US 89-91, to a point where he was in a position to have to cut into that line of traffic. I also had the approaching Ospital vehicle in a proximity that would be and identify a reasonable relationship between those two vehicles.

I was told by my superintendent, and this was prior to the completion of the CLR, to minimize the exposure, and to delete that from my diagram. So I had to complete another diagram showing that the insured [145] was, in fact, already back into the line of traffic, and place the Ospital vehicle back up the hill a ways from where he originally was in my original diagram.

Q What happened to the first diagram that you drew?

A I kept that and placed it in a Pendaflex file in my desk, with other documents citing improper claims handling or unfair claims practices.

Q But that was removed from the Campbell file?

A It was.

Q Was that by direction?

A It was by direction.

Q Was there any doubt -- Well, let me back up to your conversation with Mr. Brown. Did he indicate to you that he desired to settle, or not to settle the claims against Mr. Campbell at that time?

A No, he did not.

Q He didn't indicate either way?

A He just said, "This is one we want to defend."

Q What did that mean to you?

A It means that, or it meant to me, at the time, that we were placing our insured, Campbell, in a situation of jeopardy. If there should be a jury trial, that there could be high limits, there could also be [146] excess judgment, or excess limits.

Q When you say "limits," you mean the potential for a verdict? Or are you talking about policy limits?

A Policy limits first, there was that potential. But also there would be a potential of excess judgment above and beyond policy limits.

Q All right, I wanted to make sure we had that clarified. Tell us about Bill Brown. Tell us a little bit about his nature and how you responded to him and how he gave you direction.

A Mr. Brown was a very self-opinionated, he was never wrong. He was often sarcastic, very dominant in his rapport with the claims personnel. But more specifically, he was that same nature with insureds and with claimants.

Q How about with you? Did you feel that you had to obey and follow the directions he gives?

A Most assuredly.

Q Did you try and go against what he said? Tell us what efforts, if any, or what you were feeling about your ability to go against what he may say, or try and counter what he may be doing, if you disagreed with what he was doing?

A For the period of time that he was my immediate supervisor, and subsequent thereto as our [147] divisional superintendent, I felt that Mr. Brown was offensive, that he was very often demanding above and beyond what was reasonable.

From the onset of his supervision as a claim superintendent in our division, or of the northern Utah area, almost immediately after his arrival we started receiving instructions in our unit meetings that signalled to me, as well as --

MR. SCHULTZ: Your Honor, I'm going to object. The question was, did he feel that he could go against Mr. Brown? And I think he's gone well beyond that answer.

THE COURT: He should confine himself to answering the question.

MR. HUMPHERYS: I think this is prefatory for him to be able to explain whether or not he felt he could go against the directions of Mr. Brown.

THE COURT: I'll allow it. Overruled.

THE WITNESS: Mr. Brown very often took exception to the opinions of the claims people, he took exception to my analysis of liability on several cases, and actually gave instructions, from the onset of his supervision, to withhold, to cite comparative negligence, to withhold information, not to volunteer benefits that would be entitled to an insured. His [148] philosophy was basically, "If they want to know, they'll ask it. But don't volunteer it."

Q (BY MR. HUMPHERYS) All right. Now, did you ever fear that your job would be in jeopardy if you did not follow what he directed you to do?

A Constantly.

Q Are there things that he did that made it clear to you that you had no discretion in what he directed you to do?

A Very definitely. He was very adamant in his decisions, and you did not deviate from those.

Q All right. Now, let me turn, now, to Mr. Campbell. I assume, soon after the file was assigned to you, you met and talked with Mr. Curtis Campbell?

A I did.

Q Tell us how you found Mr. Campbell at that time, in terms of whether he was heavily involved in the investigation. Was he a trusting person? Did he turn it over to you? Was he -- What involvement did you observe that he had?

A I felt that there was an exposure, but I'd already been told to reassure the insured, Mr. Campbell, and that came from Bob Noxon in my initial review of the file with him. My reassurance was that, "If there [149] should be any problem, State Farm will be behind you and will respond to whatever arises."

Q Did he appear to be a trusting person as you were describing this to him?

A I think he had concern, particularly inasmuch as there was no contact with his vehicle. He had driven from the accident scene on up the hill, but having observed in his rear-view mirror the involvement, the accident, he stopped, and he waited there at the half way up, or even at the top of the hill before he returned to the accident scene and volunteered assistance at the accident scene.

Q Did he give you any indication, as you were giving him reassurance, that he was not believing you, or that he didn't believe that State Farm would take care of him?

A No, he felt reassured, and I think he felt at the time that, basically he was confident that State Farm would come forth

with honesty and integrity in providing what his policy of insurance required.

Q Did you represent to him that he had no need to worry, that he was not at fault?

A I suggested to him that he need not worry. I did not cite to him areas of negligence or of an exposure. I did cite that there may be some [150] involvement, because there was already an attorney on the scene involving the second claimant, Mr. Slusher.

Q At the time you gave him the information, you didn't disclose the adverse evidence; is that --

A No, sir, I did not.

Q Okay. And you reassured him that everything was okay?

A As instructed.

Q Did you know that that was not a full disclosure of what the situation was?

A Absolutely.

Q Did you do that intentionally?

A I did, as instructed.

Q How did that make you feel when you were describing this to Mr. Campbell in a way that was not the way you felt?

A I felt a sense of betrayal. I have a deep sense of propriety, I always have had. And I felt that, under the existing circumstances, there was an exposure, and I felt that I was betraying him in a sense of reassuring him to that, which really did not exist.

Q Did you expect Mr. Campbell to rely upon what you were telling him?

A I did.

* * *

[152] * * *

Q (BY MR. HUMPHERYS) Before lunch we were talking about your initial involvement in the file of Mr. Campbell and the claims against him. After this altered CLR was prepared and submitted, then did that follow the normal course, that is that copies were sent out and so forth like that?

A Yes, sir.

Q And did you place the new CLR in the file?

A I did.

Q In the normal course of how this proceeded, Mr. Summers, did you then -- Then what did State Farm do in terms of deciding how they were going to handle the claims against Mr. Campbell?

A Because there was already the notification of counsel on the file, I was directed to refer file content and meet with attorney Wendell Bennett, who was representing counsel for State Farm here in Salt Lake.

Q All right. Now, before we get into your conversations with Mr. Bennett, I would like to talk [153] about the claim committee report. Was there one done on this file?

A I wasn't aware of it at the time, but yes, there was.

Q And you've seen that, have you not?

A I have.

Q Let me put up on the screen a claim committee report. Now, you have had a chance to see this, have you not, since you were working on the file back in August of 1981?

A Subsequent to that time, yes.

Q All right. Now, drawing your attention to the bottom of this report, where it talks about a decision, is it your understanding that Mr. Brown was in charge of the decision of how to handle this file?

A Yes, sir.

Q Okay. Now, let's read, again, what the final decision was as of -- let's see, what's the date of this -- September 9, 1981. Would you read that for us, please?

A "After a careful review of the entire facts, the committee feels that the insured driver's actions were not a proximate cause of this accident, and we should defend any action brought against our insured."

Q Now, were you given that direction, as well?

A That is correct.

[154] Q Have you had a chance to review their claim, State Farm's claim file that they produced in this case?

A Yes, I have.

Q Now, I would like to write up here on a board what you found that existed in the claim file that was produced in this case as of the time of that claim committee report. It looks like we're to the end of this.

Mr. Summers, I'm going to put the CCR up here. Claim committee report. We've just had that up on the screen. And that was dated September 9, 1981. Have I got that right?

A Yes, sir.

Q Now, in reviewing the file that State Farm produced in this case, the claim file, the one that you started on, as of the time of this committee report, what did they have in there regarding the fault of the accident?

A Well, first of all, in that field file that I handled there was never a copy of the CCR.

Q All right, I appreciate that. I'm now asking --

A In the field file, the folder, inside the folder was stapled my first telephone recorded statement from Mr. Campbell.

[155] Q All right. So we had a statement from Mr. Campbell. Okay, now, I'm not asking what you had in it. I'm asking -- Boy, when I start writing up on a board I have a hard time seeing the words. Now, I'm talking now about fault, I'm not going to be addressing the other things.

A Okay.

Q All right. I know there's a lot of paper work that goes into a file, and we've looked at your police request and so forth. But I'd like to have the information regarding fault. You had a statement from Mr. Campbell. Now, I think you had more than one, didn't you?

A Yes, sir, I did.

Q I'll put "statements of Mr. Campbell." Did you have any witness statements? Did the file that you saw have any witness statements in it?

A Only copies of that which was provided by the investigating officer, Trooper Parker.

Q Okay. And was that Husband?

A Yes, sir.

Q Okay. Was he an eye witness to the accident? Did he really know much about what was going on?

A I don't think he actually observed the actual impact.

[156] Q He was a few cars behind?

A Yes, sir.

Q He didn't see the exchange of the pass?

A He was aware of the Campbell vehicle passing, but I don't think he was aware of the loss of control and the impact involving Ospital.

Q Okay, he was unaware of the interchange between Ospital and Campbell.

A As I recall.

Q Was there Mr. Palmer? Or I should say doctor?

A Yes, sir.

Q I think he was a dentist, wasn't he? He didn't witness the accident, either, did he?

A No, he did not see the actual impact.

Q All right. Now, going further in the file that was produced by State Farm in this case, as of the time of September 9, '81, was there in that file contained the witness statements of Mr. Chipman that you said you received?

A No, sir.

Q I'm going to have -- Let's see, we'll entitle this column "file," and we'll put in this column "not in file." So let's list these by number, if we can. So John Chipman's statement was not in the file [157] produced by State Farm.

A No, sir.

Q Now, was he an adverse witness to Mr. Campbell?

A I think his observations of the accident, the scene, were adverse to Mr. Campbell.

Q He placed all the fault on Mr. Campbell, didn't he?

A As I recall.

Q Did you find the Gerber statements?

A No, I did not.

Q That's Mike and his wife, Pat.

A That's correct.

Q All right. Did you find your diagram that you described to us that you drew?

A The original, or the subsequent?

Q No, your original one.

A No.

Q Did this diagram, would that have indicated that Mr. Campbell was at fault, or partially at fault in the accident?

A It more adequately demonstrated the presence of the two vehicles in proximity to each other in the involvement the accident.

Q All right, did it contain the CLR that you [158] originally wrote?

A Contained only the altered CLR.

Q All right, now, let's go a little further regarding what it did contain at the time, or the file that they produced to us in this case. Was there a statement from Trooper Parker?

A Yes, there was.

Q Okay. We'll put "Parker." Now, that was a recorded statement by you, correct?

A Yes, sir.

Q I think the jury's seen that, we looked at it, where he said that there were a few witnesses in the statement that had attributed fault to Mr. Campbell.

A Yes, sir.

Q And then he talked about how he went to the hospital and Mr. Slusher thought it was Ospital's fault. All right, now, in terms of fault -- Well, let's see. I think -- Was there a police report in there?

A Yes, sir.

Q Okay. So we'll put the investigation report. All right. Now, do you recall any other evidence that was in the file as of September 9, 1981 that was produced to us by State Farm, that went to fault?

A There was the absence of photographs that had originally been submitted with the CLR. These had been [159] removed from the file.

Q Were those the photographs taken by you?

A They were.

Q At the scene, that first day or so?

A Yes, sir.

Q All right. Were there photographs of the damaged cars after the fact in the file?

A Yes, sir.

Q All right. So we'll put down photos of vehicles.

A And some photos of the scene, but those that showed the skid marks, and what I identified as point of critical curve, those were, had been removed from the file.

Q Okay. Now, Mr. Summers, were all of these items that are listed not in the file, that is the file that was produced by State Farm in this case, were they in it at the time you were performing the investigation?

A Originally, yes.

Q Were you --

A Well, except some of the statements were not in my division, and they had to be provided by other claims personnel from other areas.

Q Right. But those statements were in the file.

[160] A Yes, sir.

Q All right.

A Copies of the statements.

Q Okay, all right. Now, were you ordered to alter the claim file after Bill Brown became involved in your conversation, or involving your conversation with Bill Brown?

A Yes, I was.

Q Were you ordered to change the contents of the file?

A Yes, I was.

Q In what way?

A Delete the information on the facts of the accident, and to remove from the analysis of liability any inference or out-and-outright statement of negligence imputable to the insured, Campbell.

Q Did you follow that direction?

A To a degree. I felt that I was being illegally, immorally directed to altering things that were not factual, and so I did leave in the report that which had an inference of liability.

Q But these items, did you take out, or were they taken out after you left?

A I did not remove them from the file.

Q And yet they were not in the file when [161] produced in this case.

A No, sir, they were not.

Q Now, I want to clarify, and make sure that we know what we're talking about. I was talking about the claim file; is that what you understood, when I was asking these questions?

A Yes, sir.

Q I'm not talking about Mr. Bennett's file, are you?

A No, sir.

Q I just wanted to make sure. Now, has there been something added to the file that was not there during the time period you were working on the file?

A Most assuredly.

Q And what was that?

A A memo of commendation.

Q To who?

A Citing from superintendent Noxon, allegedly complimenting my handling of the file and my analysis of liability.

Q All right. I want to refer on the screen to Exhibit 7, page 400009. If I have those zeros added up right, like the judge in Texas.

All right, now, I'd like to put up on the screen this memorandum, it has a date on it of September [162] 10, 1981. Were you still involved at this time?

A Yes, sir.

Q Is this the memo that you're referring to that was not in the file at the time you left?

A I have never seen it, nor have I received it. It was not in the file.

Q Now, you've seen it since.

A I have.

Q Okay. You mean while you were working there.

A Yes, sir.

Q When did you leave and stop working on the file, the Campbell file?

A When I was compelled to take early retirement.

Q And approximately when was that?

A That would have been mid-1982.

Q Was that sufficient time that if this memo would have been sent, that you would have received it?

A State that again.

Q Never mind. Let's go ahead and read the first paragraph. Would you read the first paragraph?

A "I acknowledge receipt of your timely and very comprehensive CLR of August 7th, 1981. I appreciate the details of which you have gone to get -- "

Q Get this matter?

[163] A " -- gone to get this matter completely investigated, and feel that you have done an excellent job. FCR Davis has submitted his statement from the Salt Lake City area, which concluded his statement."

Q Okay, now, I want to refer you to this sentence, "Please keep in mind that I feel you have covered all of the information in an excellent manner," and then he states, "but I feel that paragraph 5 should contain the facts of the accident only. This is not meant to be critical, and I hope you take it as instruction for future CLR preparation."

Was paragraph 5 one of those paragraphs that you were ordered to alter and change?

A It was.

Q Now, would you read to us this paragraph, beginning, "I completely."

A "I completely agree with your analysis of liability on this case, and feel that this is definitely a case of no liability, and as such we should prepare to defend the case. I am therefore planning to turn this file over to attorney Wendell Bennett to prepare for defense of the claim presented by the claimant."

Q Mr. Summers, are you aware of the term "self-serving correspondence," or letters, or memos?

A From the earliest date of my employment with [164] State Farm.

Q And tell me what the practice was while you were employed at State Farm regarding the writing of self-serving letters or memos?

A To cover a file, we were always instructed that a file had to be impeccable. Basically, not only to meet the needs of our liability exposures and our insureds' representation, but also the benefit of the company. We were instructed that if there was any derogatory information, or anything that pointed a finger of impropriety, we were to take that from the file and supplant it with appropriate memo information.

The reason for that is there was, without notice, a call-up of field files that were to be boxed up and directed to the regional office --

Q Let me just stop you, and let's continue on here, and we'll get into the area of what generally occurred in your employment another time, if I could interrupt you, please.

All right, now, had you reached, at any time you were working on this file that, the conclusion that this was definitely a case of no liability?

A Definitely it was not that conclusion.

Q Is this accurate?

A No, it is not.

[165] Q Based on your knowledge of what you have seen at State Farm, is this a self-serving correspondence?

A Emphatically.

Q Now, you mentioned that early on Mr. Slusher had retained an attorney to assist him in a settlement of the case, and we've heard testimony that was Mr. Barrett. I want to draw your attention to Exhibit 7, page Bates stamp 400008. Is this a letter from Scott Barrett that was sent to State Farm at your office?

A Yes, sir.

Q He indicates that he's representing Robert Slusher, who was seriously injured. "Our information is that two vehicles were involved in an accident other than that driven by Mr. Slusher. They were a Brooks vehicle, insured by Farmers Insurance Group, and the Curtis Campbell vehicle, which, according to our information, is insured by you.

"It is our intention to file suit on this action, but prior to doing so we would like to make contact with you and determine the amount of coverage on Mr. Campbell, and whether or not this action may not be settled. It would be appreciated if you would get in touch with us."

Q Did you timely receive this letter, that is in the normal course did it come to you at or about the [166] date of this letter?

A Yes, sir.

Q In fact, it has a stamp right here. Would that be the date received?

A That is correct.

Q Did you ever reply to Mr. Barrett regarding his request to sit down and try and settle this case?

A No, other than to acknowledge receipt of the letter by a telephone call.

Q Did you ever tell him what the coverage was?

A No, I did not.

Q Did you ever tell them that you were willing to sit down and try and work out a settlement with him?

A No, I did not.

Q In your investigation, could you find any fault whatsoever on Mr. Slusher for the cause of the accident?

A No, sir, I did not.

Q Why didn't you sit down and talk with Mr. Barrett and try and settle the case?

A I had no thought. I had already been told to deny liability, I'd already been told to conceal evidence, removing it from file. I'd already been told not to communicate with anyone relative to the involvement of the accident.

[167] Q Did anyone at State Farm, to your knowledge, reply and try and negotiate a settlement with Mr. Barrett?

A To my knowledge, no. There was total disregard of his inquiry.

Q Now, you mentioned that soon thereafter Mr. Bennett was retained to defend Mr. Campbell. Was there an ensuing lawsuit that was commenced and served?

A Yes, sir.

Q Now I'd like to again refer to Exhibit 7, page 400010. And this is a letter from Bob Noxon, who was your immediate supervisor?

A Yes, sir.

Q To Curtis Campbell, dated September 10, 1981. "Dear Mr. Campbell. I am writing to let you know that we have retained attorney Wendell Bennett to represent you and State Farm for possible defense on the accident you were involved in on May 22, 1981."

And then he asks that if he receives the suit papers to immediately give them to you so that they can be turned over to Mr. Bennett.

A Right.

Q Now, in the third paragraph. "We definitely feel at this time that there is no negligence on your part, but feel that we might possibly be joined as a [168] party in the suit, because that party who is at fault has inadequate limits to handle the injuries sustained by the injured party.

"Please feel free either to call me or Mr. Summers to discuss this situation, and we will be glad to give you any assistance that we can. It is very important that you forward any suit papers to us as soon as possible so that we can enter a timely defense in your behalf."

Mr. Summers, did anyone at State Farm at any time take any position with Mr. Campbell other than that this was a case of definitely no negligence on his part?

A Not to my knowledge, no.

Q And did you continue to take and maintain that posture as it related to your communications with Mr. Campbell?

A In the very few communications I had with him, yes, I did. To reassure him, as I had been instructed, that State Farm would respond if there should be any involvement.

Q Did you ever tell Mr. Campbell, before the trial in September of 1983, that he was at risk of an excess verdict?

A No.

Q Did you ever tell him of your concern [169] regarding his potential for an excess verdict, or excess exposure?

A I did express to him, as I recall prior to his leaving for an LDS mission, that I had reservations and concern that there might be a lawsuit, and that there could be an exposure.

Q Exposure, meaning what?

A Of liability, and of policy limits, possibly, but I did not mention anything of an excess judgment.

Q All right. Did you then tell him anything about what State Farm would do to cover him?

A Only to reassure him that if there should be any involvement, State Farm would respond.

Q Now, you've mentioned that you were troubled by the fact that State Farm had given you directions to do something that you felt was, I think, using your words, illegal or immoral. Did you prepare any documentation while you were still employed with State Farm regarding what had happened?

A I did.

Q And was that in the form of an affidavit?

A It was.

Q Let me show you what's been marked as Exhibit 46. Do you recognize that?

A I do.

[170] Q And what is it?

A It is a photocopy of my original affidavit dated October 22, 1981.

Q So this would have been about two or three months after you were ordered to alter the file and the report?

A Yes, sir.

Q Is it signed?

A It is.

Q On the second page?

A On the second page.

Q By whom?

A Myself, and my wife, Jean.

Q And does it bear the date of your signature?

A 10-22-81.

Q And is that your wife's signature?

A It is.

Q And did you and your wife sign it on that date?

A We did.

Q You were still employed by State Farm at this time?

A I was.

Q Does this affidavit set forth what you have told the jury today in terms of what happened in the [171] file?

A Most assuredly.

Q Does it talk about other things that also took place that you felt was improper?

A Yes, sir.

Q Why did you prepare a document in 1981, even before you had been terminated?

A Basically because, not only with the Campbell file, but with so many other instances, there was the same kind of directive, the same withholding of information, removing from file content, concealment, to the point that I was greatly concerned for myself and my employment, and thus my family, but I was greatly concerned over the illegallity of what was being done.

MR. HUMPHERYS: We offer Exhibit 46 into evidence.

THE COURT: Any objection?

MR. HUMPHERYS: Courtesy copies have been provided in those boxes of documents up there, Your Honor, and to opposing counsel.

MR. SCHULTZ: Your Honor, since the witness is here and testifying to these things, we would object. It's just an attempt to buttress his own testimony.

MR. HUMPHERYS: This is one of the central issues in the case, is his credibility, and State Farm [172] is attacking his credibility. I intend to call witnesses that say that they told them these same things, and they are going to deny that they heard that.

They've already raised in cross examination with Mr. Fye the fact that there were questions regarding Mr. Summers' story, and when he told them and when he didn't tell them, and a suggestion that he didn't create this story until after he was terminated, and was biased in some way, and it was also raised in opening statements.

THE COURT: Based on that proffer, that it's, to some measure, rebut charges of fabrication and the like, the court will receive it in evidence.

MR. HUMPHERYS: Thank you.

(WHEREUPON Exhibit Number 46 was received into evidence.)

Q (BY MR. HUMPHERYS) Now, did you also have an opportunity to talk to Miles Jensen?

A Yes, I did.

Q Now, was that after the trial of September of 1983 in this case?

A I'm not certain. I believe I had some discussions prior.

Q Okay. Let me represent to you that Mr. Jensen has testified he was first retained by the [173] Campbells a few days after the verdict. Would that be consistent, then, with your memory?

A Yes, sir.

Q All right. I want to show you what has been marked previously as Plaintiff's Exhibit 108. This was an exhibit that was prepared during the testimony of Miles Jensen regarding his notes that were taken during a telephone conversation with you. It was objected to, and I would like to now lay further foundation. Have you had a chance to review those notes?

A Yes, I have.

Q And the date of the first page is when?

A 9-29-83.

Q And in reviewing the substance of those notes --

MR. SCHULTZ: Your Honor, I'm going to object to this. The witness has not even been asked a question yet whether he recalls this conversation, and it appears to me that they're trying to use the notes to refresh his recollection, without him even saying whether he remembers anything. I think that's improper.

MR. HUMPHERYS: I'm not even done with my foundation yet.

MR. SCHULTZ: Well, he's already showed him the documents, though, Your Honor.

[174] THE COURT: Overruled. I'll allow you to proceed to lay a foundation.

Q (BY MR. HUMPHERYS) These notes were provided to you previously, a few days ago; is that correct?

A Yes, sir.

Q Have you had a chance to read them?

A I have.

Q Let me, first of all, ask, do you recall a conversation with Mr. Miles Jensen sometime around September 29, 1983?

A Yes, sir, I do.

Q And in that conversation did you talk to him about the things that you have told the jury today?

A Yes, sir.

Q In reviewing the substance of the notes, and what is represented here, do they accurately depict what you told him at that time period?

A Yes, sir.

MR. HUMPHERYS: We offer Exhibit 108 into evidence.

MR. SCHULTZ: I object, Your Honor. It's not his work product, he hasn't prepared them. He's here to testify he said what he said. They're also hearsay, he wasn't a representative of the company at the time, and he can testify to what he wants to testify, but that's [175] not a proper foundation to put notes of somebody else's in.

MR. HUMPHERYS: Miles Jensen testified and laid the foundation that these were notes within his file, and that he had kept them, and they were accurate to the best of his knowledge, representing the communication he had with Mr. Summers.

When they were offered into evidence it was objected, based upon hearsay, because the deponent was not here in court. He's now here at court, he's read them, verified their substance, he's here available for cross examination. There's no longer an objection that remains viable on this exhibit.

THE COURT: I'll receive them.

MR. HUMPHERYS: Thank you.

(WHEREUPON Exhibit Number 108 was received into evidence.)

MR. SCHULTZ: Your Honor, we need to have a short bench conference.

(Side bar conference held out of the hearing of the jury.)

Q (BY MR. HUMPHERYS) Now, at or around the time period when this letter to Mr. Campbell was sent by Mr. Noxon telling him that Wendell Bennett would be defending him, did you have a communication with [176] Mr. Bennett at his office regarding the Campbell file?

A Yes, I did.

Q And can you tell us where that conversation took place?

A In his office here in Salt Lake.

Q Did you come here, or to his office, for the purpose of discussing the Campbell case?

A Yes, I did.

Q And would you please now relate to the jury what you told Mr. Bennett.

A I was directed to bring file material to review with attorney Bennett, comparative to file material that had already been directed to him by superintendent Noxon.

And as I was meeting with Mr. Bennett, he was seated at his desk, I was seated at the side, attorney Paul Belnap was in the doorway. Paul Belnap was at the time a member of the Wendell Bennett law firm. And I related to Mr. Bennett, and also to the earshot and hearing of Paul Belnap, exactly what had transpired on the file, how I had been directed to conceal non-disclosure, and to change file content.

Q By that time had the decision been made by Mr. Brown that this was going to be a file to be defended?

[177] A Definitely.

Q Did you thereafter have further communication with Mr. Belnap regarding this file?

A Yes, I did.

Q Approximately when was that?

A Approximately, perhaps -- Well, it was several months later.

Q And did you discuss the Campbell file?

A I did.

Q And what was the substance, as you recall, of this conversation?

A Basically a reiteration of that which had transpired. I had called to the office to talk with attorney Bennett, and Wendell was not in the office, and so I talked with Paul, and gave him some additional information, but also asked about the proceedings of the representation, and again reiterated my anxieties and concerns over that which was transpiring.

Q Was Mr. Belnap, while he worked for Wendell Bennett, involved in State Farm files with you? In other words, were you exchanging information with him regarding the files over a period of time?

A Only as he was working under the direction of attorney Bennett.

Q Now, there was mention earlier that you were [178] terminated, or forced into retirement, in 1982.

A Yes, sir.

Q The spring, at about that period of time?

A Yes, sir.

Q What was the context of what was going on which led to that?

A Back in 1975-'76, there had initiated an effort by State Farm management to get rid of and delete Mormon management in the Utah division. And beginning with the demotion of attorney Keith McCune, who was then our divisional manager, and a very qualified attorney, and a very qualified superintendent. He was demoted, and ultimately made just house counsel.

Then Bill Brown was brought on scene, and Wayne Ballantyne, my immediate supervisor, was demoted, and told he could be terminated or accept a regular field position. And he accepted a field position as a regular claims adjuster.

Then Thomas McGlinn was brought in as Bill Brown was then promoted to divisional superintendent. Systematically several other superintendents were demoted, one or two actually were terminated, several claims men were terminated. But amazingly, several of the old-line agency managers that had been with State Farm from the inception of State Farm coverage in the [179] state of Utah were systematically deprived of their agencies and ultimately terminated.

Q All right. Now, rather than going into all the details of what you were perceiving, I think you've given us a flavor of that, but what about you personally? What was happening that led to what you say was a forced retirement?

A Basically because I was objecting to the kinds of instructions that we were receiving.

Q What kind of instructions?

A To impute negligence, unwarranted negligence to claimants, to minimize medical and PIP, personal injury protection provisions of a policy, because Utah had recently enacted a no-fault law insurance, or no-fault insurance law, and in the instructions that I was receiving were contrary to the former --

MR. SCHULTZ: Your Honor, can we have some context and foundation on this time, who's saying it?

MR. HUMPHERYS: I'm not going into the particulars. I'm trying to demonstrate what was, what he was perceiving to be the things which led to his communication with his superintendent regarding his termination.

MR. SCHULTZ: Well, then I object to that on lack of foundation.

[180] MR. HUMPHERYS: Excuse me?

THE COURT: Lay some foundation as to when this was occurring.

Q (BY MR. HUMPHERYS) You were in the process of describing a number of instructions which you were objecting to. Over what period of time were you objecting to these instructions?

A '77, on, to the time of my retirement.

Q All right. And did you sit down with someone from State Farm at the time you were forced into retirement?

A I was summonned to the Ogden claims office, quote, to review files. I was told to bring some files with me, which was a customary practice two or three times a month, and then it got to every few days.

I took files to review, and as I arrived at the claims office, Mr. Noxon, my superintendent, said, "Let's go get a drink."

And I said, "I'm not thirsty."

And he said, "Come on, we need to get out of the office."

I said, "Well, I've got such a load, I'd like to get back to my work."

He says, “Come on, we need to take a ride.”

So we left the claims office on Harrison [181] Boulevard, and he drove around to Washington Boulevard in Ogden, pulled into a motel. And I said, “What’s this?”

He said, “I have somebody that I want you to meet.”

And I said, “I’m sorry,” I said, “I have no intent of wasting time. What is it you’ve got in mind?”

He said, “Just come with me.”

And so we got out of the car, and went to the motel room, and there I was introduced to Skip, and I don’t recall his last name, which was our divisional personnel manager.

And there was laid before me an application for early retirement, and told, “Either sign it or you’re terminated.”

And I said, “I’m not going to sign it.” I said, “I object to what’s being done.” I says, “You’ve brought me here and raped me of my rights as far as what’s proper in our company procedure.” I said, “If you’ve got a problem, let me know and I’ll answer the problem.”

And he said, “Sign it or you’re terminated on the spot.”

I said, “All right, I’ll sign it, but I do it [182] under protest.”

So I signed the document, and inscribed underneath that I was being coerced into it, and signed it under protest.

Q And that was written on the paper?

A Yes, sir, that was.

Q All right. Now, thereafter did you commence a discrimination action against State Farm?

A I did.

Q Were you required to give testimony in that case?

A I was.

Q And by way of deposition, did Strong and Hanni’s office then take your deposition in that case?

A They did.

Q Is the stack of depositions there in front of you that's about eighteen inches high, was that the deposition taken of you in that case?

A If not all of them, it's part of them.

Q All right, I believe there were twenty-two volumes?

A Twenty-two volumes, or near thereto.

Q And Mr. Hanni and Mr. Burton were asking questions of you under oath; is that correct?

A Yes, sir, that is correct.

[183] Q And did you relate to them all of the instances and circumstances that you were aware of regarding the unfair claims practices that you had engaged in while at State Farm?

A Not all of them, but as much as could be recalled at the time.

Q Did the Campbell file come up in your deposition?

A It did.

Q And in different places in that deposition did you relate the same story to Mr. Hanni and Mr. Burton as you did to the jury here today?

A I did.

Q And approximately when was the deposition being taken, at least at the beginning of it?

A Well, the beginning of it I think was in 1982, but I'm not positive. It seems to me it was.

Q Do you recall giving testimony in your deposition about the Campbell file before the trial in September of 1983?

A Yes.

Q And did you relate the fact that you had been forced to alter and change the evaluation and so forth, as you've testified here today?

A I did.

[184] * * *

Q Okay. Now, I'd like to show you an exhibit, and I think we're on 129 if I'm not mistaken. That will be the court's exhibit.

Let me show you what's been marked as Exhibit 129. And without explaining what it is, do you recognize it?

A Yes, sir.

Q Briefly describe what it is, and not go into the contents for just a moment.

A It's an itemization of several pages [185] identifying unfair claims handling practices of State Farm in Utah as testified to by Ray Summers in his depositions beginning in 1983 and continuing at various times through November of 1986.

Q Now, are these the depositions in front of you, what is referred to here in Exhibit 126?

A Yes, sir.

Q All right. Now, are these summaries of the unfair claims practices that you experienced as an adjuster at State Farm?

A Yes, they are.

Q And do they -- And have you taken each of the major categories after page 3 and broken them down by names of cases and the page numbers in the depositions which you have testified to?

A I have.

Q And under each of these unfair claims practices, have you named all of the files that you recall testifying about that support the unfair claims practice defined?

A I did.

* * *

[187] * * *

Q (BY MR. HUMPHERYS) The first page is what you've been looking at. All right, now, I'd like to just review with you these practices that you have summarized as representing what you consider to be unfair claims practices, and ask you a little bit about each one.

Now, so that the jury knows -- if I can take that off for a moment -- on each of those have you gone through, for example, taking the first item of wrongful claims practices, and listed the cases which you have identified as supporting this particular unfair claims practice?

A Yes, I have, as attested to in the depositions that were taken.

Q All right. Now, we don't have time to go into every one of these cases on every point. But I want the jury to see what you have prepared in terms of the kinds of cases which support these conclusions that [188] you have reached.

The first item which you have listed here, under Roman Numeral I, "Falsifying or withholding documents, photographs, or other evidence from claim files concerning facts." Now, is the Campbell case an example of what you have just described here?

A Yes, it is.

Q And are there other cases like we just saw?

A Yes, sir, there are.

* * *

Q (BY MR. HUMPHERYS) Okay. Mr. Summers, over the course of your nineteen years at State Farm, did you handle files which involved item number 1, which was falsifying or withholding documents, photographs, or other evidence from claim files?

A Yes, I did.

Q And did that occur over a period of the entire nineteen years you worked there?

A Yes, but more so from 1976, on.

[189] Q And was that something that you were required to do by your superintendents?

A Yes, it was.

Q Was the Campbell file one which falls into this category?

A Yes, it did.

Q Are there others?

A Yes, there are.

Q Number II, withholding information from insureds and claimants regarding benefits to which they were contractually and legally entitled. Ignoring inquiries and benefit requests. Was this an item that occurred during the nineteen years you worked at State Farm?

A Yes, sir.

Q And did it occur, did it occur on a frequent or a numerous basis?

A On a numerous basis.

Q And have you listed cases in this summary, actual file names of people who were subjected to this unfair claims practice as you've described?

A Yes, sir, I have.

Q Can you give the jury an example of a case outside of the Campbell case where this was involved?

A On number II, or on number I?

[190] Q Number II, please.

A Okay. One very poignant case involved a fatality wherein our insured vehicle entered in and upon an intersection and collided with a Wycoff truck that ran a stop sign.

The insured vehicle, from that impact, spun around, and the back end of that insured vehicle struck a pedestrian on the sidewalk on the far southeast corner of the intersection and killed the pedestrian.

That pedestrian proved to be also a State Farm insured. He would have been a State Farm insured in two ways. He would have been a State Farm insured by having been struck by a State Farm insured vehicle --

Q For PIP benefits?

A For PIP benefits, and he would have had an increased benefit because of higher policy limits on his own policy of insurance, being struck by or hit by a vehicle, whether it was insured or not insured. So there were two areas of PIP benefit that he was entitled to.

Q You're saying the heirs of the decedent pedestrian?

A The heirs of the decedent were entitled to.

Q And what occurred that supports your conclusion number II?

[191] A I was directly instructed by my --

MR. SCHULTZ: Excuse me, Mr. Summers. For the record, I need to make sure that my earlier objections are on the record regarding other claims, other cases, lack of similarity, 403 and 404 and 406.

THE COURT: They're noted.

Q (BY MR. HUMPHERYS) Go ahead, please.

A I was instructed to not offer, disclose, or otherwise divulge the availability of PIP benefits to the family of the deceased. I was instructed to let the proximate cause rest with the truck that had high policy limits be the respondent company.

Q Which was a non-State Farm truck?

A That's right.

Q Or company, I should say.

A That is correct.

Q Now, I have here on the page that you have listed the various files under number 2. You've listed a number of files. Do all of those represent cases where you withheld information from insureds?

A Every one of them.

Q And there are, I think there may be some more --

A There are.

Q Let's see, at least another page and a half [192] of file names; is that right?

A There are.

Q What are the total number of cases, just so we have a record of that? Is that forty-two cases?

A I cited forty-two cases in the depositions that were taken.

Q Were there more that you did not cite?

A Yes, there were.

Q Now, as we're looking at some of these others, Mr. Summers, the Campbells, Slusher, Ospitals, the attorneys representing them, none of them had any involvement with this case that you're now describing from which this exhibit was based; is that correct?

A No, sir.

Q And the depositions, no one was involved from the Campbell case in the personal case you had against State Farm where this testimony was given; is that right?

A That is correct.

Q Let's go to number III. Ignoring legal protocol such as the requirement for court-approved settlements for injuries to minors. Do you have a case which illustrates that?

A Yes. Number 2 on the listing, or number 3. Let's take number 3, insured Gittens and the claimants [193] Tingley.

Q Let me return to that page.

A Number 2 is VanDyke, number 3 is Tingley.

Q Okay.

A This was a trial where the insured in a rain storm traveled left of center and hit the claimant vehicle head on, severely injuring the mother and driver of the vehicle, as well as two of the minor children in that vehicle.

My instructions were to ignore liability as far as the liability coverages of the policy, and try and handle it on an expense advance, leaving open the PIP benefits under the provisions of their own policy. The nature and extent of the injuries would have normally required a court-approved settlement.

Q For the minors?

A For the minors. I was totally directed to ignore that, and the file was concluded by merely taking an indemnifying release and agreement releasing the children, supposedly signed by the parents of the children who were the claimants of the file.

Q And was that a proper and legal way to handle their claims?

A Absolutly not.

Q Let's go to number IV. Unfairly downplaying [194] or ignoring liability and/or negligence of insureds to artificially create more advantageous settlement position. Did you have cases that supported this during your nineteen years of work at State Farm?

A Multiple as cited, I believe there were twenty-eight cases in the depositions that were, twenty-eight cases cited in the depositions obtained.

Let's reference number one, insured Miller. This was a double insured. Both vehicles involved were insured by State Farm. The insured Miller DUI, driving under the influence of alcohol, as well as drugs. Crossed center and hit the claimant insured Shoop vehicle, on a glancing near head-on, killing a minor child in the vehicle, and injuring the mother driver of the insured vehicle.

My instructions were to downplay and not mention, even mention in the file that there was drinking. I was told to take out of the file the statement that indicated the places that he had been drinking at, and for the period of time that he had, and his own attestation as to the use of drugs. That was not included in the file.

I was further instructed not to offer the PIP benefits to the mother for a death benefit for the child's death under the provisions of her own policy. I [195] was told definitely not to offer any more than the medical part of the personal injury protection provisions of her policy. I was not to --

MR. SCHULTZ: Your Honor -- Excuse me, Mr. Summers. Could we have him give some foundation? He keeps saying, "I was instructed." Would he please tell who he was instructed, who instructed him?

MR. HUMPHERYS: I'll ask for that, Your Honor.

MR. SCHULTZ: But can he do it as he goes?

MR. HUMPHERYS: I'll try and remember.

Q (BY MR. HUMPHERYS) Were all of the instructions which you have testified to in the past one of your superintendents above you?

A Yes, sir.

Q Were you given that by way of instruction that you understood you were supposed to adhere to in handling the files?

A Yes, sir.

MR. SCHULTZ: I need a name, Your Honor.

Q (BY MR. HUMPHERYS) Can you give me the name of this particular superintendent in Miller?

A As I recall, it would have been Tom McGlinn, but I'm not absolutely possible. Or positive on that.

Q All right. Had you completed your [196] description of how you were required to unfairly downplay and ignored liability as you indicated in this unfair claims practice?

A No, there was other information that I was directed to, that she was not to have a loss of income allowance, because she was not, quote, employed at the time and the day of the accident. But she had been employed by a dentist's office and was to report for employment, but because of her injuries was deprived of that employment. I could not render her payment for that. Nor was I to offer payment for a loss of service allowance while she was incapacitated and unable to perform her duties as a wife, mother, and householder.

Q And then those were coverages that would otherwise be properly owing and payable under the policy?

A That's correct.

Q Let's go to number V, unfairly handling cases of clear liability only under PIP, which is a no-fault, having the effect of limiting insureds' and claimants' recovery to out-of-pocket expenses and presenting payment of full and fair value of claims. Do you have a case which illustrates this?

A Yes, multiple files that illustrate this in the respect of -- Well, let's take perhaps the first [197] one, Mr. Goss.

This was an accident that happened in Idaho, and involved two claimant passengers. The insured, it was a one-car accident, or a one-vehicle accident, all three of the occupants had been drinking, the vehicle was involved in the accident and the insured and the two passengers were all injured.

My instructions were, disregard the fact that it was out of Utah jurisdiction, was an Idaho state law which they would be claimant passengers, rather than guest passengers.

As claimant passengers, they were eligible, not only for the benefits of the medical provisions of the policy, but they were also eligible for liability exposures on the policy.

My instructions were, "Do not mention the liability, and offer them as if it were a PIP benefit within Utah jurisdiction."

Q Even though that didn't necessarily apply?

A That did not apply.

THE COURT: Counsel, are you going to ask him who the person was?

MR. HUMPHERYS: Yes, I'm sorry.

Q (BY MR. HUMPHERYS) Will you tell us who your supervisor was in this particular case, the Goss case?

[198] A I believe that would have been Bill Brown or McGlinn.

Q And again, was this pursuant to his direction as your superintendent?

A Direct instructions from that superintendent.

Q Number VI. Unfairly downplaying injuries or concealing nature and extent of injuries in order to cast doubt on settlement value, especially when the claimant or insured is at a disadvantage, is experiencing financial difficulties, or has trouble communicating.

Have you selected a case that illustrates that out of the number of cases that are listed in your -- First of all, tell us how many cases are listed under this category.

A I believe there were forty cases cited and attested to in the depositions.

Q Can you relate now a case which illustrates how there was unfair advantage taken of someone who was at a disadvantaged position?

A One very flagrant file involved an insured by the name of Thad Carlson, who had a son that had an emotional break, and attempted, in the family's car, to commit suicide. At a high rate of speed he crashed into a cement abutment, and did nothing more than total the car. He had minor injuries and was hospitalized for it. [199] But because of the nature of his being distraught, he was placed in the psychiatric unit of the hospital under psychiatric evaluation, as well.

He, the following day, walked away from the hospital, walked about two blocks to his family residence, and got in another family car, drove up Logan Canyon, and at a distance up the canyon, at a relatively high speed, went left of center and hit another vehicle head on, killing two people in that vehicle.

The insured driver was uninjured and walked away from it.

Q That is this fellow who?

A That would be Scott Carlson, their son.

Q Okay. And he was the State Farm insured?

A Thad Carlson, the father. Scott walked about, oh, several hundred yards east of that accident scene, and as a large semitractor-trailer came down the canyon at a relatively high rate of speed, the boy dove under the wheels of the semi, and suffered very minor injury, well, not minor, he suffered injuries, fractures, was hospitalized in that condition.

Technically three different accidents. I reported them verbally, by telephone call, to my superintendent.

Q Who was who?

[200] A I believe Tom McGlinn was the superintendent at the time, and I told him we had a very severe exposure, and he said, "Do nothing on the file. It's an intentional act. The boy intentionally tried to do harm. Therefore there is no coverage."

I said, "Wait a minute. The boy is ill. He was hospitalized for a mental break. He was not cognizantly aware of what he was really doing."

He said, "Follow my instructions."

I talked to the named insured, Thad Carlson, with whom I was personally acquainted, and told him that there was a coverage question because of an intentional act of an insured, and I needed to get a non-waiver, which I obtained from him, to submit to the company for their review to see if they would or would not extend coverage.

I was instructed to not offer even the PIP benefits under each of the three instances, because they were three separate accidents. I was told not to discuss with the insured or anyone else relative to the involvement of the accident, I was told to remove from the file the photographs of the accident scene, which never were included in the file. The diagram that was prepared, to my knowledge, was never included in the file.

[201] I was also told not to offer any opinion as to the possibility of coverage, but to downplay, withhold the evidence from the insured, and in particular, not to disclose or divulge any content to the claimants that were involved with the fatality.

Q Now, Mr. Summers, were there other kinds of people who were vulnerable which State Farm would attempt to use as you've described, here, to take unfair advantage?

A Very definitely.

Q Is there a case that you recall, the Mashoeshoe case? Am I pronouncing that right?

A Yes, it's a member of the royal family of the South African kingdom of Lesoto.

Q Where was the accident? In Logan?

A This happened in Logan.

Q What was he doing in Logan?

A He was there as a graduate doing research on manpower utilization as an official representative of the Lesoto government.

Q And were there other native African nationalists that were there, friends or whatever?

A Yes, there were two other native Africans that were in the vehicle at the time, and the named insured driver of the described vehicle, after picking [202] up Mr. Mashoeshoe, and with Mr. Mono, who was with him at the time, instead of going east on Fourth North back to the university, this was in the evening --

Q You don't need to get into all the details of the accident. We don't have time for that. But there was an accident?

A There was an accident. Severe injuries to Mr. Mashoeshoe. And my instructions were --

MR. SCHULTZ: Your Honor --

MR. HUMPHERYS: Just a minute.

Q (BY MR. HUMPHERYS) Who gave you these instructions?

A Superintendent McGlinn.

Q All right, and what was your recommendation regarding liability?

A My recommendation regarding liability was that we have a severe exposure.

Q Meaning that your insured was at fault?

A Our insured was at fault. In fact, I had strong suspicion that there was an attempt of assassination of Mr. Mashoeshoe.

Q Well, not getting into all of those little flavors, what did your superintendent tell you regarding whether or not to pay on this claim?

MR. SCHULTZ: Your Honor, I think this is the [203] subject of a bench conference, if I'm not mistaken.

MR. HUMPHERYS: It will be in the next question. Not Mr. McGlinn. He didn't say that, but Mr. Brown did, it's the next one.

THE COURT: All right.

Q (BY MR. HUMPHERYS) What were you told regarding whether or not to honor these claims that were being made?

A I was told to deny the liability exposure, that he was considered as a passenger for hire.

Q All right. Now, did you feel that that was an appropriate decision?

A Definitely not.

Q Was this a very high damage range that you felt you needed to deal with?

A Very, very definitely.

Q All right.

A Severe injuries.

Q Did you then go to the next superintendent up in order to try and get authority?

A I complained to superintendent Brown.

Q Okay, don't go any further than that, we've got an objection pending.

A Yes, I did.

Q All right. And did you request that he [204] consider payment of these claims?

A I requested that he intervene on the file and authorize response.

MR. HUMPHERYS: All right, now, my next question will be what did he tell and instruct Mr. Summers to do?

MR. SCHULTZ: That's the point of our objection, Your Honor.

THE COURT: I'm going to sustain the objection under Rule 403.

MR. HUMPHERYS: May I have just a moment with him?

THE COURT: You may.

Q (BY MR. HUMPHERYS) Now, as further foundation, and regarding what was said by Mr. Brown, did he authorize you to pay any amount on these claims?

A No, he did not. He said, "Do what you're told, Summers." That's all.

Q And was there a reference to the fact that these individuals were not Americans?

MR. SCHULTZ: Your Honor, I object. Same objection.

THE COURT: That's a yes-or-no question, and I'll allow it to be answered.

Q (BY MR. HUMPHERYS) Go ahead.

[205] A There was.

Q Was there an indication to you that Mr. Brown had some bias toward black people?

MR. SCHULTZ: Your Honor, I object, Rule 403.

MR. HUMPHERYS: I'm laying foundation for the comment.

THE COURT: I'll allow it, overruled. That's a yes-or-no question.

Q (BY MR. HUMPHERYS) That's a yes-or-no question.

A Yes.

Q And did he, was that bias that you've described evident in other files as it related to minorities?

A Yes, it was.

Q Did he, at times, indicate to you through the words that he used, that bias when referring to the minorities?

A He did.

Q And did he refer, using words which were such that would indicate only a strong prejudice and bias to that minority?

A Yes, it was.

MR. HUMPHERYS: I would now like to ask him what the comment was in response.

[206] THE COURT: I'm going to sustain the objection on Rule 403.

Q (BY MR. HUMPHERYS) All right. Did you have any understanding whether or not he was denying the claim based upon the race of these individuals?

MR. SCHULTZ: Your Honor, I object. Counsel has asked it and asked it, and --

THE COURT: I'm going to sustain it. I think we've moved far enough in this area.

MR. HUMPHERYS: All right.

Q (BY MR. HUMPHERYS) Let's go into the next item, number VII. Unfairly imputing comparative negligence and/or assumption of the risk to claimant, even when facts did not indicate such negligence. Where some comparative negligence was indicated it was greatly exaggerated. Done to improve settlement position. Do you have any particular case which will illustrate this conclusion that you have reached?

A I would like to suggest the very first file that I handled in 1963, under the direction of my then training superintendent Ballantyne, a California policy holder in Cache valley attempted to pass a farmer who was off to the side of the road on a tractor, and as he attempted to pass, there was an oncoming vehicle that was in close proximity.

[207] Rather than hit them head on, he swerved back and hit the farmer's tractor in the rear end. It destroyed the tractor, it broke the farmer's pelvis and his leg and back injuries.

Q What was his name?

A His name was Maughan.

Q All right, go ahead.

A He was hospitalized, and I had relayed my initial reports. Mr. Ballantyne came from Greeley, Colorado, to Logan, Utah, to teach me how to negotiate settlements.

Mr. Maughan was in the hospital in casts with a leg and an arm in traction. Mr. Ballantyne told Mr. Maughan, "You had no business to be upon the road on a tractor."

Mr. Maughan said, "I had every right. I was going from one field to the other, and I was off of the road as far as I could get when I was hit."

Mr. Ballantyne said, "Well, you contributed to the accident, and therefore the only thing that we can do for you is pay you $5,000."

Mr. Maughan already had more than $5,000 of bills. Mr. Maughan said, "Leave. I'm not going to even discuss it."

We left, went out to the car. Mr. Ballantyne [208] said, "Let's go back and we'll give him a proposition."

So we went back and he said, "We'll go a little bit more. Because you contributed to the accident, we'll go $7,000."

And I was told, "Summers, get the hell out of here and take that man with you before I kill both of you."

I knew Mr. Maughan, and I felt very embarrassed in the kind of proposition that was to him. There was no question it was a case of liability, he was entitled to all damages that were as a result of his injuries, and the accident.

Q All right. Now, let me have you look at item number VIII, unfairly sending claimants to their own carriers, even when State Farm's insured's liability is clearly established by the facts, and planning to subsequently deny subrogation to force lower settlement."

Can you just quickly tell us an example of this? And again, I appreciate the details are very real to you, but we need to restrict the details to a minimum, if you can.

A Okay. This is number 10, a case of the insured --

Q No, this is number VII.

[209] Q Oh, number 10 of number VII?

A Number 10, that would be insured Hugie, who was fatally injured at the accident, he went to sleep at the wheel, crossed center and hit a Logan City garbage truck, and injured two Logan City employees.

My instructions were not indicate that he went to sleep; indicate that he had a sudden illness, and there, which resulted in the accident and his ensuing death.

I said, "But the man just got off of work after working all night, and was on his way to school. He went to sleep."

"Nevertheless, that's what you're to do."

Q Who was this that gave you that?

A That was superintendent Brown.

Q Okay. And as a result, were you not given authority to --

A I was not given authority. It dragged out to the point that Logan City, I believe, ultimately dropped the claims that were made, because I represented to the city attorney and to Logan City that it was an act of God, in that he had an illness that did not contribute to the, or result in the accident.

Q Did you feel that was dishonest, Mr. Summers?

A It was dishonest.

[210] Q Going to the next page, item number IX, unfairly directing older claimants or insureds to medicare first so that State Farm paid only excess benefits, although liability was clear and State Farm had first dollar responsibility. Summers characterized such an action on one file as bilking the government out of thousandss of dollars. Do you have an example of this?

A Multiple examples. One, number 3 was an auto-pedestrian. Our insured, Holdridge made a left turn and hit Grace Hadfield, the claimant pedestrian. She was in a crosswalk, no question of liability. Injuries were moderate. She was elderly.

My instructions on the file, "Do not offer PIP benefits, and do not discuss liability exposure. Let medicare handle it first. Then we will pay excess above and beyond medicare only, and thereby diminish our PIP coverages and avoid any bodily injury liability."

I said, "You've got to be kidding. Grace Hadfield's son is attorney Reid Hadfield in Brigham City. I know him well, and they're not going to buy this."

Q You don't need to go into the details, again. We need to move quickly. Who was the superintendent that gave you this instruction?

[211] A That, I believe, was McGlinn.

Q And were you given authority, then, to, other than what you've described?

A Ultimately only on PIP benefits.

Q Item number X. Unfairly obtaining first contact or early settlements and releases while claimaints still under physician's care, with a verbal representation that if further complications developed cases would be reopened.

Then later standing on the release and denying further payments for injuries and damages that were unknown at the time of settlement but were attributable to the same accident.

Do you have a case that illustrates this?

A I would say, under the claimant VanDyke file, there was a minor child that was injured, that should have -- As I recall, it was an auto-bicycle accident, and the child that was injured should have been handled in a court-approved settlement.

To avoid the court-approved settlement, and to justify taking an indemnifying release and trust agreement, I had the instructions to have the uncle and a cousin certify in a fraudulent, misrepresented statement that they were in care, custody, and control of the minor, and therefore they could sign and execute [212] the indemnifying release for and in behalf of the minor that was involved.

Q Who was the superintendent?

A I don't recall, I believe it was Bill Brown.

Q Okay. And then how was it that this was -- How does this case support your item number X?

A It was later denied any additional benefits under the PIP provisions, and totally excluded from the A coverage or the bodily injury liability coverages.

Q Did you represent to them that you would reopen the case?

A I did. I told them if there was any problem, that State Farm would reopen it and handle whatever there would be.

Q And did you try and do that?

A I submitted bills and requested additional authority, and I was told to ignore them.

Q And did you then stand on the release to deny any further payments?

A The release, to my knowledge, they did stand on it, and there was no additional payment rendered.

Q Item number XI, unfairly forcing claimants and insureds to litigate, threaten to litigate, or complain to insurance commission before paying claims or disclosing information, where liability is clear. Do [213] you have a case that illustrates that?

A I do. Among the eighteen files that were cited in deposition, let's take the first one. The insured Tew. It was a fatality accident, he was going north on US 89-91 in the Dry Lakes area. The vehicle from Idaho going south hit a black ice spot, went left of center, traveled all the way across the northbound lane, and the insured Tew had tried to even go off of the road, when he was hit broadside and it just peeled the car's side and nearly cut his little girl in two, who was in the back seat.

The insured was severely injured, fractured pelvis, fractured leg, fractured arm, back injuries. Mr. Tew was, or is an attorney, I believe he is now the Utah tax commissioner, but Mr. Tew was

deprived of any benefit, told to seek his recovery from the vehicle, the coverages on the vehicle that was involved, because they were primary and responsible.

I expressed to the superintendent, whom I believe was Tom McGlinn, that this was wrong, because there were horrendous bills that were already accumulating, and that the liability coverages on the southbound vehicle were inadequate to take care.

"Nevertheless, don't offer it, do not even infer the availability of those coverages."

[214] I had known Mr. Tew for years, and I went to him and I said, "I'm sorry, I can't offer you the benefits unless I have a written demand from you."

He said, "Why? I'm a policy holder."

I said, "Well, I've got to have that before I'll have any authority."

He then provided me with a written request for the medical benefits, and the death benefit under the provisions of his own policy. This was still resisted, in that I was not permitted to give him any loss of income allowance for himself or his wife, nor was I permitted to give him any loss of service allowance for himself or his wife, both of which were still either hospitalized or under a physician's care.

Q Did he ultimately have to threaten litigation?

A He threatened a complaint to the Utah insurance commissioner, and threatened to bring suit. He had an associate counsel, I believe, initiated the proceedings of a legal action.

Q And then eventually did State Farm pay it?

A Yes, they finally broke loose and paid that which he was entitled to from the onset of the involvement.

Q All right. Because of limited time, [215] Mr. Summers, let's simply read the remaining items that you have listed. Do you have names of cases under each of these items?

A That would be under --

Q We have under B, isolated actions constituting unfair claims handling. Have you referred under each of these items to a case that illustrates these points?

A Yes, I have.

Q All right. Let's just read them and then move on. Number XIII, encouraged a claimant to bring an unwarranted malpractice action against a treating physician in an attempt to avoid financial responsibility. Is that State Farm's avoidance of financial responsibility?

A Very definitely.

Q Number XIV, intentionally building a case for disclaimer instead of truthfully reporting the facts. Started by claiming an insanity defense, but then claimed that State Farm not liable for intentional acts when counsel suggested that insanity was no defense.

A That is on the Thad Carlson file. Very definitely.

Q Number XV, in a case of double coverage by State Farm, i.e. both parties insured by State Farm, [216] induced insured claimant to sign a blank release representing that it was for one policy, and later standing on the release to avoid payment on the other policy.

A That is correct.

Q Number XVI, hiding, or influencing insured to hide physical evidence. Truck involved in a collision that had been negligently maintained.

Hiding evidence?

A Very definitely, I was instructed not to put photographs of the vehicle in the file, the insured sold the vehicle. My superintendent said, "Good, now any problems that evolve, they'll have difficulty tracing it."

It finally resulted in litigation wherein the person involved did locate the vehicle that had been sold, and it was in Idaho, and definitely confirmed that it was not a road-worthy vehicle. That it was not, as my superintendent instructed me to say it was

a latent mechanical defect. The transmission fell out and he lost control and hit the vehicle. But it was, in fact, it didn't even have an inspection sticker on the vehicle.

Q And that was the State Farm insured vehicle?

A That is right.

[217] MR. SCHULTZ: Could he please identify the name of the file.

Q (BY MR. HUMPHERYS) Who was the superintendent, first?

A The superintendent, I believe was Bill Brown.

Q Okay. And do you have a name listed there?

A The insured, Wynn.

Q All right. Number XVII, unjustly attacking the character, reputation, and credibility of a claimant, and making notations to that effect in the claim file to create prejudice in the event the claim ever came before a jury. Did that actually happen, Mr. Summers?

A That did actually happen.

Q Would you refer to the file name?

A I'd refer to the file involved, the insured traveled left of center and hit the claimant vehicle.

Q You don't need to give us the facts of the accident. Just give us the name of the file, please.

A The name of the file is Lowell, the claimant is Sears.

Q And who was your superintendent at the time?

A Superintendent, I believe, was Bill Brown.

Q There are a couple of more items I'll simply read to the jury, and then let's move on. Number XVIII, [218] unilaterally changing expense advance requests into settlement agreements.

Number XIX, use delay tactics to reduce settlement value, especially where insured or claimants appeared vulnerable.

All right. Now, Mr. Summers, approximately how many files did you discuss in this deposition?

A Well over a hundred, maybe more than 150.

Q Were you able to ever see the Excess Liability Handbook, as an employee of State Farm?

A Never knew of its existence.

Q We understand, from prior testimony, that was given to divisional claims superintendents. Did you have access to divisional claims superintendents' manuals?

A No, sir.

Q Have you had a chance more recently to review the handbook?

A Yes, sir, I have.

Q And are the principles that are set forth in that Excess Liability Handbook, were they used and taught, used by you and taught to you as acceptable practices to do business in excess claims while working at State Farm?

A Yes.

[219] MR. SCHULTZ: Object, foundation, leading.

THE COURT: Lay the foundation.

Q (BY MR. HUMPHERYS) All right, now, did you have, during the course of your nineteen years, claims that involved excess exposure?

A Yes, I did.

Q And were you taught and trained in, during your tenure at State Farm, regarding what to do with excess claims?

A Yes.

Q Did you have set procedures and policies that you had to follow regarding excess liability claims?

A These were verbally related to us in individual file review, as well as in unit meetings, where the claims superintendent would instruct us relative to the handling of the files.

Q All right, now, having read the Excess Liability Handbook, were the principles and policies set forth in that handbook consistent with what you were taught orally, as it relates to excess liability cases?

A Yes.

MR. SCHULTZ: Your Honor, may I --

THE WITNESS: Pardon me.

MR. SCHULTZ: Please, Mr. Summers. May I ask one voir dire question, Your Honor?

[220] THE COURT: You may.

MR. SCHULTZ: Mr. Summers, haven't you testified under oath that during the time you worked for State Farm, you were never told what the policy limits were on the claims you were handling?

THE WITNESS: Only in instances of where the policy limits were involved in the actual settlement of the file. But as to the disclosure of the policy coverages and limits, no, we never were apprised of it on the opening of a file, and the handling of a file.

A coverage card was directed to us that had initially a stamped out, or a punch out showing what the policy limits were. Later that was revised into a franking of the policy limits. So no, we did not know what the policy limits were on a routine handling of the file.

MR. SCHULTZ: Your Honor, I would object, then, to him testifying about practices, or uses with respect to excess cases, because he would not have the foundation to know whether a case was excess or not if he didn't know what the policy limits were.

MR. HUMPHERYS: Let me lay a little additional foundation, Your Honor.

Q (BY MR. HUMPHERYS) Were there cases where the injuries were so severe that you had any idea [221] whether there may be excess exposure?

A My, yes.

Q And were there cases, specific cases where you did learn of policy limits in the handling of it?

A Yes, when authority was extended.

Q When cases went to litigation, were policy limits typically addressed?

A Not until required, either in the legal action, or in the settlement of the file.

Q And were there times when you learned of the policy limits through that process?

A Yes, on those occasions, and occasional -- We knew on every file that there were basic policy limits set by Utah law, like five and ten, or fifteen and twenty, and as they are now, twenty-five and fifty. We knew that basically existed. But we never knew, above and beyond that, the higher policy limits that a policy holder might purchase and subscribe to.

Q From time to time did you become aware, in the handling of a file, that there may be excess exposure?

A Yes, definitely.

Q All right.

MR. HUMPHERYS: We then submit the issue, Your Honor.

[222] MR. SCHULTZ: Same objection.

THE COURT: Overruled.

Q (BY MR. HUMPHERYS) And your answer was yes?

A Yes, sir.

Q To that question? Okay. Now, you mentioned earlier that you participated in the training and teaching for State Farm in claim conferences. How many claim conferences did you end up teaching at State Farm?

A I recall there were more in conferences where I had some participation, but there were three that I had by assignment to participate in the presentations of those conferences.

Q All right. Just quickly relate those three conferences for us.

A One, I believe, was at Jackson Lake Lodge, and it was a skit performance --

Q We'll get into the details in a minute. What was the second?

A The second one, I believe, was either at Park City or at Vail, Colorado.

Q And the third?

A The third one, I believe, was in Sun Valley, Idaho.

Q All right. And were you asked to speak at these conferences by a superintendent?

[223] A Yes, I was.

Q Let's go to -- Was one a Utah unit meeting?

A One was in a Utah meeting, I believe that was in Park City.

Q Was that -- Who did that involve?

A I was directed by superintendent --

Q I'm sorry, who was the audience involved in that?

A The claims personnel in the Utah division.

Q And were you asked to speak at that?

A I was directed to speak at it.

Q And by whom?

A Bill Brown.

Q And what was the topic you were asked to speak on?

A How to minimize high settlement value, how to minimize policy limits, how to --

Q What do you mean, policy limits? You can't change policy limits.

A Yeah, how to avoid policy limit settlements, as well as how to avoid excess judgment in negotiating with attorneys, particularly.

Q Okay. Did you ever speak on the area of how to reduce pendings?

A Yes, I did.

[224] Q I want to address your attention to that topic. How did you teach the various people, the claims personnel that you were teaching during these conferences, regarding how to reduce pendings?

MR. SCHULTZ: Can we have foundation, what conference he's talking about?

Q (BY MR. HUMPHERYS) Which conference was this? Was this the Utah conference, or one of the others?

A I believe it was the Vail, Colorado conference. And the instructions were to --

MR. SCHULTZ: When was this?

Q (BY MR. HUMPHERYS) Hold on just a minute, do you know the approximate time period?

A I can't recall exactly the time.

Q Would it have been prior to 1982?

A Oh, my, yes.

Q Okay. And now, pendings, so that the jury understands what that is, what is a pending?

A Every file that we receive, if we have it beyond thirty days, we have to do that combined liability report, and then report every month on the progress of the settlement of the file. And we were constantly under pressure, "Get those files settled. Get them within the thirty-day period and you can [225] classify it as a first contact settlement."

So first contact settlements were pushed. Irrespective of what was offered, or what was in the exposure, the emphasis was, get the files settled to avoid the prolongation of the exposure, and to avoid a higher settlement value. Because the longer that it drug on, the higher were the values of settlement. And so the pressure was constantly, "Unload your files, keep pendings down."

Q What did you teach in this session regarding one of the ways to keep pendings down?

A To approach the individual on a first contact settlement, and obtain a release, often with the promise that if there's anything additional, we'll reopen the file and handle it accordingly. Or, you may go against your own carrier and then they can come back to State Farm for repayment.

Q Did you teach anything about using deceptive practices?

A Yes.

Q In what way, and how did you teach that?

A Under the direction of superintendent Brown, his suggestion was to prepare a memo, a phony memo. When we would get a memo identifying, "You have such an amount of authority on this file for settlement," rather [226] than disclosing that amount, prepare another memo, as if from the superintendent, and show, say, instead of $10,000, you've got $5,000 authority.

And of course, the psychological result was, "Is that all they're going to offer me?"

"Well, if that's all, I may be able to get more for you."

And so those dummy memos were for the purpose of inducing an individual to prematurely sign a release and negate their claim for compensation.

Q All right. Now, in first contact settlements, you mentioned that you also addressed that in one of the claim conferences.

A Yes, sir.

Q All right, sir. Explain to the jury whether you found, in your experience, that you could settle a claim for far less if there was no attorney involvement in the case?

A That was the sum total and purpose of our first contact settlements. Avoid the possibility of the claimant, or the insured going to an attorney, fully being aware that the settlement value suddenly mushrooms and becomes much higher. And therefore a greater cost and expense to State Farm.

Q Did you use sometimes the word "control [227] claimants" in your expressions?

MR. SCHULTZ: Objection, leading.

THE COURT: Overruled.

THE WITNESS: Would you state that again, please?

Q (BY MR. HUMPHERYS) Did you, from time to time, while at State Farm, use the word "control claimants"?

A Yes.

Q What did you mean by that, when you expressed that?

A The controlling of the claimant would be to piecemeal the settlements, perhaps with an expense advance, and thereby keep them vaguely satisfied, without going a full gamut of settlement, while they were still under a physician's care, but controlling the file to keep it out of the hands of counsel, out of the hands of an attorney.

Q Was it your experience that people typically were ignorant, without legal representation, regarding what values their claim might have?

A Oh, yes. And we played upon that ignorance in our settlements.

Q Was there much pressure on you regarding reducing average paid claims?

[228] MR. SCHULTZ: Your Honor, I object, it's leading.

THE COURT: Sustained.

Q (BY MR. HUMPHERYS) Did you have any involvement regarding, any involvement with anyone at State Farm regarding average paid claims?

A Yes.

Q And would you explain to the jury what type of involvement you had, or how that played in your work as an adjuster?

A Each year we had a performance evaluation to see if we were up to standard in the company's eye, and thereby worthy of maybe a pay increase, so we had these performance reviews. And in those reviews they would categorize every claim type that we had, the number of pendings under bodily injury, under property damage, under those that were with files with attorneys, those that were under PIP files, or personal injury protection.

And if you had a certain number in those, as compared to last year's ratios, you had to set a goal and say, "Okay, I will cut those down."

And then the supervisor would say, "You get it down 20 percent, as a goal."

Well, those were often unrealistic, trying as [229] we were, because claim frequency and severity was constantly increasing. And so it was always a matter of pressure to perform, and perform basically as to the dictates of the company, rather than propriety of the insureds and the claimants involved.

Q How did this influence you, as you were trying to settle claims?

A I felt great anxiety of doing it as fast as I could to please my superintendent.

Q Did it result in paying fair value?

A No. The majority of the instances, it was taking a token payment, and maybe offering nothing more than their accumulated bills, and then psychologically, as was suggested to us in our unit meetings, offer them a little bit more to get their mind off of their injury, and say, "If I give you a little extra will you take your wife and have a night out and go to dinner?"

Q A little bit more than what?

A More than what their actual bills, or what they were entitled to.

Q By "medical bills," you mean?

A Medical bills or out-of-pocket expense, such as over-the-counter medications, or travel to and from a doctor.

Q Would that include general damages?

[230] A No. Never.

Q Would you disclose that to claimants?

A Never.

Q Were you instructed regarding that?

A Instructed never to offer general damages.

Q Now, Mr. Summers, would you just typically, and as quickly as you can, explain how you would typically go about settling for the medical bills. Just describe a typical setting.

A A typical setting would be, as we would sit down with a claimant or an insured, and go through all of the itemization of their bills, and then the itemization show a total. Very often it was even suggested, show an error, mistake, over the amount that was being stated.

And have them look at the itemization and add it up. "No, you've made an error, there."

"Well, fine, let's correct that error."

With that kind of a negotiation, "If I then give you some additional, even though you're still under a physician's care, I'll give you another hundred or $150, so that that'll be a future contingency for you to go and have that treatment and care. Is that acceptable to you?"

Well, what could they say, with their own [231] itemizations and their own billings, and I had already offered to them a little extra for travel to and from the doctor, or travel associated with their loss of use, or loss of their vehicle, so that they could have even a rental vehicle.

And we were not authorized to give rental vehicles, we had to hide it some way, unless we had authority to out-and-outright give that. And so with those items, as we then would submit to a person, "Are these acceptable to you?"

Well, what is acceptable? The itemization, or the settlement? If they said, "Well, that looks to be right," then, "Fine, I'll give you this extra amount and you can go ahead and execute this release. And if there are future problems your carrier can come back to State Farm and recover for what they pay in your behalf, or if it's something of a different nature, State Farm can reopen the file and protect your interests."

Q All right, now, Mr. Summers --

MR. SCHULTZ: Your Honor, could we have a name of the person who told him to do that?

Q (BY MR. HUMPHERYS) Do you recall any names of people where you followed this procedure?

A Bill Brown, Tom McGlinn, Bob Noxon, each in succession, the same practices were involved.

[232] Q All right, now, have you ever seen Article 12 of the divisional Claims Superintendent's Manual?

A No, sir, I have not.

Q Have you ever reviewed the Claims Superintendent's Manual?

A No, I've never seen one.

Q We'll look at that another day with the jury. Did you find that by following this process you were able to settle many claims for the actual medical expenses and very little more?

A And ofttimes less than what their expenses ultimately came to.

Q And so the answer was yes?

A Yes.

Q All right. Now, just a couple of little followup questions. Let me just, before I ask my concluding questions, why was this kind of settlement unfair, in your opinion?

A Number one, it deprived the policy holder from the benefits that he had paid a premium for. Number two, it deprived claimants from that which they would otherwise be entitled to, because of the kinds of losses that they had sustained.

Q You mean additional losses?

A Additional losses. Very rarely was there [233] ever any consideration for, quote, pain and suffering. In fact, we were not ever to identify that an allowance was given for pain and suffering.

Q All right. And yet that would be allowed under the law?

A Definitely so.

Q And that would be something covered by the insurance?

A That is right.

Q All right, now, Mr. Summers, were there many people that you dealt with as an adjuster in settling your claims, where you paid less, in your opinion, than fair value?

A In the majority of the instances.

Q Were there some that you did not deceive or take advantage of as you've described?

A Yes, because I felt guilt in the respect of denying them benefits that they were entitled to, and which I knew was fraudulent misrepresentation, depriving them of that which they were entitled to.

MR. SCHULTZ: Object, move to strike the legal conclusion, Your Honor.

MR. HUMPHERYS: I don't think he's making a conclusion.

Q (BY MR. HUMPHERYS) Were you trying to use [234] the word "fraudulently" from a legal standpoint, Mr. Summers?

A No, just in a moral situation.

MR. SCHULTZ: I still object.

THE COURT: Overruled.

Q (BY MR. HUMPHERYS) Are there many people who you deceived, as you've described, who, even today, don't know that they were deceived and defrauded, using your term?

A Yes.

* * *

[235] * * *

(The jury left the courtroom)

* * *

MR. HUMPHERYS: Your Honor, we'd like to make [236] a proffer, if we could, regarding the bench conference?

I would like to make a proffer of what Mr. Summers would have testified to regarding the Mashoeshoe case. At the time he sought authority to pay the claims, I understand that he would testify that Bill Brown said to deny the claims and, "We don't want any more of those Niggers from Africa to make claims against our policy."

And we felt that such was very important, particularly due to the fact that when, in a case where punitive damages are being involved, it is for the purpose of punishing the defendant for actions that are inappropriate, which are wrong, and which should be punishable under the law.

And the fact that the N-word has been used by State Farm in depicting their bias and prejudice in denying a claim is one of the very things that we are advancing as an unfair claims practice of State Farm, at least at that point in time.

And it also demonstrates how State Farm uses predatory practices on people, foreigners, and their bias against those, and their willingness to take advantage of them, even through their expression of rather inflammatory words. And it is something the jury should hear for the purpose of punitive damages.

[237] THE COURT: Mr. Schultz, do you want to make your record?

MR. SCHULTZ: Your Honor, we objected, mainly on the basis of Rule 403, that any probative value of that evidence, alleged evidence, I should say, is far outweighed by the substantial prejudice.

We also objected, in that same regard, on this ground. There's one instance identified of that in Mr. Summers' testimony. It certainly is not a basis for suggesting some kind of pattern, practice, or habit, and to allow that one instance to be testified to would be just too prejudicial and will outweigh substantially any probative value of the evidence.

And in addition to that, Your Honor, it is absolutely not, in any way, shape, or form, substantially similar to the facts of this accident. There's nothing involved with race or ethnic persons or anything like that in the Campbell claim, and it's an attempt to inject and inflame the jury unfairly.

THE COURT: Do I understand that you would proffer Mr. Brown would deny ever making the statement?

MR. SCHULTZ: Well I didn't even see it until today, Your Honor, so I can't tell you.

THE COURT: I thought I understood you to say that.

[238] MR. SCHULTZ: I haven't asked Mr. Brown, so I can't proffer that, but I'll check on it.

THE COURT: The reason that I excluded it was under Rule 403. I believe that the prejudicial effect will far outweigh the probative value. I don't believe that racial discrimination plays any role in the underlying facts or the basis of this bad faith case.

And though I've certainly allowed evidence to come before the jury that would not be identical to the nature of the claims, because I've ruled on the relevance and the probative value of pattern and practice evidence, which have been produced, in the court's view, because of the absence of issues of discrimination and because of the highly inflammatory nature of the use of the term that was a content of that, and the fact that it is, I have not seen another reference to that term, or any other evidence brought before me of racial discrimination.

I believed that it was more prejudicial than probative, and I did allow a foundation to be laid, and evidence to be adduced, and placed in the record, which did have the probative value of establishing some willingness on the part of State Farm to take advantage of disadvantaged groups. That's come in consistently.

And I felt like the way in which it was [239] placed in the record, as limited by the court's instruction and ruling, fairly presented that issue, without allowing what the court believed to be prejudicial reference that I could not see allowing in, in light of its prejudicial effect.

Anything else we need to take up? I would like a report on where we are in terms of getting this case concluded. How much longer do you think you'll be before you'll be finished with your case in chief?

MR. HUMPHERYS: The plaintiffs have, I think, at this juncture, eliminated three witnesses.

THE COURT: Tell me who you're thinking of.

MR. HUMPHERYS: Dr. Hurst is one. I think we've fairly well decided now that Calvin Thur will not be called, and Clark Davis will not be called. We have an item regarding Steven Prater which could shorten his time.

Steven Prater was called, not only to address some of the aspects of the pattern and practice that Mr. Fye did not address, but he was also, he has also been requested to address the evidence presented by State Farm regarding the commissioners of insurance who they have designated, who they intend to elicit testimony that, based on their knowledge and complaints made to commissioners, that State Farm is not any worse [240] than any other company, or any better. I'm not sure how to phrase it. And that they don't believe that there's a significant pattern and practice.

It appears to us that Mr. Prater's testimony regarding the commissioners --

MR. SCHULTZ: Your Honor, could we ask Mr. Summers to leave the courtroom?

THE COURT: That's probably appropriate, Mr. Summers. We're discussing some of the contents of the case, and we would ask you if you wouldn't mind leaving.

MR. HUMPHERYS: Mr. Prater will be addressing, actually, the rebuttal of this evidence. Now, it would appear appropriate for Mr. Prater to address this on rebuttal, since it is evidence that's being adduced, or presented by the defendant, and it's not something we're presenting.

And I'm not sure how State Farm feels about it, but we need to have a clear understanding that it is our position that that's rebuttal, because if we had him talk about it in our case in chief, he first has to say, "Well, State Farm claims this, and their witnesses say that, and my response is this."

And so in essence, what we're doing is presenting their testimony and then refuting it. And [241] and it would appear the appropriate way to deal with it is put him on in rebuttal after their witnesses have testified.

And that would shorten his time. So we're probably looking at Thursday to wrap up our case, if that is the scenario. If, for some reason, we have to present the commissioner evidence through Mr. Prater, we think we would go into Friday.

MR. CHRISTENSEN: Let me add something to that on the same vein. I understand the court's current ruling on our evidence of other cases, and so forth, that we were limited on that list of cases to use those for cross and rebuttal, and that's Mr. Prater's area, too. So we'd have to have him come back, anyway, for that.

* * *

[245] MR. BELNAP: I'd also like to say, Your Honor, that on this situation with Mr. Prater, on whether he should be allowed to come back in rebuttal, I realize that Mr. Hanni has some thoughts on this, and I don't want to preempt him, but I can state to the court that his feeling is that that's not proper rebuttal.

And this is an area, as I understand the law, and we could provide a brief to you, if you would like, Your Honor, that if the plaintiff knows that there are certain claims being made, that either they need to affirmatively prove in their case, or they know that there's a defense being made, and they're aware of it, they can't skirt past that and bring it in on rebuttal, having had that knowledge.

And Mr. Prater has read all the depositions of the regulators, he's gone out and allegedly done his own research to rebut the deposition testimony from the regulators, and they ought to just put that on in their case, is our position. And if you want a brief on that, there's some case law on that subject.

THE COURT: Why don't you submit me a short memorandum on that. If it's going to be contested, I'll hear what you have to say, and it's helpful in writing.

MR. CHRISTENSEN: Let me just respond briefly. First of all, we've got concern, they've [246] changed their testimonies. Accordingly, secondly, they've obtained an order saying we can only use some evidence on rebuttal. Now they're saying we don't get any rebuttal.

You can't have it both ways. I don't know how he can respond to testimony until they've presented it. We are, Your Honor, which is going to save a tremendous amount of time, going to respond to four witnesses that they've called with one. The four regulators. I don't see any way that that's workable. And not only that, I suppose we could brief it, but I'm sure it's discretionary. I'm sure when we look at the cases, that's what we're going to find.

THE COURT: Well, again, any time anybody invites me, to encourage them to give me something in writing, I'm going to take them up on it, and I'll do my best to review it. But I'll reserve ruling on that.

* * *

[247] * * *

MR. HUMPHERYS: There is one other item on the bench conference, and that was the exhibit that we proffered and they objected to, the summary.

THE COURT: This was the summary of the depositions?

MR. HUMPHERYS: Yes, let me see -- It's Exhibit 129. We wanted to offer that to shorten the testimony so he didn't have to go through so much of the facts of the cases, and his opinions regarding unfair claims practices.

We've done it orally, and we've put up on the screen some of it, but the record doesn't reflect the scores or hundreds of cases that supported each of the items. And so we had made an

offer of that exhibit to support our claim that the wrongful actions were widespread, at least in Logan area, and had been done by Mr. Summers, which is very difficult to do, given our time restraints, to talk about how many cases.

THE COURT: I, as I expressed in the bench [248] conference, I'm troubled by admitting a summary of deposition testimony, and entering it into evidence so it can be taken in the jury room.

I'd invite you, again, if there's any authority that you can point to that that's an appropriate way in which to get deposition testimony placed into evidence, other than in normal form, in which it's only read to the jury, and not taken in as an exhibit, then I'd invite you to do that.

I know you'll -- Again, I'm inviting something in writing that would address that, because my instincts on it are that it's not the sort of thing that would be normally permissible. But again, I'm open to some suggestion that I'm incorrect in that.

MR. HUMPHERYS: Maybe the problem we have, Your Honor, is talking about the fact that this is a summary of deposition. In reality, it's a summary of his testimony, as opposed to it, even though it's worded as a summary of his deposition. It's a compilation of his points which he has raised as unfair claims practices, and then it's simply a list of cases which he found which supports each of those items.

And so maybe we've misnamed it.

THE COURT: Well, whatever it means, give me anything you have that can support that.

[249] MR. HUMPHERYS: Well, for example, defendants intend to put before the court as part of their evidence with the insurance commissioners their lists of complaints and their summaries of cases which have resulted in complaints or verified complaints or non-verified complaints and so forth.

It seems to me, I see all of the time exhibits being presented which spells out in more detail their testimony. For example, all

of the PP&Rs are examples of Mr. Fye's conclusion of wrongful conduct, and we are presenting these, as opposed to having him testify as to each one.

This isn't intended to take a deposition of somebody, summarize it, and then put it into evidence. It's intended to simply list the number of cases that he has commented about and has information about.

THE COURT: Well, I guess basically I'm not inclined to rule today, because I have some discomfort, and when I have that sort of of agitation I defer it. So I will hear further argument from both sides.

If you want to give me something in writing, or anything that you want to suggest that that's a proper form to present evidence, I'll listen to it. But I'll hear you orally again after we've gone further, and if anything comes in from the other side that's [250] analogous to it and I can be persuaded that, well then that would obviously strengthen your position. I see some distinction in some of the other exhibits that we've had presented. But again, I don't want to -- I'm just not of a mind to make a decision on it right now.

MR. HUMPHERYS: All right.

* * *

[Vol. 13, R. 10268, commencing at p. 4]

V. RAY SUMMERS the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

CROSS EXAMINATION BY MR. SCHULTZ:

Q Mr. Summers, I believe you testified on Friday that you began working at State Farm in 1963; is that correct?

A That is correct.

Q And that you worked there until May of 1982?

A Yes, sir.

Q And in May of 1982 you were terminated, or forced to take an early retirement, correct?

A That is correct.

Q How old were you, Mr. Summers, when you began working for State Farm?

A I don't rightly recall.

Q Well, you're seventy now?

A It's easier to go forward than it is to go [5] backward.

Q Are you seventy years old now?

A I am seventy years of age now.

Q So you must have been, what, about thirty-seven or thirty-eight?

A Thirty-seven, thirty-eight, in that area.

Q Did you consider yourself to be a responsible adult at that time, sir?

A With six children, yes.

Q Okay. Did you consider yourself a person who knew how to understand the difference between what was true and what wasn't true?

A Yes, you bet.

Q And you've testified here that you had a high sense of propriety?

A I do.

Q And you did then also?

A I did.

Q And you had that throughout the nineteen years that you worked for State Farm?

A I did.

Q And is it your testimony, Mr. Summers, that throughout that entire nineteen-year period, you knowingly committed dishonest acts as a claim representative for State Farm?

[6] A I did, in concert with instructions given.

Q So your testimony here under oath, Mr. Summers, is that you're a dishonest man.

A In that context, it would have been, yes. In multiple instances.

Q Now, I want to get into a little bit of information, here, Mr. Summers, that goes to just some of the timing involved with your employment. In May of 1982, is when you were terminated, right?

A When I took retirement.

Q And you've asserted in various court cases that you were wrongfully terminated, haven't you?

A Yes, I felt I was.

Q All right. Now, in about June of 1982, a month or so after your termination, you filed with the federal government a claim, or a charge, against State Farm of discrimination; is that correct?

A Yes, sir, I did.

Q And then you charged that you were discriminated on the basis of your religion and your age, in substance; isn't that true?

A That is correct.

Q Okay. Now, in about April of 1983, you filed a lawsuit in the United States Federal Court against State Farm and several individuals, correct?

[7] A Yes, sir.

Q And that was here in Salt Lake, correct?

A Yes, sir.

* * *

Q Now, Mr. Summers, that case then proceeded through the courts, did it not?

A Yes, it did.

Q And you had an opportunity to present your position regarding your claims in the way of many days of depositions; is that right?

A Many, many days of depositions.

Q Okay. Now, do you recall, Mr. Summers, that in 1984, all of the claims that were filed against [8] Mr. Noxon individually, Mr. McGlinn individually, and Mr. Brown individually, were all dismissed by the federal district judge?

A As far as the charge of age and religious discrimination.

Q Well, weren't all claims against them dismissed, Mr. Summers? They were dismissed as defendants from this lawsuit in 1984.

A Yes, that's correct.

Q Okay. And most of the claims against State Farm as a company were dismissed at that time also, but there was one that was not, correct?

A I don't recall.

Q Okay, well we'll look at that, then.

A In any event, in about '84.

Q And just to get this all in context, Mr. Summers, in late 1986, in December of 1986, the federal district judge dismissed all claims that were remaining in your case; is that true?

A As to my knowledge, yes.

Q And you didn't ever have a trial, did you?

A No.

Q The case was dismissed without getting into, in front of a jury, right?

A That's correct.

[12] * * *

Q Okay, thank you. And you're aware, are you not, Mr. Summers, that the United States Tenth Circuit Court of Appeals decided that appeal, and affirmed the decision to dismiss your case?

A That is correct.

Q Okay. And they decided that as of December 30, 1988, correct?

A I presume. I don't know for certain.

Q All right. Now, Mr. Summers, I want to show you -- Do you have a copy of the Tenth Circuit's opinion in this case in front of you, sir?

A Yes, I do.

[13] * * *

MR. HUMPHERYS: Counsel, are you going to be putting on the screen the legal opinion?

MR. SCHULTZ: Some parts of it, yes.

MR. HUMPHERYS: Your Honor, we would object because it goes into a lot of legal theories and situations which are totally outside of the issues in this case.

We have no problem if he wants to ask Mr. Summers about some of the findings, but it goes into areas completely unrelated to this case.

MR. SCHULTZ: I'm not going to use it for the purpose of legal theories or espousals of the court, necessarily, of legal theories. But there is a long statement of facts, here, Your Honor, that goes into the factual matters. And I think it would help the witness to refresh his memory and to get us moved into where we [14] need to be. And that's the purpose for using it.

THE COURT: Overruled, I'll allow it.

Q (BY MR. SCHULTZ) Now, Mr. Summers, let me direct your attention to page 702 of this opinion. And just to refresh your recollection, what we talked about a minute ago -- Have you got that there, page 702?

A Yes.

Q Okay. Let me reference, here, this paragraph that starts out, "In 1984, a district court granted summary judgment in favor of all individual defendants on all claims." Do you see that?

A That is correct.

Q So that confirms what I asked you about over here, that in 1984 those were all dismissed.

A Yes.

Q Okay. Now, if we go down to this paragraph, right here, that starts out, "The facts in this case." Do you see that, Mr. Summers?

A Yes.

Q Okay. That says, "The facts in this case, all of which were before the district court when hearing was held on State Farm's second motion for summary judgment, are not seriously disputed.

"Summers began working for State Farm in 1963." That's correct, isn't it?

[15] A Yes, sir.

Q "Initially working for one year in State Farm's office at Ogden, Utah." That's correct?

A Yes, sir.

Q "In 1964, he was transferred to State Farm's office in Logan, Utah, where he continued to work until his discharge in 1982." That's all correct, also?

A That is correct.

Q Okay. "Summers' basic duties were to settle claims made against State Farm, which included an investigation of the facts giving rise to a claim, a review of the policy provisions concerning coverage, a determination and verification of damages claimed, and the issuance of a draft in exchange for a release." That's true, correct?

A That is correct.

Q "Summers was encouraged by State Farm to adjust claims quickly, but was also told of the importance of, quote, covering the file, close quote, or ensuring that all sums paid by State Farm were backed up by documentation."

Now, is that true, that State Farm wanted all claims, or all sums paid by State Farm to be backed up by documentation?

A In theory, yes.

[16] Q Okay. Now, we go on and it says, "From 1963 to July, 1980, Summers' employment record with State Farm was satisfactory. However, in July, 1980, it was discovered that Summers had forged the signature of a representative of Monsanto Chemical Company to document a loss of wages claim made by one of Monsanto's employees. Summers did not dispute the falsification, and was warned that another such falsification could result in dismissal." That's true, isn't it, Mr. Summers?

A It is true to the extent that, yes, I did forge the name on a document for the loss of income.

Q Thank you. Now, we go down, here, and -- Are you denying, sir, that you were warned not to do that again?

A I'm denying that the circumstance of the involvement was a flagrant misrepresentation.

Q Well, let me ask you this. Are you denying -- You're not denying that you forged the signature of a representative of Monsanto Chemical Company.

Are you denying what the court said, here, "Summers did not dispute the falsification and was warned that another such falsification could result in dismissal." Do you deny that you were warned against [17] falsifying documents after that incident?

A I was, by superintendent McGlinn.

Q Thank you. Okay, now we go on a little further, here, "In September, 1981," now, that is about the same time as the Campbell case lawsuit was filed; is that true, Mr. Summers?

A That is correct.

Q "In September, 1981, State Farm discovered evidence regarding a 1977 incident where Summers had falsified various medical and pharmacy bills for medical services and drugs which State Farm's insured supposedly had received, though, in fact, she had not." Now, Mr. Summers, who was that person?

A As I recall, it was a Mrs. Gittens, a claimant who was involved in an accident, where the insured was at fault and negligent. My first instructions on the submission of my reports

were to deny liability, and to impute negligence to the claimant by making a wide turn.

Q Mr. Summers, I think you've answered my question. Now, the claimant involved in this was a Mrs. Gittens?

A As I recall, yes.

Q Now, as I recall, one of the files that you listed in your list of improper claims handling examples [18] on Friday was the Gittens case, wasn't it?

A I believe so, yes.

Q Okay. Now, isn't it a fact, Mr. Summers, that that, what happened in the Gittens case, as it says, here, that was a 1977 incident discovered by State Farm in September of '81, correct?

A That is correct.

Q And isn't it true, Mr. Summers, that Wendell Bennett found out about this claim by Mrs. Gittens, that medical bills and pharmacy bills had been prepared improperly by you, that Wendell Bennett found out about that in September of 1981 while he was taking Mrs. Gittens' deposition in a lawsuit that she had filed; isn't that true?

A That is true.

Q And what you had done, Mr. Summers, was -- correct me if I'm wrong, here -- but as I understand it, what had happened was, you had made a settlement with Mrs. Gittens, and she had indicated something to the effect that she thought she was going to have to have some additional medical care, and so you had paid her for some additional medical expenses at the time of the settlement, and then she didn't get that medical care, correct?

A To my knowledge and recall, the original [19] settlement was extended on the basis that she -- I knew she was still under treatment and care. I was advised to take a release and render the payment, and as customarily was done, to reassure the claimant that if there were problems, that the file could be reopened or she could go against her own carrier.

She advised me that she did not have insurance, that her insurance had lapsed. I so reported that information to my superintendent, and he said, "Nevertheless, handle the file and obtain the release." I did.

Q Okay. And it was after that time, though, Mr. Summers, part of the money -- Or at that time part of the money you paid her for that release was some money for some anticipated future medical bills; isn't that true?

A The money that was extended was an inducement to obtain the release.

Q Mr. Summers, would you answer my question? Was part of the money you paid her for some anticipated future medical expenses?

A As I reported in my report to the superintendent.

Q Does that mean yes?

A That means yes, there was an allowance.

[20] Q Now, you found out later that she had never incurred those additional medical bills; true or false?

A I don't recall that. I knew that she was still under a physician's care, and that she was still having problems.

Q Mr. Summers, let's read this again, okay? "In September, 1981, State Farm discovered evidence regarding a 1977 incident where Summers had falsified various medical and pharmacy bills for medical services and drugs which State Farm's insured supposedly had received, though, in fact, she had not."

Now, that is a true statement of what happened, isn't it? You falsified, you made up medical bills and pharmacy bills to put in the file to show that she had received those services, when she really hadn't. You did that, didn't you, Mr. Summers?

A I don't know that she had not received service. She was still receiving treatment and care. There were three times that the woman approached and asked for additional consideration, three different releases were obtained.

Q So, Mr. Summers, are you denying that you falsified medical records of Mrs. Gittens and pharmacy, medical bills and pharmacy bills? Are you denying that, sir?

[21] A No, I'm not. I'm saying that it had transpired over three separate instances of obtaining independent releases. Even after I was instructed to have the claimant obtain an independent medical evaluation to affirm the validity of her injuries. That referral was made to a Dr. Swindler in Ogden. Dr. Swindler concurred with the fact that the woman was injured and she needed medical care.

I was told not to consider that report, and not to include it in the file in my handling of additional benefits for Mrs. Gittens.

Q Let's get this squared away, Mr. Summers. That's the brief that your lawyer filed on your behalf in the Tenth Circuit Court of Appeals that I just showed you a minute ago, correct?

A Yes, that is correct.

Q Do you see up here there's a part of this brief that starts out, "Statement of facts"?

A That's correct.

Q Do you see that? Look at page 5, would you please?

A I am.

Q I want you to start reading at the bottom of the, or the last paragraph on that page, and please read the statement of facts as set forth by your lawyer.

[22] A "On May 19th, 1982, Summers was terminated by State Farm. His termination was preceded by a company-initiated leave of absence without pay from September 21st, 19 -- 25th, 1981, through October 8th, 1981. He returned from the leave of absence and worked on a probationary status until his termination.

"Summers was given a leave without pay and put on probation because he was found to have falsified some medical billings in a claim known as the Gittens case."

Q Keep going.

A "Summers explained to company officials that the claimant had seen her doctor, who found no serious injuries at the time, but advised claimant to return for X-rays and medication if she did not feel better.

"To achieve an early settlement Summers called the doctor's office to verify the information he had received from the claimant, and then wrote the claimant a draft to pay for automobile salvage and for what Summers estimated would be the cost of X-rays and medication if incurred in the future.

"As it turned out, the claimant did not incur additional expense, so Summers made up bills for the file. The bills amounted to less than $200."

Q Thank you. So you did make up the bills, [23] didn't you, Mr. Summers?

A There were other instances, as well, in following circumstances when there were bills.

Q You did make up the bills in the Gittens case, just like the court said?

A On that $200 allowance, that is correct.

Q Now, let's go back here, again, Mr. Summers. After State Farm found out about the Gittens matter --

A Where are you referring, now?

Q "Again." Do you see that? On page 702?

A "As a result of September '81"; is that correct?

Q No, the sentence above that. "Again Summers was advised that he should not falsify company records, and was warned that future falsifications would result in discharge.

"As a result of the September, 1981 discovery, State Farm examined approximately ninety randomly selected files involving claims Summers had handled for State Farm, and concluded that seven or eight of these were suspicious."

Now, you recall that a sampling of your files was reviewed at that time, correct?

A Yes, I do.

Q Okay. "Again Summers was confronted with [24] these additional suspected falsifications, and warned that he should never again falsify company records.

"Notwithstanding his admission that he had falsified some records, Summers was not fired, but was placed on probationary status for two weeks without pay. In opting for probationary status as opposed to discharge, State Farm officials indicated they were influenced by the fact that Summers did not personally profit from any of these falsifications."

That's correct, isn't it, what I just read?

A That is correct.

Q On October 8, 1981 Summers returned to work from his probationary status and was again warned about the consequence of any future falsifications of State Farm records. Summers continued to work for State Farm until he was discharged on May 19th, 1982."

Now, Mr. Summers, I want to go back just for a minute to the Gittens case, as indicated, there, that falsification of those medical bills was discovered in September of 1981, while Wendell Bennett was taking the deposition of Mrs. Gittens, right?

A That is right.

Q And isn't it a fact, Mr. Summers, that Mr. Bennett called you at your office after that deposition, and specifically asked you, "What is going [25] on on this file, Ray?"

A I don't think that he called me at the office. I believe I was already there at the deposition, and I think it was in the offices of Hillyard, Low and Anderson in Logan.

Q Okay, well he asked you after the deposition about Mrs. Gittens' claim that, "I never incurred these medical bills," didn't he?

A No, it was during her deposition, he had a brief respite and asked me, several and separate from the presence of Mrs. Gittens and her attorney, and asked, what was the situation?

Q Okay.

A I explained to him that these were issued in anticipation of her treatment and care, and that there had been subsequent instances where there was additional allowance, and the obtaining of three separate releases above and beyond my recommendation that the file should be reopened and handled on its merits instead of imputing comparative negligence to Mrs. Gittens.

Q Okay, Mr. Summers. Now, you're aware, are you not, that after that deposition, Mr. Bennett notified Mr. Noxon immediately that evidence had been discovered in the deposition of falsifying of records by you? You're aware of that, aren't you?

[26] A That is correct.

Q And you're aware also, are you not, Mr. Summers, that Mr. Noxon immediately notified Mr. Bill Brown that there was evidence that you had falsified records.

A That is right.

Q Okay. And this all happened at the same time, approximately, Mr. Summers, that you have testified you went down to Mr. Bennett and told him that you'd been required to change, or falsify documents in the Campbell case.

A I don't recall the time element, but it was a several and separate circumstance.

Q Mr. Summers, what I'm asking you is, this happened at approximately September, 1981, was approximately the same time that you have testified you took a file down to Mr., you took the Campbell file down to Mr. Bennett, and disclosed to him that you had been told to change, or falsify parts of that file; isn't that correct?

A That happened, to my knowledge and recall, prior to the involvement of the Gittens situation.

Q But at approximately the same time frame, August, September of 1981.

A Prior to, yes.

[27] Q Okay. And it's your testimony that Mr. Bennett never did a thing about that information that you gave him as far as the fact that you said to him you had been required to change documents in the Campbell case.

A No, that's not the case.

Q Isn't it your testimony that Mr. Bennett did not disclose that information that you gave him to anyone else?

A I can't say that, because I don't know what his communications were. But he was aware, as was Paul Belnap, in the same office.

Q Okay, Mr. Summers, let's continue on with this Tenth Circuit court decision. We're right down at the bottom of the page, now.

It says, "Summers continued to work for State Farm until he was discharged on May 19th, 1981. State Farm officials conceded that Summers was not fired because of his falsification of records, but because of his poor attitude, inability to get along with fellow employees and customers, and similar problems in dealing with the public and co-workers."

And as a matter of fact, Mr. Summers, State Farm never claimed that they fired you because of any objections you raised regarding how the Campbell case [28] was handled. They never alleged that in this Tenth Circuit case, did they?

A No, I don't think there was ever any mention, as far as the Campbell case, as far as the Tenth Circuit decision was concerned.

Q Okay. Now, let's go on, here. "In early 1986, nearly four years after Summers' discharge, State Farm, when preparing for trial, made a thorough examination of records prepared by Summers, and discovered over 150 instances where Summers had falsified records, with eighteen of those falsifications occurring after Summers returned to work from his probationary status. Summers, in his depositions, did not deny these falsifications."

That's a correct statement, isn't it?

A It is correct in the extent that, with the Gittens file, and I believe it was prior to the awareness of the forthcoming problem with the Campbell file --

Q Mr. Summers --

A I sent a memo --

Q Mr. Summers, is it true that during 1986, four years after you were discharged, State Farm discovered 150 instances where you had falsified records, that eighteen of them were after you returned [29] to work from probation, and is it true that you did not deny these falsifications in your deposition?

A That's correct. And I admitted that in those depositions from 1983, on through to 1986. And cited the practices that I was directed to.

Q Mr. Summers -- Mr. Summers, you've answered my question. I'd appreciate it if you would wait for the next one. Now, Mr. Summers, as part of this lawsuit, in 1986, after State Farm discovered these 150 other falsifications, your lawyers in that case asked the federal judge not to allow that to come into evidence in that case, didn't they?

A I'm not aware of that, no.

Q Well, let me show you a document -- Well, let me just read it to you. Right here, see that? "On April 24, 1986, counsel for Summers filed a motion in limine," which is just a big word for keeping evidence out, isn't it?

A Uh-huh.

Q You understand that, don't you, Mr. Summers?

A Yes, I do.

Q Okay. "Counsel for Summers filed a motion in limine seeking a pretrial ruling which would bar State Farm from using at trial the falsifications discovered in its 1986 investigation of Summers' files." Now, does [30] that refresh your recollection that your lawyers asked to keep that evidence out of the case, Mr. Summers?

A Apparently so. I did not recall that being the case.

Q Now, Mr. Summers, would you turn to page 704 of this decision? I want you to refer to right there. See where it says, "It was Summers' position"?

A Yes.

Q "It was Summers' position in the district court, as it is in this court, that since they were not discovered," "they" meaning the 150 falsifications, "since they were not discovered until 1986, these additional falsifications are irrelevant and inadmissible, and that, accordingly, the fact finder should not even know of them."

So it was your position in that case, was it not, Mr. Summers, that State Farm did not know about those 150 falsifications at the time --

MR. HUMPHERYS: Your Honor, we would object. This is misleading, and this mischaracterizes the evidence. The evidence was, "assuming." And I'm happy to have a bench bar, but this misrepresents what was going on.

MR. SCHULTZ: It does not misrepresent it at all, Your Honor.

[31] MR. HUMPHERYS: May we have a bench conference?

THE COURT: You may.

(Side bar conference held out of the hearing of the jury.)

Q (BY MR. SCHULTZ) Okay, Mr. Summers, let's go back to this again. There on the second column under Roman Numeral II, where it says, "It was Summers' position in the district court, as it is in this court, that since they were not discovered until 1986, these additional falsifications are irrelevant, and inadmissible, and that, accordingly, the fact finder should not even know of them." Did I read that correctly?

A Yes, you have.

Q That was your position in the Tenth Circuit, alleged on your behalf, correct?

A Yes, I would state so. However --

Q Okay.

A It was for the --

Q Mr. Summers.

THE COURT: Just a minute, let him finish.

MR. HUMPHERYS: That is unfair, he needs to be able to explain it, or it gets to that very issue we raised in the bench conference.

[32] THE COURT: Complete your answer, Mr. Summers.

THE WITNESS: It was for the fact that they were aware of more than 150 files I had cited in my depositions of impropriety, of falsification of information, of directives that were contrary to the public interest, in violation of State Farm's policy, really, but certainly to the deprivation of benefits to claimants, the deprivation of benefits to insureds.

And in those circumstances I did cite over 150 files of impropriety. And some of which, not all, but some of which did require the instrumentation of false documentation to justify the handling of the file, and the position that State Farm was taking relative to those claims.

Q (BY MR. SCHULTZ) And when it was in your best interest, Mr. Summers, in your own lawsuit against State Farm over here, to assert that State Farm did not know about those things, that was the position you took.

A I took the position that they did have an awareness of improprieties of files.

Q But you took --

A I had cited them in my depositions.

Q But you took the position, in front of the United States Tenth Circuit Court of Appeals, that State [33] Farm could not use as evidence against you 150 instances where you falsified documents, because you claimed that State Farm did not know about them at the time you were terminated. That's the position you took in your own case, isn't it?

A I do not know why the attorneys entered the limine. My position was and still is, they did have an awareness of it.

* * *

[45] * * *

Q Mr. Summers, your testimony last Friday was, with respect to the CLR document that you prepared on the Campbell case --

A Yes, sir.

Q And that stands for, again -- What does that stand for?

A A combined liability report.

Q Okay. And your testimony on Friday, as I recall it, was that a claim liability report is a lengthy report where you compile all of the information that you have up to that point in time; is that correct?

A That is correct.

Q And is it also your testimony that what you changed at the request of Mr. Brown was part of paragraph 5, and part of paragraph 16.

A Yes, that is correct.

Q Okay. And that report had been prepared, or had been typed through a word processing machine that State Farm had in its Murray, Utah office?

A Yes, that's correct.

Q You had, as I understand it, you had dictated the original report, and then you forward the tape down to Murray, and the tape is then typed up there; is that correct?

[46] A Yes, that's correct.

Q All right. And then, when you were told to change parts of paragraph 5 and of paragraph 16 -- And let's just revisit, real briefly, paragraph 5 was the part of the report that talked about the facts of the accident; is that correct?

A That is correct.

Q And paragraph 16 was the part of the report where you talked about your evaluation of the liability; is that correct?

A The section is entitled "Analysis of Liability."

Q Okay. Now, when you made those changes that you say you were required to make, Mr. Summers, did it require that the entire report be retyped?

A No.

Q So it just required the page or two that was affected by the changes to be retyped?

A To my knowledge, yes.

Q And is it your testimony that you made those changes by calling the Murray office, and telling one of the word processor operators over the phone what changes to make?

A I redictated what I had been advised to do.

Q Okay. And when those changes were made, what [47] did you receive back from the word processing people, Mr. Summers?

A The pages that were identified containing paragraph 5 and the pages identified as paragraph 16.

Q And you were able to just take those pages, or were you -- Let me ask you this. Were you able to take the pages that you say you got back from Murray, and just insert those into the place where they should be in the CLR, and take out the ones that had originally been there?

A I had already removed the pages from the report that I had received, and did insert the new pages received.

Q Okay. And other than those pages that you received that you say you had to change, the rest of the pages stayed the way they were originally.

A To my knowledge, yes.

* * *

[89] * * *

Q Okay. Now, Mr. Summers, last Friday you talked about a lot of things that you identified you [90] thought were improper claims practices. Do you recall that?

A Yes.

Q I want to talk to you for a minute about the Campbell case. Okay?

A Okay.

Q The Campbell case was defended on the basis of liability; isn't that correct?

A Liability exposure.

Q In other words, the position State Farm took was that Mr. Campbell was not negligent, and that was the reason the case was defended, correct?

A That's what they indicated in their claims committee review, and what was indicated to attorney Bennett, the basis for his representation.

Q Okay. Now, how much did State Farm offer to settle this case, Mr. Summers?

A To my knowledge, there was never an offer made.

Q No offer was made, was there?

A To my knowledge, no.

Q Now, you're aware in this case that it resulted in excess judgments against Mr. Campbell, aren't you?

A I became aware during a time of my deposition [91] to State Farm.

Q Okay. And you're aware also that State Farm has paid those excess judgments in full.

A No, I have no awareness of that.

Q Oh, nobody told you that, I take it?

A No, sir.

Q Okay. Well, I'll just tell you that those judgments have been paid in full with interest, all right?

A Uh-huh.

Q Now, Mr. Summers, I want to know if you can identify any cases on your list that you brought in here Friday that have every one of these elements in them. Defended on liability, no settlement offer made, excess judgments, excess judgments paid in full with interest. Can you name one of those cases that has every one of those elements in your file?

A Eliminating the last two --

Q No, I'm not eliminating any of them, Mr. Summers.

A Oh, all right.

Q Can you name me one case that has all four of those elements on your list?

A No, I don't recall there having been.

Q Okay. Regarding these different practices [92] that you've talked about that you felt were improper, Mr. Summers, is it true that you thought those were not in keeping with State Farm's policies and practices as you had been taught them over the years?

A Very definitely.

Q Okay. In fact, let me just show you something you said in your deposition back in 1983, I believe it was. And I'll just lay the foundation, here, for you, if you will accept my representation. This is page 416 of your deposition, and you had just talked about the Campbell case for the first time. Okay?

A Okay.

Q All right, and the question here, starting on line 4 that's put to you, is, "So what is so devastating here in your mind about your supervisor saying, 'Ray, we don't need to go all gung-ho on this particular accident, let's wait and see what happens'? Spell that out for me." Now, this is when you're being deposed in your case.

A Yes, sir.

Q All right. Now, read your answer, if you would, please, Mr. Summers, to that question.

A "That isn't the philosophy of State Farm. The philosophy of State Farm is that you cite in your investigation the facts of the involvement, do not [93] overplay, do not underplay them. If the facts are there, indicate them. If we've got an exposure, and redundantly, repetitively in all of our claims conferences, it was reinforced time and time again, and in claims schools, if we have an obligation of a legal liability situation, it is our intent to protect the policy holders, as it is our intent to protect the claimants, and pay them every penny that they are entitled to, and not a penny less and not a penny more.

"And, of course, that criteria of settlement comes in the analysis of liability, the evaluation of the exposure, the evaluation of the injuries, the evaluation of the damages that are resulting therefrom, and then set a reserve upon that until it is negotiated settlement or litigated through adjudication."

Q That's how you'd been taught, right?

A That is correct.

Q Now, let me go to page 420 of that same deposition, Mr. Summers. Start up there on line 3. And by the way, you started with State Farm in '63, and so you'd gotten these instructions over the years, moving up to '81 and '82, right?

A Yes, that's correct.

Q Now, on line 3, the question is, "Who is the source of this State Farm philosophy on accident [94] reporting that you told me about?"

And you say, "You mean the variable from the -- "

And then the question is, "No, this original philosophy that you were telling me about. Who was the source of that?" And what is your answer?

A "In our claims manual, in the claims schools, in our conferences, repetitively reinforced."

Q "Your supervisors?"

A "Supervisors, yes, sir."

Q "They are the ones that told you what State Farm's philosophy was, right?"

A "Yes."

Q Okay, now, Mr. Summers, when you were involved in your case against State Farm, you felt like these improper practices that you were upset about, you felt like they were imposed on you as a way to discriminate against you, didn't you?

A No, not totally.

Q But you didn't think that they were things that you were being told to do by all the claims people, did you?

A Well, I couldn't say for all of them, because I wouldn't have been privy to those situations. But I do know that in our claims unit, and in my specific [95] instances of review, which came about in the, starting in about 1977 with the administration of Bill Brown, then Thomas McGlinn, and with Bob Noxon. These were the times of severe deviation from those company philosophies.

Q Okay, let me just have you read this one answer. This is from your deposition also, page 1402.

Question. "Mr. Summers, in your complaint in the third cause of action, you state that you were forced to take early retirement because you refused to violate fundamental principles of public policy. What does that mean?" Can you read your answer?

A "I believe it's reflective of the sum of the files that we have heretofore discussed, Campbell and multiple others, wherein I received instructions from supervision that I felt was certainly not in keeping with what I had always held as the principles of State Farm. I could never determine in my mind whether these were changes sanctioned by State Farm, which I couldn't really believe because, as I discussed with others, they were not receiving the kinds of instructions that I was receiving.

"In my mind I felt that these, then, may be attempts by supervision to entrap, to discredit, literally to destroy my position in State Farm, of which [96] I commented repeatedly when these circumstances would come to me. Several of them -- "

Q That's all I'll ask you to read. Thanks. So you had found that, in commenting to other people that you worked with, that they were not getting the kind of instructions that you thought were wrong, that you were being given, correct?

A Not generally. Some of them were receiving intermittent instructions on specific file handling.

Q But in any event, you didn't think that was in keeping with the policies of State Farm, did you?

A It was a direct 180-degree turn from what we had been used to up until 1976.

Q Mr. Summers, with respect to these cases that you identified last week, and that was put up on the projector, one of your areas that you said you felt was improper was that there was a practice of falsifying or withholding documents, photographs, or other evidence from claims files, and concealing facts. Can you name for me, Mr. Summers, one State Farm claim handling manual which specifically taught you to do that?

A No. These came by way of directive, instructions from the superintendent.

Q The second one was, withholding information from insureds and claimants regarding benefits to which [97] they were contractually and legally entitled, and ignoring inquiries and benefit requests. Can you name me one State Farm claim handling manual that you ever read that told you to do that?

A Not as a claims manual. However, there was, as I have recently reviewed, the manual that was provided divisional claims --

Q Are you talking about the Excess Liability Handbook?

A The Excess Liability Handbook, yes, sir.

Q Okay.

A And in that --

Q But you never read that while you were working for State Farm, did you?

A No. No one ever received any written verification of that. It was later discovered that that which was outlined in that manual fit precisely the sequence of occurrences of how to avoid policy payments, policy limits, and excess judgments.

Q Have you read the Excess Liability Handbook, Mr. Summers?

A No, sir, I have not. I have not in total. I have scanned and reviewed some areas.

Q So if I handed this to you right now, do you think you could find something that you say, you just [98] said was in there? Do you think you could find it?

A I imagine so.

Q How long would it take you?

A Well, depending on how detailed you want, in what areas you want. I believe I could identify some area.

Q When is the first time you read this document, Mr. Summers?

A Just in the past few days.

Q When is the first time you ever saw it, Mr. Summers?

A When attorney Anderson in California contacted me and asked about my proceedings with State Farm. He, at that point, indicated that he had produced this manual in litigation that he was involved in in California, and that it was very detrimental to State Farm, and had been admitted as evidence in his case in California.

Q And that was after you left State Farm, wasn't it, Mr. Summers?

A Yes, sir, that was.

Q You never saw this document in your nineteen years of employment with State Farm, did you?

A No, and I don't know of anyone else that did.

Q Okay.

[99] Now, you asked if I might identify an area of involvement --

Q Hold on just a minute, Mr. Summers. I'm asking the questions, okay?

A Well, you did ask.

Q Well, I'm asking another one now.

A All right.

Q Are there, other than the Excess Liability Handbook, which you never saw while you worked for State Farm, Mr. Summers, can you identify any claim handling manual that was given to you for review and use by State Farm Mutual Automobile Company that told you to do any of the items or things that you've identified as unfair claims practices?

A No. As I've previously indicated, these instructions --

Q That's all I need.

A -- came from the superintendent direct.

Q So there was no written manual that told you to do these things?

A No, sir. To my knowledge, however, in the manual that you have just discussed, there are areas which specifically identify that.

Q Mr. Summers, I excluded that for purposes of my question, okay?

[100] A Okay.

Q All right. You said that the practices of the Excess Liability Handbook, in your view, were used by State Farm. Did you say that?

A Yes, I do believe that.

Q Do you find -- Let me read you something, Mr. Summers. Is this appropriate claims handling practice? "When making the initial evaluation of injury claims we should evaluate on the basis of the facts, and possible damages, as if there were no policy limits. We should give credence to the insured's version of the

facts. We cannot ignore dangerous testimony of disinterested witnesses. Such an honest evaluation as to settlement value of the claim should certainly give the interest of the insured equal consideration with the interest of the company." Have you got any problem with what I've just read?

A No, that seems to be in keeping with the philosophy that I was aware of during my years with State Farm.

Q Okay. "Where the legal liability is questionable, the policy limits low, and the damage is very high, equal consideration of the rights of the party must take into account the relatively low exposure of the company, and the correspondingly high exposure of [101] the insured. No general rule can be laid down to the handling of such cases. Each must be considered according to its particular facts." Have you got any problem with that?

A I think that identifies it adequately. The divergence from that was the instructions given by the superintendent, which was diametrically opposed to that which is outlined in that manual.

Q Do you know where I just read that from, Mr. Summers?

A The document that you had in front of you.

Q That's the Excess Liability Handbook, Mr. Summers.

A Of course.

Q So that -- You've already testified that in all your years the practices identified in there were followed to the tee by State Farm, didn't you?

A No, I did not say they were followed to the tee. I said it was the philosophy of State Farm. That does not mean, and it was not the circumstance that every file was handled in that manner.

* * *

[113] * * *

Q Okay. Mr. Summers, did you tell Curtis Campbell that you thought -- before, before this case was tried -- did you tell Curtis Campbell that you thought he had a risk of exposure for an excess judgment?

A Yes, I thought that.

Q Did you tell Curtis Campbell that before this verdict was entered? Did you tell him that he had a risk for an excess judgment?

A As I recall, I told him that there was a possible risk factor, that there was an exposure that could result in litigation. Basically because we already had an attorney on scene, and because he had requested file material, which I was told to totally ignore and not even respond to.

I did tell Mr. Campbell that there was a possibility of exposure and a possibility of judgment.

Q An excess judgment?

A I do not recall having specifically said excess judgment, but I could have.

Q And that was before the trial. Right?

A You're asking questions of fifteen years ago, and considering my age and the addition of that, I can't be specific in all instances.

Q Okay.

[114] A I'm trying to be very candid, sir.

Q All right. Let me show you a letter that's been put into evidence in this case, Mr. Summers. This is a letter that Mr. Barrett sent to Mr. Humphereys, it's dated December 3rd, 1982.

He says here, "I received a very interesting call from Ray Summers, former adjuster for Campbell's insurance carrier. Mr. Summers advised me that he had been forced into early retirment, an one of the reasons was his sharp disagreement with upper management on how the claim against Campbell should be handled in connection with the Slusher/Ospital accident.

"Mr. Summers advised that he wrote a memorandum, which he was ordered to retract and destroy. The memorandum advised setting up a large reserve for the claim against Campbell.

"Mr. Summers is so upset about the whole matter, that he decided to call me. Has also, or he also has talked to Campbell

and advised Campbell of the attitude of the company and has pointed out to Campbell that if there was an excess judgment against him, he might have some recourse against the company."

Did you tell Mr. Barrett that, Mr. Summers?

A I very well could have.

Q So is it true that you did contact [115] Mr. Campbell before the trial, and you told him that the company had told you to destroy a document on this case?

A As I --

Q And that there could be excess liability, and that he might have a claim against State Farm?

MR. HUMPHREYS: Your Honor, I object, it's misleading. It says only that he told him about the attitude, and I think that's improper for him to misrepresent that.

THE COURT: Reframe the question.

Q (BY MR. SCHULTZ) Mr. Summers, did you tell Mr. Campbell what is written in this paragraph, right here?

A I don't recall having said it as per se. I told him, as best I can recall, that there was an exposure that he could be hit with policy limits, and as I recall, I may have even said, "You could be hit with excess judgment."

* * *

[125] **REDIRECT EXAMINATION BY MR. HUMPHERYS:**

Q Mr. Summers, I want to cover a few things that have been raised by counsel. One is, as it relates to the lawsuit you had against State Farm, and the reason stated regarding the Gittens case which led to your probation, and the comment that was referred to, that State Farm did not discover falsifications until approximately four years after you were fired, or terminated.

Now, in light of that, I want to, first of all, ask you, in the depositions that started in September, 1983, was that the correct date of the depositions in your case against State Farm?

A I believe so.

Q And we have stacks of them there in front of you. Did you specifically discuss the Gittens case with Strong and Hanni as they questioned you in that lawsuit?

A Yes, sir.

Q Strong and Hanni being the law firm here today?

A Yes, sir, I did.

Q Did you specifically discuss more than 100 other cases, and files in that deposition?

A I did.

[126] Q Did that deposition last twenty-two days?

A Or more.

Q And did you talk about falsifying documents in those depositions?

A Yes, sir.

Q Now, this was in 1983; is that correct?

A Yes, sir.

Q Did you, at any time, deny that you had been falsifying documents in the files?

A No. I denied that there was a preponderance of all file involvement, which it was not, that there were files that I admittedly entered false documents to cover the file, and to take and protect, really, the position that I'd been instructed to, for the benefit of the company.

Q All right. We looked at, last Friday, one of these, what you referred to as the unfair claims handling practices of State Farm as you testified to in your deposition in 1983. The first item that was listed was falsifying or withholding documents. Now, do these page numbers reflect the specific instances where you talked with Strong and Hanni about falsifying documents?

A Those aren't case numbers, they're page numbers of the deposition, as I recall.

Q Thank you. I misspoke.

[127] A And in some of them there was discussion, but not in all instances were there discussions about each and every file.

Q All right. Some of them were general discussions, like up here?

A Yes, sir.

Q And did you specifically tell Strong and Hanni that you had falsified documents in files?

A I admitted that there were falsifications, yes.

Q And that was in 1983.

A Yes.

* * *

[128] * * *

Q (BY MR. HUMPHERYS) All right. Now, inasmuch as you had actually discussed this, as you've just testified, with Strong and Hanni, what was your understanding, if you recall, why your attorneys were trying to keep the evidence of falsification out of your case?

A Because they did not want the documentation of improper claims handling, of concealment, of instances, time and time and time again of instruction to withhold liability, withhold benefits, to not offer coverages.

Q What was your understanding of why you were terminated?

A My understanding, for the reason of termination, or taking early retirement, was based back from the Gittens file.

Q Now, this was before your probation?

A That's before my probation.

Q Okay. Now, explain to the jury what happened, now, as it relates to the Gittens file that led to your probation.

A Okay. In the Gittens file, and I believe it's already been discussed, it was a clear-cut case of liability, improper overtaking and passing at a high [129] rate of speed, within a T-type intersection.

The insured did hit into the claimant vehicle, and resulted in property damage and bodily injury to the claimant, as well as injury to the insured.

My first review with the superintendent on that file, I was instructed directly to plead comparative negligence on the part of the claimant, in that she was to have allegedly pulled to the right to make a left turn, when, in fact, she had not.

My next instruction on it was not to cite the improper overtaking and passing on precedent double lines, not to admit that or indicate it in the file, and to play down the speed involvement relative to the insured, and that there was no signal given on the part of the claimant, when, in fact, her attestation was she had given a signal, she was making an appropriate left turn, when she was hit from behind and to the side by the insured vehicle.

Q "Insured," meaning the State Farm vehicle?

A That's right.

Q All right.

A The next issue that came up was to, after imputing comparative negligence to her, was to send her to her own carrier, because of, quote, comparative [130] negligence. With that, also, I was told to downplay her injuries, and really not to indicate any injury that would be of a serious nature.

Q Okay, what was it about the Gittens file, as far as you understand it, that led to your probation?

A After Mrs. Gittens revealed that she did not have insurance, and no basis to pay for her injury or her treatment or anticipated treatment, she was then advised that State Farm would reopen and handle, if there should be a basis for it.

Q You mean, was this after a release was signed?

A After the first settlement and a release was obtained. And in that initial settlement there was the allocation of funds to cover that which was anticipated for her treatment.

Q And is this what was referred to as the phony document?

A That is right.

Q Okay. So that was known at the time.

A That was known at the time.

Q All right.

A Second to that, after two succeeding instances of where she complained that she was still receiving pain, discomfort, needed continued treatment [131] and care, my superintendent said, "Let's get an independent evaluation, so we can confirm if there is, in fact, the injury that is being alleged."

Accordingly an appointment was set up with an independent company physician whom we routinely referred to, because his reports were favorable to the insurance. An appointment was made, the appointment was kept, the doctor gave his opinion and said definitely the woman has sustained injuries, and she needs continued treatment and care.

My superintendent said, "Do not discuss the doctor's report, don't mention it, and do not put it in the file." I objected to it. I was told to do as I was told, and we would now stand on the release.

Q What does it mean to stand on the release?

A That we would deny the liability because of imputed comparative negligence, and that she had had adequate compensation, quote, because of the amount of, I think it was $200 that was given principally as an inducement for the settlement, and with that, she was compelled to go to counsel to try and protect her interests?

And I refused to be a future party to such kinds of unfair claims practices. I put a memo to my superintendent, one to Bill Brown, because both of them [132] had been involved in the denial and the practice of concealment. I said in my memo to them that I was to a point that I could not, in all conscience, continue with the kinds of directives being given, that I felt that it was an injustice to the claimant, certainly an injustice, and not in the best interests of State Farm.

Q And what was their response to you?

A "You're not being cooperative, Summers." And born of that, immediately there was the inference, not of my refusal to

continue in hiding and concealing, but in allegedly putting false documents in a file, which was done at the suggestion of the superintendent, in that there was, had to be credibility for what was being offered to get a first contact settlement release.

Q All right. Now, that was the time, the probation was issued against you; is that right?

A That is right.

Q Now, what I would like to ask you, out of all of these falsifications that you've talked about, were any of those for your personal gain?

A Never.

Q Was it for the gain of State Farm?

A Oh, most assuredly.

Q And now, so that we understand what these falsifications mean, you mentioned the Gittens file and [133] you were going to pay her an extra $200 for something she might need in the future, is that the --

A Well, she indicated that she needed to go to the doctor, that she was going to be X-rayed, and so I gave an approximation of the costs for an initial visit, with the proviso -- and taking that first contact release, and issuing that first check -- that if there was a problem, we would reopen the file, and handle it accordingly.

Q All right. Now, so that the jury understands why there needs to be a document, there, is it State Farm's policy that every time you issue a check you have to have a document supporting it?

A Not in front. I would say 90 percent of the time we never had the documentation of the basis for a settlement before us. We had to rely basically on what was alleged --

Q Okay, but here's what I'm saying. What led to the phony medical bill that you prepared in order to get the $200?

A So I could justify the first contact settlement.

Q Okay. That's what I was trying to get at. That was part of a procedure?

A That was the procedure.

[134] Q That before you paid out, you had a documented expense item.

A That is correct.

Q And so the phony document was that which you prepared to justify that expense, even though it hadn't been incurred at that time?

A That is right.

Q All right. Now, you mentioned that that process you had done in many other files. Did I misstate that? You have done that in previous files?

A Many files.

Q Now, I asked you Friday whether you had ever seen the Claims Superintendent's Manual, and I think you said no.

A That is right.

Q I want to show you page 2 of Article 12 of the Claims Superintendent's Manual. I'll just represent to you, Mr. Summers, that this is a portion of the manual of State Farm, given to claims superintendents, and it's entitled, "Settlement Negotiations on Liability Claims."

A Okay.

Q Looking at, drawing your attention to page 2, if you can look here, here's Article 12, the date, Claim Superintendent's Manual.

[135] Now, this, there was a prior version of this, I'll represent, at least State Farm has represented there's a prior version to this, and this is page 2.

Now, under the heading, "Must analyze claimant to understand and empathize." I want to draw your attention now to the subheading number 4. "How should I handle? Examples.

"B. Suspicious, do something for claimant or claimant's family. Win their confidence." Now, is that particular concept something which you were taught orally?

A Constantly.

Q Tell me how trying to pay an extra $200, for example, and then dummying up a medical expense slip to justify the payment of it, applies to that?

A So I could gain her confidence to the extent that she would be willing to sign a release of all claims.

Q Now, you described for us last Friday a little bit about how you would proceed to do a first contact settlement. This is page 4 of the same manual, Article 12, under the heading of number 8, "Controlling the Claim."

And just drawing your attention, here, A, "Control starts with the first contact. Start selling [136] yourself, develop a rapport with claimant." Is that what you would do, or is that what you were taught to do?

A That's what I was taught to do.

Q Under C, "Your interest in claimant and claimant's problems will merit and gain confidence, so be sincere." There are some other portions of that we'll get to, probably at another portion of the trial. But Mr. Summers, how important was it, based on your training, that you control a claimant?

A Very, very important, because if they were not controlled, the value of the settlement went correspondingly higher. And if it went to counsel, it went much higher. And if it went to trial, it was much higher.

Q You also referred to the fact that there were first-party settlements, and you described last Saturday, or last Friday, how that would take place. And I would like now to draw your attention to page 6 of Article 12.

"Actual Loss Settlement. A. May well settle for actual loss, 50 percent do." Fifty percent do. Has that been your experience, that you were able to settle cases for actual loss?

A Sometimes more than 50 percent.

[137] Q And would actual loss include general damages for pain and suffering?

A No, sir.

Q Let's talk about the techniques used here. "One, have claimant assemble records of expenses due to accident. Two, review them one at a time. A, ask questions to verify. B, appropriate comments on large expenses." What --

What is your understanding of what it means to have appropriate comments on large expenses?

A Try to establish whether there was any pre-existing condition, try to establish if the condition is being blown out of proportion, but then as the records were itemized, as I testified previously --

This instruction came directly from Bill Brown when he was my superintendent. You itemize them from what they prepare, and provide for you, you add it up, and you intentionally make an error. And thereby have them check the addition to see if it is correct. And thereby, as they find the error, it's corrected, and an additional amount would then be suggested for the obtaining of a release.

Q All right, number 3, "When properly qualified, list on paper. Four, when all listed, check to be sure, total up. Five, ask claimant to check [138] addition. Six, while claimant checks, prepare release in amount determined." That would be the amount of your medical expenses?

A Basically, yes.

Q When the claimant says, "Correct," produce the release, quote, "I'll need your signature and that of your spouse, while I prepare the draft."

A Exact procedure.

Q Number 8, "Then prepare draft while claimant and spouse get release properly executed.

"B. You lead and direct claimant. Claimant never has to face an issue.

"C. This approach will settle 50 percent of your claims for actual loss, will result in a lower demand on the rest. Claimant is oriented to specials. See value more realistically."

Is this the first time you have seen this manual, Mr. Summers?

A It is.

Q Does that accurately reflect what you taught, and what you used in your claims practices?

A As instructed verbally, and reinforced in memo form.

Q Now, in addressing settlement, I'd now like to go to page 5, under Roman Numeral I. "Prior [139] arrangements, may be best not to make an appointment to negotiate. A. Drop in, or call, as if a routine matter. B. Doesn't give claimant time to rationalize reasons for not settling. C. Easier to find out what the claimant really has in mind."

Is this all part of the process of controlling a claimant?

A Exactly.

Q Did you actually stop in without an appointment for the express purpose of settling a claim?

A Almost every circumstance that we were negotiating, yes, it was my intent to try and settle it with that visit.

Q All right. Now, going back to the issue raised by counsel regarding your lawsuit. I would like to know if the reasons, I think what was stated was that you were unable to work with your fellow people, claimants were upset with you. Was there anything else that you recall?

A That I was not cooperative with my supervisors, or superintendent.

Q All right. Now, do you recall receiving a recognition at State Farm a couple of years earlier than that?

A Yes, sir.

[140] Q And did that come out in a State Farm publication?

A Yes, it did.

Q Let me show you what's been marked as Exhibit 130-P. Tell me what Exhibit 130 is, please.

A This is a copy of a printed, I believe it was Mountain States news of the, of State Farm in the Mountain States Region. It was written by my then claims superintendent, Bill Brown.

Q Is he the same one that later put you on probation for not cooperating?

A That is correct.

Q Okay. And the same one that later -- Well, he wasn't part of your termination, was he? The meeting you described in the motel room?

A No, he was not.

Q Okay.

MR. HUMPHERYS: We offer Exhibit 130 into evidence.

MR. SCHULTZ: No objection, Your Honor.

THE COURT: Received.

(WHEREUPON Exhibit Number 130 was received into evidence.)

Q (BY MR. HUMPHERYS) Let's look, here, at this publication. Mr. Summers, I have to admit that picture, [141] though it's a little rough?

A A little bit younger.

Q It makes you look a little younger. All right. It's entitled, "Mr. Involvement Resides in Logan."

And is this the Bill Brown -- It says, "By William S. Brown." Is this the Bill Brown we've been talking about through this trial?

A Yes, sir, it is.

Q And he was your superintendent at the time?

A Yes, sir.

Q Would you please read that article to us, or can you see it -- I have guess you have your copy?

A I have a copy.

Q Please read it into the record.

A "On October 9th, V. Ray Summers celebrated his fifteenth year with State Farm. During these fifteen years, Ray has become "Mr. Involvement" in the Logan, Utah area. He has given over fifty speeches for the Western Insurance Information Service. It seems that any time any Logan area legal, medical, or law enforcement group needs a speaker, they call on Ray.

"Ray also is involved in serving his church and the youth in his community. If the boy scouts need someone to take boys on a thirty-mile bicycle trip, go [142] mountain climbing, or canoe across Lake Yellowstone, they call on Ray.

"As the senior adjuster in the Logan CSO, Ray has been called on to be involved with managing the Logan office. Many times he has been asked to obtain community growth information, new office sites, or any number of other assessments. He always has made time to accomplish every task.

"Ray's smartest investment was marrying a charming lady named Jeannie. Together they have raised a beautiful family of which they can truly be proud."

"I guess you might summarize Ray by saying he is simply involved with people. I have never seen any other claims person receive as many complementary letters as I have seen about Ray. If a person has a serious accident they will be fortunate if they have Ray as their claims representative, for they will not only have a real pro as a claims person, but a truly involved, caring person to help them.

"Ray, congratulations on a great 'beginning' fifteen years. We hope the next fifteen will be even more fun and more rewarding."

* * *

[151] * * *

Q All right. Now, we looked at this memo last Friday. And drawing your attention to the paragraph, this is September 10 of '81, a memo from Mr. Noxon to Mr. Summers, in Exhibit 7, 400009.

And where Mr. Noxon says, "I completely agree with your analysis of liability on this case and that this is definitely a case of no liability." Going to your diagram before you had any communication with Mr. Noxon, does that appear to be a case of definitely no liability?

A Absolutely not.

Q Going to your BI report, the way you described it, does that appear to be a case of no liability?

A Definitely no.

Q Was the jury, in September of 1983, the jury that heard all of the evidence regarding the underlying accident, was their finding consistent with a definitely a case of no liability?

A No.

Q Was the jury last October, in 1995?

A No.

Q Did their verdict indicate a case of no [152] liability?

A No, they did not.

Q Now, Mr. Summers, in your deposition in 1983 that was shown on the board and read, you read where you had been taught, at least the philosophy of State Farm was to pay fairly. To your knowledge, did they do that?

A No, sir.

Q Was it this same deposition that you were describing literally scores, if not hundreds of cases where they were not doing so?

A That is right.

Q There was also a letter put up from Mr. Barrett to Mr. Humpherys dated in December of 1982 that indicated a summary of a conversation that Mr. Barrett was representing he had with you. Do you recall talking to him?

A Yes, sir, I do.

Q Now, do you recall that the Campbells were on a mission at about this time?

A Yes.

Q When did they leave, do you remember?

A Very -- Not too soon after -- As I recall, it was about the fall of 1981.

Q Okay. I'll represent to you that the Campbells said they were leaving in the early spring of [153] 1982. Does that sound about right?

A That's about right.

Q Okay. You didn't -- Did you have any conversations with the Campbells while they were on their mission?

A No, I did not.

Q Were they still on their mission as of December of 1982?

A I believe --

Q As far as you know?

A I believe they were.

Q Now, in that letter it said he just had a conversation with you, and you had indicated that you had talked to Curtis Campbell about the attitude of the company, and talked about the possibility that if there was an excess judgment that he would have a cause of action.

Do you specifically remember telling Mr. Curtis that, or was that something that -- Well, just tell us your best memory. You said you weren't sure, but I want you to give us your best memory. Did you have that conversation?

A I had a conversation with Mr. Campbell, but I do not believe I discussed anything about excess judgment. I believe I merely proffered the opinion that [154] there could be a higher settlement value, that there could possibly be even a policy limits value on it, should it go to trial.

* * *

Q (BY MR. HUMPHERYS) Mr. Summers, I'll represent to you that in the deposition testimony of Mr. Campbell, he testified that no one from, or that in discussing the case with you, he had never heard that [155] there may be an excess judgment rendered against him. Would you deny his testimony?

MR. SCHULTZ: It's the same question, Your Honor. I object again. He's still asking for a comment on another person's testimony.

THE COURT: I sustained the objection. There are other ways to ask the question. Please reframe it.

Q (BY MR. HUMPHERYS) Did you ever -- Did you do anything other than reassure him that he had nothing to worry about in your conversations with him?

A I did not.

Q All right, now just some concluding questions. Whose employee were you when you were cheating people, as you testified last Friday?

MR. SCHULTZ: Your Honor, I object to the question on Rule 403 grounds, and leading.

MR. HUMPHERYS: I don't understand that.

THE COURT: Overruled. I'll let him answer.

THE WITNESS: Would you please restate the question?

MR. HUMPHERYS: Yes.

Q (BY MR. HUMPHERYS) Whose employee were you when you were cheating people, as you described last Friday?

[156] A I was employed by State Farm.

Q Whose employee were you when you falsified documents?

A I was employed by State Farm.

Q Whose employee were you when you taught at claim conferences how to dummy up memos?

A I was employed by State Farm.

Q Whose employee were you when you told Mr. Campbell, and reassured him he had nothing to worry about?

A I was employed by State Farm.

Q Whose employee were you when you changed the report that first recommended settlement, but then reached the conclusion not to settle?

A State Farm.

Q Whose employee were you when you took out the adverse evidence from the claim file?

A State Farm.

* * * *

EXCERPTS OF TRIAL TESTIMONY OF H. DENNIS TOLLEY, JULY 23, 1996

[Vol. 28, R. 10283, commencing at p. 131]

* * *

H. DENNIS TOLLEY called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. SCHULTZ:

Q Would you please state your full name for the record.

A Yes, my name is Harold Dennis Tolley.

* * *

Q Are you presently employed?

A I am.

Q And where are you employed?

A I'm employed at Brigham Young University.

Q And what is your position at Brigham Young?

A I'm a professor of statistics.

Q How long have you been a professor of [132] statistics?

A At Brigham Young University?

Q Yes, at Brigham Young University.

A Let's see. Since '86. Ten years.

Q I'd like to ask you just a little bit about your educational background after high school. Could you tell the jury what your college degrees are since high school, and when you received them?

A Yes. I studied statistics at Brigham Young University, and received my bachelors degree in statistics in 1970. I subsequently went to the University of North Carolina and got a Ph.D. in biostatistics in 1974.

Q And do you have any other formal educational degrees, Dr. Tolley?

A I am -- The Society of Actuaries has an educational program which entails self -- You study on your own, and then are licensed through a series of exams. I have gone through the associate level of the Society of Actuaries exams and passed them. So I am licensed as an actuary by the Society of Actuaries.

Q After you received your Ph.D. in biostatistics from North Carolina in 1974, did you then proceed to take employment?

A I did. I worked first at Duke University in [133] the, I taught in the medical school and in the school of engineering. Then I subsequently moved to --

Q What years were you assistant professor at Duke?

A I was assistant professor there from '74 through '76. I subsequently moved to Japan and worked with the, joint with the National Academy of Sciences in the United States and the Ministry of Health for Japan on long-term effects of radiation on people who were in Hiroshima and Nagasaki during the bomb.

I was there one year, and returned to Texas A and M University, where I was an assistant professor in the department of statistics at Texas A and M university for two years. Subsequent to that, I went to Bal-Tel, or Pacific Northwest Labs in Richland, Washington, and worked in the areas of defense and in the area of long-term effects of radiation.

I left there in '83 to come to BYU to take an associate professor position, and then full professor in 1986, where I am now.

Q So you have been a professor, either an associate professor or a full professor at BYU since 1983?

A Yes.

Q And that is in the department of statistics?

[134] A Correct.

Q And during the time frame, have you also held any adjunct associate professor positions?

A Yes, I am still actually an adjunct, have an adjunct position at Duke University in their center for demographic studies, and that is basically in the actuarial area. I also have held a visiting position at the Shenyang University in Shenyang, China, which is the other side of the world.

Q Shenyang?

A Most landlocked city in the world.

Q Okay, now, what types of areas -- You talked about having some experience in actuarial science. What teaching, if any, experience do you have in that area?

A We actually have an actuarial program at Brigham Young University where students are taught the basics of, for passing the exams, and the basics of certifying to become an actuary. In fact, many of the students have gone to work at other places. I think there's one student, in fact, from our program that actually works at State Farm, but I can't remember who it is.

Q Okay.

A And so I also am one of the persons involved in setting the exam requirements in the exams for the [135] Casualty Actuarial Society's exam on credibility and premium rating.

Q Okay. Now, in addition to your positions as a professor and a teacher, have you been involved in any research or -- Let me back up. Let me ask you this.

As part of your training to become a, to hold a Ph.D. in the area of biostatistics, and your bachelors degree, and your work as a professor, have you had training and experience in analyzing statistics?

A I have. I've had a variety of opportunities in analyzing data, looking at trends in data.

Q And have you had, also, training and experience in analyzing statistics to determine patterns?

A Patterns is one of the things that statisticians look for the most. If there's no pattern in any data, why, there's no need for a statistician.

Q Now, in addition to your teaching and your training experience, have you been involved in any practical experiences, that is research or consulting projects that involve the analysis of data, and the analysis of statistics to try and determine patterns or trends?

A Yes.

Q Could you give just a few examples of some of [136] your experiences?

A Okay. I've been involved on and off for the last decade working with the World Health Organization on patterns and trends in non-communicable diseases, stroke, heart attack, cancer, the risk factors associated with them.

I've been also involved, over the last eight years, with the World Bank, and recently with the Asian Development Bank in looking at forecasting possible mortality patterns, health care needs, hospital needs, of developing countries, for example, for China.

I predicted patterns for future patterns of mortality and morbidity, health care use for the country of Chile, and I'm currently working on forecast model for the Philippines. In addition, why, I've worked in miscellaneous projects with various companies.

Q Have you also participated in any publications, or written materials in the field of statistics and the analysis of the data?

A I have. I've published several, maybe five dozen or so articles that have been peer reviewed in the area of statistics, analysis of statistical patterns, methodology for looking at patterns, et cetera.

Q Did our law office contact you a few weeks or months ago, Dr. Tolley, and request that you analyze [137] certain data with respect to this case, Campbell versus State Farm?

A They did. And I think it was in late March or early April of this year.

Q Prior to that time, had you ever served or worked as an expert witness for State Farm?

A I had not, no.

Q Have you ever given testimony as an expert witness in a court?

A I gave testimony at the Food and Drug Administration hearings on the use of subtherapeutic doses of penicillin and tetracycline in the food that was given to animals to fatten them faster.

Q But you haven't actually been in a court like this?

A No, this is all I know. I'm nervous.

Q Did we provide you certain data, Mr. Tolley, regarding third-party bodily injury claims in automobile cases?

A Yes.

Q Let me just show you what has been admitted into evidence already as Defendant's Exhibit 152-D, which is a summary of the reported claims, bodily injury only, total auto, for Utah and for State Farm Company-wide by year, 1980 through 1994.

[138] A Yes.

Q Are you familiar with that data?

A Yes, I have a copy of this.

Q Okay. And let me also just show you what else has been admitted into evidence, defendant's Exhibit 153-D, which are company-wide total auto bodily injury lawsuit reports for the same years, 1980 through 1994. Were you also provided with that data?

A Yes, this seems to be the same set of data, the same set of tables that I was given.

Q Now, can you explain just generally the procedure --

A I told you I was nervous.

Q Can you explain the procedure for what you did to evaluate the data from State Farm, the fifteen years of data with respect to third-party bodily injury claims, what procedure did you go through to analyze that?

A Yes. The first thing that I looked at is whether or not there was a temporal pattern, a pattern over time from 1980 through 1994. A pattern in the percentage of bodily injury claims that became lawsuits, versus percentage of lawsuits that went to trial.

I also looked at the number, that percentage of those that went to trial, that were won or lost by [139] State Farm. I was interested to see if you could look at things, over time, collectively, or if you had to focus on certain years as being different than other years.

The second reason I did this is, when handling data one always has to be careful you don't make a keypunch error, and so you try to get overall patterns that you're interested, that you see in the data, and see as you continue to process the data whether those overall patterns hold up, or whether or not you input something incorrectly, or if there is some odd observation that you should look more seriously at. That's what I did.

Q Okay. Now, in reviewing the data, did you compile some numbers yourself?

A I did.

Q And much of this, or some of this, at least, I think, has already been shown to the jury, but I want to just go through this with you quickly, Dr. Tolley, and so we can get our perspective.

From the data that you were provided, how many total third-party bodily injury claims -- and I'll just put up here

the time frame, 1980 through '94 -- how many total third-party bodily injury claims did State Farm handle in the state of Utah during that time frame?

[140] A Okay, according to the data that I tabulated from the tables that I was given, there were 29,497.

Q Okay. And how many nationwide?

A Nationwide, there were 6,157,002.

Q All right. Now, from the data contained in those two exhibits, were you also able to compile the total number of third-party bodily injury claims that were settled without a lawsuit being filed?

A Yes, there were --

Q In Utah.

A In Utah there were 26,486.

Q And nationwide?

A Nationwide there were 5,263,290.

Q Were you able to determine, then, from these numbers, the total number of lawsuits -- that would, again, be third-party bodily injury lawsuits -- filed during this time frame in Utah?

A Yes.

Q How many?

A The number of suits were 3,011.

Q And how many nationwide?

A Nationwide it's 893,712.

Q Were you able to determine from this data the number of bodily injury, third-party bodily injury lawsuits that were actually tried during this same time [141] frame in the state of Utah?

A Yes. Initially I included and tried those that were dismissals, and subsequently removed those. The number that were tried to verdict for Utah were 438.

Q And how many nationwide?

A Nationwide there were 105,183.

Q Were you able to determine -- First off, let me ask you, were you provided information as to what was meant from the concept of winning a bodily injury lawsuit?

A Yes.

Q What did that mean?

A I was told that winning a lawsuit, as far as State Farm was defining that, meant that the jury verdict on, something that went to verdict came in less than or equal to State Farm's final pretrial highest offer.

Q Now, you said final pretrial highest offer. Is that the way you understood it?

A I understood it their pretrial highest offer.

Q Okay. Now, given that definition from the statistics, were you able to determine how many third-party bodily injury lawsuits that were tried were won in the state of Utah?

A Yes.

[142] Q How many?

A The number that were won were 396.

Q And nationwide?

A Nationwide, 91,849.

Q You understand, and it's been testified to in this case already, that third-party bodily injury lawsuits are those where a person sues a State Farm insured.

A Correct. I was told that. I was told that these data are only for that situation.

Q Okay. Now, you mentioned that you also had some information regarding the number of lawsuits that were dismissed without a trial, and I haven't got that specifically on here.

A Right.

Q But I do want to ask you, have you been able to determine the percentage of the total third-party bodily injury claims that were either settled or dismissed without a trial?

A I determined the number that were settled -- Let's see, here. I'll have to make a calculation on that. Is that okay?

Q Okay, sure.

A Of the 3,011 --

Q I'm talking about total injury.

[143] A Right, of the 3,011 suits, there were 438 trials, so the number that would have been settled or dismissed would be 3,011 minus the 438. That would be 25,073. And the percentage, dividing that by 29,497 is approximately 8.7 percent.

Now, be careful, here, this is --

Q What is the percentage of the total third-party BI claims that are settled or dismissed without a trial?

A I gave you settled. That's settled and dismissed there, those are without a suit.

Q Right.

A Do you want to include those?

Q Yes.

A Okay, just a minute, here. There's 29,029 that either do not go to suit, or go to suit and are settled or are dismissed. That represents 98.4 percent.

Q And can you figure the same percentage on the nationwide?

A I can. Yes, it looks like -- Just a minute, here. It looks like it's about 98.3 percent.

Q Okay. Now, this next item, here, Dr. Tolley, just says "percent of total third-party claims that go to trial." So that would just be the difference between 100 percent and those numbers?

[144] A That's correct, and that would be 1.6 percent.

Q In Utah it's 1.6 percent --

A And 1.7 percent.

Q Nationwide?

A Nationwide.

Q Okay. Now, from this data, can you also determine the percentage of total third-party bodily injury claims, going back to the first number, again, that result in a lost trial?

A Correct. That is, for Utah, that is 0.14 percent.

Q And nationwide?

A Nationwide, that's 0.22 percent.

Q Now, were you also given some information, Dr. Tolley, regarding the number of excess verdicts or judgments that State Farm was able to determine have occurred in the state of Utah since 1980?

A I was given information that the number of excesses in the state of Utah, by recollection, was seven.

Q Okay.

A That would indicate that the percentage of, total percentage of bodily injuries that end up as a loss to State Farm is 0.02 percent.

[145] Q In other words, if you took the percentage of total third-party BI claims that State Farm has handled in the state of Utah, and determined, or were trying to determine what percentage of that number had resulted in verdicts in excess of the policy limit, it would be what?

A 0.02 percent.

Q Okay.

MR. BELNAP: Judge, something's wrong with our computer.

THE COURT: Why don't we be seated.

Q (BY MR. SCHULTZ) Now, Dr. Tolley, you mentioned that one of the things you're looking for when you examine data with respect to the third-party bodily injury claims statistics, is whether or not there were any trends over the fifteen-year period of time. Can you explain what you mean by that? What would constitute a trend, or a lack of a trend?

A Okay. A trend might be, for example, percent of wins during a year as a percentage of those that are taken to verdict. And I thought that that might go one way or the other, up or down. It seemed to stay right about, for Utah, about 90 percent

of those that go to verdict were, in fact, wins, and that was true in 1980, and it's also true in 1994. So that seemed to be dead [146] flat.

The percentage of those that actually went to trial seemed to be pretty stable, too, also, about 15 percent of the total suits actually went to trial in Utah. And I was a little surprised at that. I had thought that it would vary a little more.

Q What is the significance of that, from the standpoint of trying to form conclusions or opinions regarding data over a fifteen-year time frame?

A One of the common mistakes in statistics is to take all the data and add it up over time and divide by the total number of cases you had over the same time period, just as we've done here. Now, that is a mistake if there is a trend. If there is no trend, then that is an acceptable procedure as a summary statistic for what is happening.

I wanted to make sure beforehand that there wasn't any trend up or trend down that would bias the conclusion that I might get by adding the data all together.

Q So did you feel comfortable, from a professional standpoint, having looked at each year's data, to using that compiled data for statistical analysis?

A I felt, based upon the data that I had, I [147] felt very comfortable with it. At one time I thought they had an error in one of the years reporting, because it was out of touch, but it turned out it was a tabulation error on my part.

Q Okay. Now, when you are asked to evaluate statistical data in your profession, and when you have done it as a consultant or as a research person, is it typical that you are required to rely on data that is supplied to you from a client or a customer or a governmental agency?

A It is. I, with only one exception that I am aware of, I've always had to assume that the person who is providing the data had gathered the data appropriately, and had given me the data that he'd actually gathered.

Nevertheless I have usually checked the data to see if there were any obvious patterns that might indicate something odd in the way the person gathered the data.

Q Okay. And is it your understanding from what you have read, or been advised about in your work in this case, that the data from which this information is taken comes from reports and/or data compilations that have been kept in the ordinary course of State Farm's business?

[148] A I understand that that is the data that they collect, and the sheets that I look at look like regular spread sheets that have been programmed as a piece of information that the company would use in its own day-to-day or month-to-month business.

Q Now, let me ask you about a concept called a non-random sample bias. Is that a concept that you use in statistics?

A It is. In fact, there are --

Q Can you explain what that is?

A There are some heroic examples in this. Maybe some of the people have seen these. In the early thirties, Landon ran against Roosevelt, and of course the pollsters wanted to know who was going to win.

So they took a random sample, unaware that the way they selected the random sample were those who read a certain magazine, and those whose names were in a phone book. Consequently, all the people that they gathered had to have a phone or subscribe to this journal.

In the early thirties there were a lot of people who didn't have a phone, or who didn't subscribe to this journal who, in fact, weren't interested in Landon. And so when the poll came out it indicated that Landon would win the election by 57 percent of the vote, [149] when, in fact, Roosevelt got 62 percent of the vote.

This example so almost damaged statistics to the point that very rarely do pollsters now ever rely on taking a non-random sample.

Q Okay. Now, in opposition to a non-random sample -- And let me ask you this. You speak in terms of a bias that could be created if you don't take a non-random sample?

A Correct.

Q And what do you mean by a bias?

A If you don't take a random sample, if you have a non-random sample, even though you may not be aware that it's non-random, you may be including in your data a pattern that has nothing to do with the way the data is being generated.

In the sixties, in the late fifties and sixties, for example, there was a check on duodenal ulcer and how to treat that, and some physicians had actually gathered data on the fact that you could freeze this, you could put a balloon in people's stomach and freeze it and deflate the balloon, and that seemed to work great.

But they had taken just a sample of people that were around. And when they started to look at a random sample of people that had duodenal ulcers, in [150] fact, the procedure did not work. And in the medical area, in polling you get a lot of examples in the past that have been seriously biased by somebody thinking that they have a representative sample, but just taking a sample that's convenient.

Q So what you're saying, I guess, just to be clear on this, is that the thing you need is a random sample, as opposed to a non-random sample.

A Correct. If you take a non-random sample you can almost always get biased results.

Q Now, if you -- Is there another approach you can take if you're not just sampling, that's called a total enumeration approach?

A A total enumeration would be to check everybody in the population, and you wouldn't need a random sample. A total enumeration is a random sample, but it's a sample that includes everybody.

Q Okay, now, with respect to the analysis of State Farm's approach to handling third-party bodily injury claims, 1980 through 1994, have you taken a total enumeration?

A I understand that the data that was given to me is a total enumeration, and that is what I have used.

Q And is that an acceptable approach to try and analyze data and determine trends or patterns?

[151] A It is. One always loves to get more data, a statistician, and a total experience like this is actually enjoyable to look at, because you can hope to see the way a company behaves by their pattern in their data.

Q Let me ask you this. Assume for a moment that instead of a total enumeration, someone took twenty-five or fifty, or maybe even 150 third-party bodily injury claim files, and reviewed those, and from that decided to testify or give opinions about company-wide patterns and practices. Is there a danger in that?

A The first -- It is possible to do that, provided that the person who is selecting the fifty or 150 observations is very careful not to, in his selection procedure, include a bias. And usually if you take cases that are exciting, cases that are well known, cases that have big settlements, or cases that are in Alabama only, or something like this, you have a tendency to be including a bias in your data.

If the person were to take selectively either randomly or stratified randomly a selection of fifty or 150 cases and then go through those, it is possible to make a generalization to the business records. The 150, usually samplers with pollsters who do this recommend [152] that the minimum number you look at is approximately 384 cases.

Q Now, what if, for purposes of my question, we were to assume that those twenty-five or fifty or 150 claims that were evaluated were not randomly selected, but were specifically drawn, or sent to a person to look at by persons interested in pursuing litigation, or claiming that there was, in fact, a problem with the handling of the file, that it was going to result in litigation. Would it be a danger in trying to generalize if that was the category from which those files were chosen?

A Yes, there would. A person who is given the data, if he were explaining it, he would have to explain subject to whatever randomization conditions prevailed.

If he didn't know what those were, I personally would have a difficult time accepting the conclusions as conclusions for the company. I could possibly see, "Oh, well, this is interesting," it would be interesting. It could possibly identify things that one would want to look at in further detail. But in that further detail, you would need to remove bias that would be incurred by selection.

Q Now, Dr. Tolley, based on the data that you've analyzed, this total enumeration approach, were [153] you able to reach certain opinions or conclusions with respect to State Farm's patterns or practices regarding the handling of third-party bodily injury claims?

A Yes, I was.

Q And could you --

A It appears --

Q Could you explain what those are? What your opinions are?

A My opinions are, it appears that State Farm in general has a tendency to settle at a higher price, or higher value than would be estimated by a jury.

Q Now, let me stop you there and have you explain how you came to that conclusion on the basis of the data. And if you want to diagram this, feel free to come down.

A Okay, thank you.

Q Do you want to just say what that opinion was, again, and then you can explain it?

A Suppose for each case there is a value. Now, I don't know what this value is, and I'm not sure that the attorneys know what this value is, but we will say that the value would be that that would be determined by a jury. So we'll say a jury determines value. Not all cases are going to go to the jury, but those that do, we'll be able to determine a value for.

[154] State Farm gets a value, State Farm has their own value. They estimate this from tons and tons of data all over the nation, and grind their computers a lot to get some sort of value that they think is the value of the case. Then they make an offer.

Let's suppose, for example, that a case has a theoretical value of $1,200. I apologize, I shouldn't do this, this is in green. This is the real value, what the jury would have determined. And then State Farm makes an offer.

Now, just for simplicity, let's assume that they'll make one of three offers. They value this case to be $600, or they value it to be $1,200, right on, or they value it to be $2,400. And then they make an offer on it.

Let's subtract the true value, this green one, from the red one, okay? So we draw a picture, here. Do you have a black pen? Thanks.

We'll draw a picture under a line, here. This will be, if State Farm offers $600, and the value $1,200, then State Farm valued that $600 low. So we'll call that minus $600. So minus $600 here.

Or if State Farm says, "Well, it's $1,200 and the true value is $1,200, so State Farm hit it right on, so that will be a zero.

[155] And if State Farm offers $2,400 and it was really $1,200, then that would be up here, they would be $1,200

high. Notice the negative sign here means State Farm was negative i.e. they were below what the true value was, they were on, or they were high.

Now, in any particular case -- or we've got three -- suppose we were to look at a case, we draw a picture, suppose there's one place where State Farm, oh, gee, they offered $600 too little, so we'll put it down here. Then we look at another case, they may not be $1,200 but we'll subtract them all. They got one just right, they got one up here at $1,200 positive, that means they're offering $1,200 more than they need.

Well, if State Farm is offering the true value in general, then where would you do the subtraction, and you total it up, where's it all going to be? Well, it should get zero, a lot of times, depending upon how well they do.

If they were perfect, why, then it'll be zero all the time if that's what they offer, or if they offer something that is a little too high, then they'll be out here, too low, their program may not work just fine.

I watched the NBA finals, and despite all my cheering, being an alumnus of North Carolina, Michael Jordan missed every once in a while. And it's hard for [156] me to believe that when Michael Jordan goes in and gets below his average, that he's trying to miss. And I think that's the same here. I don't know they're trying to miss just because they missed. They're below or they're high. I don't know that that's an indication.

So if we were to draw all these, we should get something sort of right in here, and a few that we miss high, and a few that we miss low, if State Farm is offering zero. The right amount.

If State Farm in general is offering too much, so they're up here, offering $2,400 for a $1,200 settlement of value, then when we look at the cases, we should get a lot that's stacking up here, okay?

Now, I looked at the data that has actually gone to a jury to see how they behaved, and it turns out -- I'll draw this in green -- we have some down here, and I didn't know how far down they were, I just had, and then we had some up here.

It turned out that the number of cases that were on this side where State Farm was offering more than they, more than the value, was 90 percent, and 10 percent of the time down here.

Now, this is only those that go to a jury.

Q Okay. So is that the basis for your first opinion, then, that as a general proposition State Farm [157] is offering more to settle third-party BI lawsuits than what juries are awarding?

A That is correct. Where the jury value is considered to be the value. Since they're way over here on the giving them more than the value 90 percent of the time, then they're below 10 percent, which Jordan was, I wish Jordan was this good on his shots, then I would indicate, I would say that in general State Farm is looking right here.

Q Now, based on that analysis, and your evaluation of the data, Dr. Tolley, did you observe any pattern or practice on the part of State Farm to offer less than the value of a third-party bodily injury claim?

A I did not --

MR. HUMPHERYS: Just a minute. Objection, Your Honor. The only thing he's been testifying to is the data regarding trials. And that question went to a BI claim in general. There's no foundation for that.

MR. SCHULTZ: Well, I'll ask him.

THE COURT: Reframe.

MR. SCHULTZ: Okay.

Q (BY MR. SCHULTZ) Do you have sufficient data available to you, Dr. Tolley, to form an opinion regarding

whether or not there is a pattern or practice [158] on the part of State Farm to offer less than what a third-party bodily injury claim is fairly valued at?

MR. HUMPHERYS: And Your Honor --

MR. SCHULTZ: I'm just asking him if he has sufficient.

MR. HUMPHERYS: Okay.

Q (BY MR. SCHULTZ) Was the data that was provided to you sufficient for you to form an opinion in that regard?

A I can form an opinion based upon the data, coupled with a rational thought that I went through. But the data that I have is only for those cases that go, not only go to trial, but for which we have a jury verdict.

Q Okay. And are you able, based upon the data that you have, combined with your experience, training, and knowledge in the area of statistics, to render your opinion or judgment with respect to whether there is a pattern or practice of offering below what a third-party bodily injury case is fairly worth?

MR. HUMPHERYS: You're talking about general, now, not those that went to trial?

MR. SCHULTZ: In general, yeah.

MR. HUMPHERYS: I object, Your Honor, there's no evidence whatsoever of any foundation of what offers [159] have been in those cases that did not go to trial, and therefore he has insufficient information to base his opinion on.

MR. SCHULTZ: Well, let me go into it a little further, Your Honor.

Q (BY MR. SCHULTZ) Dr. Tolley, you have data here that tells you 98.4 percent of all third-party bodily injury claims are either settled or dismissed without a trial.

A Correct.

Q Is that right?

A Correct.

Q You have data here that shows that that is in the state of Utah, and 98.3 percent nationwide. You also have data here that shows, of the 438 cases, or lawsuits, excuse me, that went to trial in Utah over a fifteen-year period, the jury result in those, 396 of those cases was a verdict for either equal to or less than State Farm's highest offer prior to trial. You understand that?

A Correct, I do.

Q Okay. And you have the same, you have the data with respect to those same numbers nationwide?

A I do.

Q Is that correct? And you also understand [160] that those cases that do not go to trial have been settled by a negotiation between the parties?

A I presume they have in some sense, yes.

Q Okay. And you understand that 26,400 some-odd of the total claims, of the total of 29,400, are settled without ever going to trial, right?

A Correct.

Q All right. Now, what procedure, or approach could you take to analyze, Dr. Tolley, as a statistician, whether or not you believe there is a pattern of paying less than what a third-party bodily injury claim is worth, based on that data? What approach or procedure would you take to do that?

A I would do the following. I would assume that those persons who go to court, or at least file suit, have a belief that their settlement, State Farm's offer, is not adequate. I also would believe that those people who are getting, in general, less than the value, would have a higher tendency to file a suit, or to seek an attorney to up the settlement.

Therefore, if that's true, then the percent of people that are given an offer by State Farm that is below the value would be less than those that are turning up in court.

It's hard for me to believe that the people [161] who are bringing State Farm to court are, in general, those people who are getting the highest offers relative to the value. So if they're getting the lowest offers, then the 90 percent that are wins by State Farm, if they were to all come to court, would be at least 90, possibly higher.

Q Now, based on the information that you have reviewed and analyzed, have you formed any conclusions with respect to whether or not State Farm has a pattern or practice of compelling, or forcing people to go to court in order to settle their cases, or resolve their cases, I should say?

MR. HUMPHERYS: That's a yes-or-no question.

THE WITNESS: Okay, would you restate the question?

Q (BY MR. SCHULTZ) Okay. Do you have an opinion, based on the data that you have reviewed and analyzed, as to whether or not, in the third-party bodily injury claim handling area, State Farm has a pattern or practice of compelling, or forcing claimants to go to court in order to resolve their claims? Do you have an opinion?

A I have an opinion, yes.

Q And what is your opinion?

MR. HUMPHERYS: Your Honor, I object on the [162] basis of foundation. So far all of his assumptions relate to lawsuits and the BI lawsuit report, which was the only data that's been given to him. He's, again, been given no data as far as offers that have been given to policy holders before a lawsuit is filed.

There's no data at all that's been provided regarding what the offers have been that resulted in the settlements, and therefore there's a lack of foundation, even as to the lawsuits, but particularly as to all BI claims, than those which have not gone to lawsuit and there's no data on it at all.

THE COURT: Overruled. I've heard the foundation that was laid, and I allow him to give his expert opinion based on the foundation, and subject that to cross examination.

Q (BY MR. SCHULTZ) Do you remember the question?

A I believe I do.

Q Okay.

A The question is, what is my opinion with regard to State Farm's pattern and practice of forcing or encouraging a lawsuit in any of the claims. Is that correct?

Q Yes, uh-huh.

A My opinion is State Farm does not try to push [163] people into court by their practice.

Q And why do -- What basis do you have for that opinion in this data, here?

A Two. One is that the number of cases that are actually go to suit is very small, 10 percent. And then, of those, presumably most of those who have filed a suit have already contacted legal counsel and would be able to get advice, hopefully credible advice from legal counsel, on what they should do.

So of those who have seen an attorney, as verified by the fact that they file a suit, only 14 percent, 14 and a half percent of those actually go to trial.

Q If there was a pervasive company-wide philosophy with respect to third-party bodily injury claims and suits to, by State Farm, to go to trial at the risk of State Farm's insureds, in your view would the results of this data be different than what you've seen?

A Would you restate that?

Q If there was a pervasive, company-wide scheme or philosophy by State Farm to put their own insureds at risk in third-party bodily injury claims, and go to trial and put their own people at risk for their own benefit, do you think that the data, or the results of [164] the data that you've seen would be different?

A Yes, I do. I believe, if State Farm had a tendency to put the assets, say, or the finances of an insured at risk, that

they would have a tendency to offer lower relative to the value, the green value that we had on the other sheet. And when that came to a jury, you would see that the value actually determined by State Farm, or excuse me, determined by the jury, would be closer to the State Farm's value, in that the number of cases that State Farm wins would be closer to 50 percent.

Q Now, there's been some suggestion that it would be to an insurance company's benefit, Dr. Tolley, or economic benefit, to pay less than what was fairly owed on a third-party bodily injury claim so they could make more money. Based on your experience as an actuarial person and in statistics, what is your view on that?

A I believe that would not result in more money for State Farm. The reason that I believe that is people have a tendency to be sensitive to service, to what they hear, to word of mouth from friends that they have, to what they read in the newspaper.

I was involved in a study on managed care, that's with health maintenance organizations for people [165] over sixty-five. And we found that the people who use the managed care the most had a tendency to leave, even though it cost more, to go to a fee-for-service physician, because the HMO, in an effort to trim prices, was apparently not offering the service that could be attained for the fee for service.

Additionally, insurance companies have a tendency to look at what happens when you raise a premium or when you trim benefits. If State Farm were to trim their benefits considerably, the profit that would accumulate from that would disappear on two accounts. One, marketing would be more expensive, but secondly, the state insurance commissioners would lower the premium that State Farm could charge.

Q There's been some criticism of the way State Farm defines what a win is in this third-party bodily injury area, Dr. Tolley. From an actuarial standpoint, do you have any problem with the way State Farm defines a win?

A From an actuarial standpoint, I do not. Let me illustrate this. The idea of insurance is not to just collect premiums, but to pay benefits. I actually invented a game to teach the students about actuarial methods, and found initially all the beginning actuarial students, they didn't mind collecting premiums on the [166] game, but they never wanted to pay any benefits. And it doesn't work that way.

So State Farm has an estimate of how much benefit they're going to pay during a year. They have very sophisticated ways of estimating this, and their offers are related to what they estimate their benefit is going to be.

So when an incident happens, an accident or some untoward outcome, State Farm stands ready to pay, that's the business that they're in, unless of course they only want to be in business for two or three years. And they have an estimate of what that value is going to be.

Now, the thing that would make sense is, how often do you have the value right? And the value that we have here, the win, would be 90 percent of the time, the amount you're coming up with as the amount you should pay is at least equal to what the jury will decide, often more.

MR. SCHULTZ: Just a moment, Your Honor. That's all.

THE COURT: Mr. Humpherys?

MR. SCHULTZ: Your Honor, I forgot one thing. Can I mark this? And I'd like to admit this chart as an exhibit. We can wait.

[167]

CROSS EXAMINATION BY MR. HUMPHERYS:

Q Dr. Tolley, good afternoon.

A How are you?

Q I'm fine, thank you. I'd like to cover a couple of points before we discuss directly your figures. You would agree, would you not, that statistics can be deceptive?

A Yes.

Q In fact, there's even a book you've probably seen, "How to Lie With Statistics"?

A Correct.

Q All right, I'm going, we're going to look at that in just a moment. Isn't it true that in rendering your opinions today you've assumed that the data given to you by State Farm is complete, fair, and accurate, and not self-serving?

A I have.

Q And if the data State Farm has given you is self-serving, then the opinions that you have reached may not be accurate, too?

A Yes, sir, that is correct.

Q And so this really boils down to trusting State Farm to provide you with honest and accurate figures, doesn't it?

[168] A It does, sir.

Q You've not been able to verify the underlying data, have you?

A I have not.

Q In fact, you haven't been given any of the underlying files to find out what offers were made or what offers were not made, what verdicts were, what verdicts were not, and so forth.

A That is correct.

Q And neither have we. Except for the Campbell file. Which I think would be a loss under this scenario, wouldn't it?

A I don't know very much about it.

Q Okay. Now, you've completely relied upon the figures that State Farm has given you in these reports, which are the BI lawsuit reports.

A Yes. In addition to those, we have this thing which wasn't part of the report.

Q Right.

A This BI claims.

Q That one additional sheet that provides how many BI claims have been made.

A Correct, for Utah, and company-wide. And then I also relied upon the seven excess cases, which isn't one of those.

[169] Q Right, okay. I'm glad you clarified that. Now, what I would like to do is to talk with you for a moment about duties. First of all, are you familiar with what duties an insurance company owes in good faith to a policy holder?

A Somewhat. I suppose there are lots of duties I'm unaware of. I've never worked for an insurance company.

Q All right. This isn't a test to see how much you know about insurance. But what it is, it's going to be to determine whether your opinions, and whether these statistics truly go to the issues in this case.

A Okay.

Q All right. Now, I'm going to indicate to you, or have you assume that one of the duties an insurance company owes is to investigate thoroughly. Do you agree with that, or do you have any opinion when it comes to a claim?

A Investigate --

Q I'm referring duties as it relates to claims handling.

A To investigate a claim thoroughly. I think, yes, there is of course some confusion on what "thoroughly" would be.

Q These terms are not necessarily completely [170] clear in all respects.

A They're sort of fuzzy. I understand.

Q The next is to evaluate fairly. Do you agree with that?

A Yes.

Q And third, is to offer full fair value promptly. Do you agree with that?

A In the literature that I have read, I understand that insurance companies have a responsibility for fair value as contracted, in a prompt manner. Though oftentimes full cannot be paid. How does one pay for the loss of an infant that is hit by a drunk driver? What's the value? Is that this many dollars? Is that that many dollars?

And I don't believe insurance companies pretend to be paying the full value for the loss. But they would pay what contractually had been determined as a fair value.

Q All right. And then number four, would you agree that they are to provide peace of mind? That's what insurance offers, isn't it?

A I would, yes. Without -- That's the whole idea of spreading risk.

Q All right. Now, I would like to go through these duties and see whether the statistics you have can [171] assist us in determining whether State Farm has a widespread basis or practice of violating any of these duties.

A Okay.

Q Let me now turn to the next one. First of all, Dr. Tolley, it's Tolley?

A Tolley. Just like "tall."

Q Dr. Tolley. To really evaluate what State Farm is doing, you would need to look at all aspects of its adjusting practice, wouldn't you?

A Yes.

Q All right, what information has been given to you regarding first-party claims?

A None.

Q What information has been given to you regarding bad faith claims?

A No information.

Q Now, so that we get this in context, we've had testimony previously that State Farm adjusts approximately 15 million claims per year. Is that about right, counsel?

MR. BELNAP: I think it's fourteen.

MR. HUMPHERYS: Fourteen-something? All right, fourteen, 15 million, something in that range.

MR. BELNAP: That's all claims. Property [172] damage, first, third.

Q (BY MR. HUMPHERYS) Tell us, what percent are the statistics you're dealing with, assuming it's fourteen to fifteen?

A Fourteen to fifteen annually, or over a --

Q Annually?

A Fourteen to fifteen annually would be, they seem to be at about 500,000 now in bodily injury, so that would be maybe 3 percent.

Q So they've only given you 3 percent of the information regarding their claims handling; is that right?

A Yes.

Q And we don't know about bad faith claims, so they haven't given us any information about them.

Now, let me just stop you, here. Is it possible, in evaluating State Farm, on the basis of 3 percent of its cases, to be able to determine whether these four duties we've just listed are being violated or met by State Farm?

MR. SCHULTZ: Object, Your Honor, it's outside the scope of this witness' testimony. He was only examining third-party bodily injury cases.

MR. HUMPHERYS: He may be, because I'm impeaching his opinions, because he's giving opinions [173] regarding it, and I'm entitled to test them.

THE COURT: I'll allow it. Overruled.

THE WITNESS: Would you restate the question.

Q (BY MR. CHRISTENSEN) Sure. Isn't it true that you can't take 3 percent of the data and extrapolate whether or not State Farm is fulfilling the four duties we've just talked about?

A You cannot take the 3 percent of the data, which is on bodily injury only, and extrapolate whether or not State Farm is fulfilling those four things in another area, that is correct.

Q Tell me what the win-loss ratio is on first-party claims, which is the bulk of the claims we've been talking about, 97 percent?

A State that again.

Q What's the win-loss record in any lawsuits regarding first-party claims?

A Okay, I stated that I had no information on first-party claims.

Q If you're trying to determine whether or not State Farm offers appropriate amounts at full values, don't you need this information before you can render that opinion, Dr. Tolley?

A I think if I were --

MR. SCHULTZ: Just a second, Dr. Tolley. I [174] make the same objection again. He was not presented to render opinions on that. This is a third-party case, and that's what he's been asked to render opinions on. He wasn't presented for any other reason.

MR. HUMPHERYS: I'm presenting this to --

MR. SCHULTZ: It goes outside the scope of direct.

MR. HUMPHERYS: I'm presenting this to show biased sample, which we will get into, and the data which does not accurately reflect an extension of those opinions.

THE COURT: Overruled.

Q (BY MR. HUMPHERYS) All right. Now, did you hear my question?

A I'd like to hear it again, please.

Q We'd better ask Cecilee to repeat that.

(WHEREUPON the pending question was read by the Reporter.)

Q (BY MR. HUMPHERYS) And we were referring to the win-loss.

A Right. My opinion on the win-loss offer was for bodily injuries, and I think I have data on that. I cannot make any statement with how they did with first party, or how they do with any other area of their business.

[175] Q Now, we heard from Mr. Eschelman a few days ago that State Farm has chosen not to keep a record of its win-loss ratios in first-party claims. Will you tell us why, if that is a good measure, as you've indicated, to evaluate whether State Farm is properly servicing its policy holders? Or do you know?

A Let me ask a question on -- I didn't hear Eschelman's testimony. Did he say the data was not in existence, or the data was not readily available?

Q He simply indicated State Farm chose not to compile it in a form of a report such as the bodily injury report.

A All right. The data on third party would be an index of how State Farm services their customers. If I were insured and had an accident and there was a claim against me and it was brought into court, I would certainly like State Farm to stand up for me, or at least give me some support.

Whereas in first party, I'm not very familiar with first party, so it's hard for me to generalize to that.

Q Okay, and I think that that's fair. But in any event, you don't have the data, and I think State Farm has chosen not to compile it.

A I've -- I don't know why I don't have the [176] data, other than I was only asked for bodily injury stuff.

Q Now, let me go a little bit further with you. They've not shown you Article 12, have they, in the Claims Superintendent's Manual?

A No.

Q That was applicable for many, many years? On page 6, and I don't want to belabor this point, but it indicates that if --

A Excuse me, you're not on part of that.

MR. BELNAP: I think that was moved when I walked over here.

Q (BY MR. HUMPHERYS) Page 6 of Article 12, it indicates that, "When settling claims, that if you follow these directions contained in this article, that you can settle third-party claims for, up to 50 percent for only the actual loss," meaning the out-of-pocket expense, as opposed to general damages.

Now, do you know anything about that? That was a question --

A I don't. Would you state that again, please?

Q Well, are you aware of what special damages or general damages are?

A I am not.

Q All right. Special damages are those damages [177] which are for out-of-pocket expenses, or actual loss. Where general damages is for pain, suffering, loss of enjoyment, disability, and those more intangible items.

A Okay.

Q All right. Now, here in their own manual it indicates that if the adjusters or the claims representatives will follow the directions contained in this article, that up to 50 percent of the cases can be settled without paying any general damages. Now, is that offering and paying full fair value, in your opinion?

MR. SCHULTZ: Object, Your Honor, foundation. This goes beyond this witness' area of expertise.

MR. HUMPHERYS: He's testifying as to BI claims. This is settlement of BI claims, and their own manual impeaches his opinion. I think I'm entitled to it.

MR. SCHULTZ: I object to that statement by counsel, what the manual does or doesn't do.

THE COURT: I'll allow him to testify as to his understanding and knowledge. I'm not persuaded the foundation is there, but we'll test it.

Q (BY MR. HUMPHERYS) Let me lay a little bit more foundation.

A Also tell me --

[178] Q You have a general understanding, do you not, that general damages are awardable in BI claims.

A Yes.

Q All right. And you can see here that in this particular section actual loss is not the same as general damages.

A I see that. I don't know what minus 50 percent DOT means.

Q I don't think it's a minus. I think it's just a dash.

A Ah, well, I don't know what a dash 50 percent --

Q Let me go to the next page. Maybe it'll be a little clearer. This is on the following page. "This approach will settle 50 percent of your claims for actual loss, will result in a lower demand on the rest. Claimant is oriented to specials, see value more realistically."

Isn't it true, Mr. Tolley, if you understand that a BI claimant is entitled to general damages in addition to special damages, that, based on this manual, 50 percent of the time, or up to 50 percent of the time no general damages are paid?

MR. SCHULTZ: Objection, Your Honor, that assumes facts that are not in evidence in this case.

[179] MR. HUMPHERYS: Your Honor, it's right there in black and white. It says 50 percent of your claims will settle for actual loss.

MR. SCHULTZ: There's no data that actually supports that in this case, Your Honor.

MR. HUMPHERYS: It's their manual.

THE COURT: Where are you going to go with this?

MR. HUMPHERYS: Just to have him concede that, based on their own manual, that his opinions are called into question as it relates to settlement issues, settlement cases.

MR. SCHULTZ: I'll object to that, Your Honor. It's assuming facts that are not supported by the data, it's argumentative.

MR. HUMPHERYS: He rendered opinions.

THE COURT: I'll allow him to answer the question based on the assumptions that are inherent in that question.

Q (BY MR. HUMPHERYS) Let me back up before we have you answer that question. You gave an opinion just a few minutes ago that you are able to determine that even BI claims which are not involved in lawsuits have been settled for full fair value. Did you not?

A I claimed that, based upon the data on jury [180] selection, those people who did not come to seek counsel, apply for suit, or actually get a jury verdict, they would have, in my opinion, they would have a tendency to be the ones that were not low, but were relatively high in that case. Then I extrapolated that 90 percent, which would also be the same number.

Q For those that were not in a lawsuit but settled before?

A That is correct. Just a minute. That is based upon the assumption that the people who are feeling they're getting the right amount, or more than the right amount, are the ones who have the least likelihood of bringing the case forward for suit.

Q Isn't it true that this very figure, here, in their own manual, suggests that your opinion is not correct? When 50 percent of them settle for actual cash value, with no general damages paid?

A Yes, based on that -- Just a minute.

Q Did you need to back up?

A Yes, uh-huh. I think that what that says is that, in my opinion, if you follow this recipe, which was on those two pages, that you will have 50 percent of the people settle for actual costs, saying that's, yes, that's what it says.

Now, I don't have any idea of how the suit, [181] the costs of the suit or any of those things, play into making this fair for the person who's been injured.

Q Now, tell me what information you have, Dr. Tolley, regarding what first offers were made, in these cases of which you do have information, and their highest offer. What information do you have regarding that?

A The only information I have regards highest offer, highest pretrial offer, and the information that I have is that, whether or not it was greater than or equal to the jury decision or not. I do not have information on what the jury decision was, so I don't know where the highest offer is.

Neither do I have any information on the first offer. Nor do I know what the difference between the first offer or the highest offer is.

Q I was just going to ask you. What information do you have as to the difference between the first offer and the highest offer?

A Yes, I thought I just answered that.

Q You have no such information, do you?

A No. If I had that, then I would have some information on the first offer. And I do not have that.

Q And isn't it true, to find out if State Farm promptly offered full fair value, that the difference [182] between these two would be very valuable in reaching an opinion?

A State that again, please.

Q In order to render an opinion that State Farm promptly paid full fair value, wouldn't it be important to know the difference between what their first offer was and their highest offer?

A That would be important to know. It wouldn't necessarily resolve the promptly issue.

Q How many of these lawsuits, Dr. Tolley, was that highest offer made just before trial, years after the claim was brought?

A Do you want me to guess?

Q Do you know?

A I do not know.

Q Did you know that in these reports they used to keep track of how many months in litigation a claim was?

MR. SCHULTZ: Object, Your Honor, that's a misstatement.

MR. HUMPHERYS: Well, let's put it on the board, then.

MR. SCHULTZ: It's not in the reports. The data was compiled. There's no testimony it was ever in the report.

[183] THE COURT: Reframe the question accurately.

MR. HUMPHERYS: I'll just put up what it says in the memorandum from general claims.

Q (BY MR. HUMPHERYS) I think we went through this. I was trying to save having to go through it. Dr. Tolley, here in general claims memo 238 in 1988, it says, "An additional column -- " Now, it's referring to the BI lawsuit report. That's what this report is.

A Okay.

Q "Entitled months in litigation, has been added in the disposition section. Enter in this column the number of months the suit or arbitration was in litigation, beginning with the month in which the suit was referred to defense counsel."

Have you been given any information about how long claims are in lawsuit before there's finally a highest offer given?

A Or as long as it was in litigation, no, I have not.

Q Okay. Don't you think that would determine whether or not State Farm promptly paid full, fair value?

A It's easy for me to imagine cases where, as a statistician, I'd have a tough time analyzing that data even if I had it.

[184] Q Right. I appreciate that it's very difficult. But I'm suggesting -- Well, let me give you an example. Let's assume that there was an accident, someone was injured, an offer of $1,000 was offered to them. It went into a claim negotiations and so forth.

Years later, just before trial, State Farm offered $15,000, and the verdict came in at fifteen-five. Excuse me, fourteen-five. That would be considered a win, wouldn't it?

A That is correct.

Q And yet wouldn't that be a perfect illustration of how State Farm low balled that claimant, and did not offer full fair value in a prompt fashion?

A Let me -- As I said, I'd have a tough time analyzing that as a statistician. Suppose I was in the accident and hurt my two middle fingers on my left hand. Those, for somebody who is a statistician, don't seem like very important injury. But I can't complete a project, because I can't use the computer.

I talk to an attorney, an attorney says, "Let's go for $50,000," or, "Let's go for $100,000. You're going to lose some business on this, we won't accept anything less than that."

The attorney sends a letter to the claims person and says, "Look either give us fifty or get [185] ready." And that could take five or six years, and yet State Farm had no control at all over the time. So promptly, they may be ready to pay fifteen right off, and only after my finger heals and stuff do we decide, well, maybe we ought to get that.

Q Did you know that the legal duty of the insurance company is to offer full fair value promptly?

A Yes.

Q Okay.

MR. SCHULTZ: Well, Your Honor, I'd object to that statement. That's contrary to what several witnesses have testified. That's his position. It's not necessarily the law.

THE COURT: Sustained.

MR. HUMPHERYS: Okay, well, I was asking him if he was aware of that.

MR. SCHULTZ: I move to strike.

MR. HUMPHERYS: And he said yes. I think it is an accurate description, but --

MR. SCHULTZ: We'd move to strike the testimony.

THE COURT: Granted.

Q (BY MR. HUMPHERYS) Okay. Now, Dr. Tolley, let's examine a few other things. What information do you have about State Farm's offers with someone who is [186] represented and someone who is unrepresented in any kind of a claim, third party or first party, the comparison of these two?

A No information.

Q Don't you think that's important to determine whether or not State Farm is offering full fair value?

A I would guess that State Farm has a procedure, and this is just a guess, based --

Q I don't think it's appropriate to guess. If you know, then you're welcome to say it. If you don't, guessing is not allowed in this court.

A Thank you. Let me give you an actuarial view, then.

Q That all of the sudden that takes it out of the realm of guessing.

A Thank you. I appreciate that.

Q Go ahead.

A Okay, if I were an actuary working for State Farm working in their property casualty area, I would have a method of estimating what the value was, based upon the data that came in. For example, how big the automobile was that you were in, the age of the person, et cetera, et cetera. And I would make a judgment on that initially. I don't --

I think, if I started to include whether or [187] not there was an attorney, I would be violating the public trust that Mr. Christensen talked about.

Q I think that's exactly right, Doctor.

A But I don't know that State Farm does it that way.

Q All right, let me represent to you that Samantha Bird said she saw national statistic schedules produced internally by State Farm regarding similar types of accidents and injuries. And she said that on the average, State Farm paid, in this particular example she found, $5,000 to unrepresented claimants, but paid $8,000 to those who were represented. Do you have any information about that?

A Yes. I think that would be a classic example of self-selection.

Q That would, wouldn't it?

A Selection by the attorney, probably.

Q All right. But now let me ask you this. A claim is not worth more, merely because an attorney is involved? It is what it is, isn't it?

A Yes. But the likelihood that an attorney will pick it up is probably different. If I were an attorney, and I'm not, and I don't know anything about the practice, if someone comes in with a hangnail they got in a case, versus somebody

who was, had their leg [188] broken because a bulldozer fell off of a truck, I think that I would have a tendency to be more oriented towards representing the bigger item case.

I don't know that to be true, I don't know how attorneys practice. But if that were true, then the data that you see in the represented versus non-represented would have the tendency to have all the non-represented really low, because the attorneys won't represent them, and all other people really high that were represented by attorneys.

Q Okay, maybe you missed one of the points I mentioned. Ms. Bird testified that these comparisons were for the same type of injury, not different injuries.

A Same type of injury?

Q Yes.

A Well, that's interesting. I think that -- I'm going to have to accept that analysis, but I have seen an analysis like this before in a national Halothane study, where they were looking at people who were getting a barbiturate, or Halothane, or something for surgery, and it turned out that though the claims were exactly the same, they weren't the same.

Q What percent increase is that, a 60 percent increase?

[189] A Correct.

Q 60 percent difference. Okay. So State Farm pays, assuming that what Ms. Bird said was accurate, pays 60 percent more if someone were to get an attorney.

A Let me answer that. In the recent studies done on individual health insurance, people who seem to be in exactly the same health select, because they know their situation personally, better than the underwriter or the insurer.

And because of that, people who are well leave an insurance company when the premiums go up. People who are not well, though for all of the variables that we record, for all the variables that you would assign, these are the same

cases for, these individuals are identical. Yet you look, after the selection procedure, and you'll notice a two to four-fold increase, much more than 60 percent, in the self-selection effect. Because some people feel that they can go to an attorney because of issues that they know that would not be recorded.

Secondly is, I would guess that there is a regional difference, here.

Q Is this an actuarial guess?

A Opinion?

Q Or is this just a guess?

[190] A Well, the thing on the costs is an actuarial study on two different companies in self-selections.

Q When you say you guess, what you're saying is you can't guess in court.

A Thank you, yes. Where was I guessing? Go ahead --

Q I'm not sure what you were about to guess on, but I would ask you not to guess, because that's not appropriate.

A Thank you very much. I appreciate your help. Now, I think that -- Excuse me, my opinion is that unless I looked at the data, factored out some of the regional differences -- Florida costs differently than Idaho, and there are more attorneys in Florida than Idaho -- I don't know what the relationship is between bodily injury and bodily injury representation, that there might be biases due to that.

There certainly would be a tendency to have a self-selection effect on who goes to an attorney and who does not, for something that is ostensibly the same case.

Q All right, now, you've raised a lot of things which call into question your opinion. Isn't it impossible, without more data, to conclude with reasonable certainty that State Farm pays full fair [191] value, based solely upon these reports that you were given regarding verdicts?

MR. SCHULTZ: Object to counsel's comment on the evidence.

MR. HUMPHERYS: I'm not sure I commented on the evidence. I'm asking a leading question.

MR. SCHULTZ: He said, "You've raised several things which put your opinion into question."

THE COURT: The court will strike that comment, but allow that question to stand.

Q (BY MR. CHRISTENSEN) Do you remember the question now?

A Could you restate it?

Q Sure. Haven't the very reasons which we have gone through, here, on this sheet, regarding no information on first-party claims, no information regarding bad faith, no information regarding win-loss on first-party claims, no information regarding the offers and when they were made, and how long before trial was the highest offer made, the information regarding what is paid to a represented or unrepresented claimant, doesn't all of that call into question the opinion that you raised --

Or let me phrase it this way. You can't, with reasonable certainty, conclude, with all of these [192] question marks, that State Farm always pays fair and full value on claims, can you?

A On claims in general?

Q Yes.

A I cannot. I still believe, as I testified before, that in my opinion the third-party bodily injury claims, the conclusions that we reached previously, still make sense to me.

Q Okay. Let's talk about why people settle for less than fair value, because there are other conclusions that can be reached.

You've said the only way you can reach your conclusion is because people would have a tendency to try and get the

most out of their claim, and therefore you can conclude that, based on the data that's been given you, they must be paying fair value?

A No. I think I said that those -- Suppose there's a value fixed. Suppose that an individual has a value. He either seeks an attorney or makes an assessment himself. If the value that he has in his mind is lower than the value that State Farm has offered, I believe he will not have a tendency to sue.

Whereas if the value is less, the value that State Farm offers is less than the value he has in his mind, or that his attorney has suggested might be an [193] appropriate value, you'll have a greater tendency to sue.

Q All right. Then, now, with that explanation, thank you, I didn't mean to misrepresent what you said, I'm just not as artful at it.

With that in mind, let's talk about other conclusions why people do not choose to pursue the claim for full fair value, even if they believe it's worth more than what State Farm's offering.

Isn't it true that many people have no idea what general damages are worth?

A I would guess -- I have -- That isn't an actuarial opinion that I can make.

Q Common sense tells you that, doesn't it?

A Common sense tells me, and this is a guess, yes.

Q In fact, when I asked you, you said you weren't aware what it was.

A No.

Q And you're an educated actuarially-trained person --

A -- type. Correct, I didn't say I wasn't sure. I said I didn't know.

Q Okay. Second. They don't know what they are entitled to by way of coverages under the policy. You'd [194] agree with that, too, wouldn't you?

A That's probably true, although that involves, in part, the first thing.

Q Right. But the two can be separate, one can be the valuation process, not knowing how to evaluate it, the other is not knowing that I'm even entitled to ask for this kind of coverage.

A Correct. But if someone doesn't know how to evaluate it, I don't know any information that would indicate that people value things less. They may have a tendency to value things more. Very few times does State Farm lose a $200 lawsuit and it appear in the Chicago Tribune.

Whereas if they lose a big one, a guy bumped his knee, can't sing any more in the opera, therefore big suit. That would appear in the newspaper. People who are literate would read those and say, "Gee, I bumped my knee too, and now I can't whatever, maybe this is worth a lot." I believe that there is -- Well, this is --

Q It could go either way?

A It could go either way.

Q Right. Third, there are a lot of people that don't like confrontation and fight, aren't there?

MR. SCHULTZ: Object, he's not an expert on [195] that, Your Honor.

MR. HUMPHERYS: This is just common sense, and it goes to the issue of why people would choose to take less than fair value.

THE COURT: I'll allow him to answer to his understanding. Overruled.

Q (BY MR. HUMPHERYS) Isn't it true that there are a lot of people that just don't, can't cope with, or stomach the confrontation and fighting process of negotiating back and forth?

A I would guess that's true. Though I don't know to what extent the person who goes to an attorney actually gets in the fight.

Q How about financial need? When someone is strapped financially due to the medical expenses and the loss of earnings, and they need the money now to pay their bills or they may lose their house or things such as that, financial duress? That's certainly a reason why someone would take less than fair value, isn't it?

A It would be a reason. I don't know how prevalent that reason is. I believe most hospitals and health care givers I'm aware of are willing to delay, or set up some sort of scheme whereby the expenses can be paid.

Q Do you know many banks that are willing to [196] forego the mortgage payments if you don't pay? All right. Let's go on. How about fear of the court system, fear of lawyers, fear of judges? There are a lot that have fears about the entire system, aren't there?

A Probably less than have interest in big bucks.

Q Okay. But there certainly are some that fear the entire judicial process. Next, they can't afford, or they perceive they can't afford to go through the legal process of hiring experts and hiring lawyers, hiring, or paying for court costs and expenses.

A I would say that that is less of an issue now than maybe in the seventies. I believe most --

Q It's still a factor, isn't it?

A People that watch any TV would indicate that there's a lot of free opportunity with attorneys if you have any case at all. So I don't know that that's a very big issue.

Q You wouldn't know one way or the other on that?

A No. I would guess --

Q How about the years of delay in coping with an unresolved issue and problem for years? There are a lot of people that just have a hard time coping with [197] that kind of delay, aren't there?

A There are, but how many people realize that? How many people -- The people that don't know what the legal system will do, won't have any understanding of the time delay.

Q All right. Now, I think you've received the initial data from Henry Heath from Strong and Hanni; is that right?

A Correct.

Q Did you receive any information directly from State Farm?

A No.

Q Have you, or are you aware of any independent verification of the offers to determine the win-loss ratio that was legitimate?

A I have not.

Q And you've not done any random sampling to find out if the offers, in fact, were high, low, or what they say they are?

A I have not.

Q Now, we've heard some evidence about incentives that are placed upon claims personnel to obtain favorable results. I want to have you assume that this win-loss ratio is one which is looked on very favorably by State Farm management, and places an [198] immense amount of weight and emphasis on having a, quote, win.

Wouldn't you be concerned that perhaps there may be inaccurate reporting of what their highest offer was, in order to get a win?

A State the assumption again.

Q I want you to assume that there is heavy emphasis and incentive on the claims personnel to post a win, and in order to get a win you've got to have an offer higher than the verdict. And there being no way to verify independently what that offer is, isn't there, isn't, in that situation, doesn't that

create a suspect, or a biased-type reporting of a, quote, "win," because of their ability to adjust or modify what their highest offer really was, as opposed to what it really was?

MR. SCHULTZ: Object to the question, it assumes facts that are not in evidence. It's an incorrect hypothetical.

MR. HUMPHERYS: Your Honor, I'm just asking him to assume. I'm not asking him -- I'm not, at this point in time, suggesting there are facts in evidence on that point. I think there are, but --

THE COURT: I'll allow him to answer it. Overruled.

Q (BY MR. HUMPHERYS) Do you need me to state [199] it again?

A No, thank you. I believe that such an incentive would at least temporarily cause a possible bias in the reporting. But that bias is going to be uncovered in the actuarial analysis when things don't line up.

Q If there's --

A If the actuaries analyze the data.

Q If there's independent review, right?

A No, the -- It will come up in a premium discrepancy. The reserve will be degraded.

Q Don't you find it interesting, and I think you said surprising, that the percent of wins is almost identical from year to year?

A If I said identical, I meant to say stable. It is stable, it varies around 90 percent, a little bit goes down, it dips to 86, sometimes it'll get up to 93.

Q In Utah?

A Yes.

Q And nationwide?

A Nationwide it is, has a tendency to be slightly lower, but is around 89, 88 and a half percent.

Q Let me see if there are other explanations for the wins. We've heard some evidence about how State Farm uses predictable experts, and advances them as [200] independent in order to gain advantage in a litigation. Have you factored that into the win-loss ratio?

A Say that again.

Q That State Farm uses predictable experts, such as medical experts, and advances them as independent medical examiners in order to try and get a more favorable result. Have you factored that into the win-loss ratio?

A I'm trying to correlate what you said, here. That would be factored in, in the premium calculation reserve estimation procedure, the fact that they do that.

Q But it's not factored in your win-loss, is it?

A The fact they had a win, that was particularly high because they had a physician guess that it was high?

Q No, that during the course of the trial they use predictable experts to attack the claimant's verdict?

A To lower the jury's verdict?

Q Right.

A I had to assume that the legal process is fair, and that the jury listens to both sides, and that they make the determination, they make a reasonable, [201] fair value. If I were taking away the fact that the jury doesn't have a clue as to what they're doing, then there are a lot of conclusions I can't draw.

Q And have you factored in the fact that State Farm uses superior lawyers than many of the claimants?

A I didn't know they used superior lawyers.

Q How about they have more financial resources?

A They have lots more money.

Q What about to the extent that they withhold information?

A Money has to do with withholding information? Is that what you said?

Q No, I'm using that as another item. That can also explain why a win-loss ratio?

A Absolutely.

MR. SCHULTZ: Your Honor, I'm going to object. This goes way beyond the scope of his direct examination. These are facts that he has not been asked to review, they're argumentative, too.

THE COURT: As to the last question, I'm going to strike, sustain the objection to strike that.

MR. HUMPHERYS: As to the last one, and the others not?

THE COURT: Right.

Q (BY MR. HUMPHERYS) Let me see if there's [202] another conclusion that you can draw from the win-loss ratio, Dr. Tolley. We can draw a conclusion that State Farm only offers full fair value after you sue them and after you press them all the way up to the time of trial before they finally offer top dollar.

A If that were true, I would not buy nor invest in any State Farm material. They will eventually go under. People, at least me, has no loyalty at all to an insurance carrier. I'm not going to stick with State Farm if everybody that I hear is not getting anything until they go to court.

Q You're getting paid $200 an hour?

A I am.

Q Counsel, Mr. Christensen just reminded me, in response to what you just said, in BI lawsuits, the money that's being paid to claimants aren't State Farm insureds, are they? They're the other side, the third-party claimants, aren't they?

A Correct.

Q So when you say that you would think that State Farm policy holders would not stay with State Farm, that doesn't apply to third parties, doesn't it?

A Yes. If I were in an accident, I were a State Farm insured, and State Farm hung me out to dry, even though it was somebody else that was making the [203] claim, I would feel bent out of shape, and I believe I would convey that to everybody that I knew.

Q All right. So you feel that if a third party makes a claim, and an insurance company low balls that third party, that I, as an insured, who has nothing to gain from it, is somehow going to be dissatisfied? Is that what you're saying?

A I'm saying that if the actions of State Farm cause the people that are bringing the claims to be upset, that will filter through the system in an excess of suits, or an excess of complaints, and the persons who are currently insured, plus a potential future insured, will be curtailed.

Q All right. Let's talk about the excess files. You've said there are seven. Were you told that State Farm does not keep track of any kind, or keep record of any kind of compilation of excess verdicts?

A I was told that. I'm not sure that the statement is whether or not they have it in the catacombs, in the bowels of Bloomington, or whether or not they have it readily available.

Q Let me represent to you that in two different questions, requests for production of documents, we requested the complete information on any excess verdict. Paul Short, under oath, answered and said that [204] State Farm does not keep records of excess verdicts, and the only one he was familiar with was the Campbell case.

A Okay.

Q And now, can you tell me, upon what information, or what -- How did State Farm come to the conclusion there were seven in Utah?

A I don't know that State Farm came to that conclusion. I was told by Strong and Hanni that that was the information they had gathered.

Q And you needed to rely upon that which you had?

A I had to, yes.

Q Now, if I were to tell you that that was based upon Mr. Arnold's call, making a few phone calls to various people in Utah, and asking them if they remembered any, and he compiled that list based upon a memory, do you feel that is scientific data, and a proper sampling from which you can draw your conclusions here in this case?

A I would have a tendency to be afraid of that data, and, in fact, I understand from conversations with Mr. Schultz, that there was data available for a period of, in the late sixties, early seventies, where such extreme excess data was available nationwide.

Q Right. And we've seen, and I don't want to [205] go through this again too much, but in the Excess Liability Handbook, which you're referring to, here are the 222 cases that were tracked regarding excess liability. And they talk about State Farm and how profitable these cases were. Have you reviewed this, Dr. Tolley?

A I have not reviewed that.

Q If they had the capacity in the late sixties and early seventies to keep track of this, and how profitable, don't you think they would have the ability to do that today?

A They'd have the ability. It's not clear to me that there would be -- There's no actuarial advantage in having excesses labeled independently. So when I make premium calculation, when I make income tax assessments, reserve calculations, I don't need to know that.

Q That may be for actuarial purposes, but isn't it true that State Farm doesn't want that information here in a bad faith claim?

MR. SCHULTZ: Objection, Your Honor, argumentative.

THE COURT: Sustained.

Q (BY MR. HUMPHERYS) All right, let's cover a couple of additional points. You recall in your [206] deposition indicating that pie charts are quite deceptive?

A Pie charts can be deceptive, particularly when there are three or four or five variables you're trying to compare.

Q Right. Would you publish a paper that would be critically reviewed by your peers, based upon the information we've just gone through, or the lack of information, and advance your opinions as solid in a publication with your peers?

A That's a good question.

Q That is a good question, isn't it?

A I've thought about that. I've actually thought about that exact thing. I don't know how much information there is available on pattern and practice and the statistical evaluation of pattern and practice. It is my opinion that oftentimes courts proceed along with experts who are giving extreme conclusions based upon a sample here or a sample there. And getting back --

Q I'm asking you about your paper.

MR. SCHULTZ: Let him answer his question.

Q (BY MR. HUMPHERYS) We were talking about court opinions. I'm asking you now about peer review opinions.

[207] A Right. Therefore I thought this would be a very interesting thing to research further, and have entertained -- have not made a decision -- but have entertained the idea of pursuing what is pattern and practice, how is it determined in a legal setting, and submitting that to one of the legal review journals. I have considered that. This would be an example.

But in this example, you would have to say, "Look, this is the data you have, this is what you can say, you can't say things beyond this." For example, the 6,000, or 8,000, versus

5,000. How do you integrate that? What are the sources of bias, there? There would be issues that you would need to bring into this paper.

Q That's right. And you would not want to advance among your peers, would you, Doctor, the opinion you advanced today, without having something more than self-serving data which State Farm has given to you to rely upon?

MR. SCHULTZ: Object to the comment on the evidence, Your Honor.

THE COURT: Allow the question to stand and strike the comment. You can answer the question.

THE WITNESS: What was the conclusion?

THE COURT: You can answer the question.

THE WITNESS: No, I didn't say that. I said [208] that I would be interested in reviewing a paper, writing a paper, that would be critically peer reviewed by my colleagues on this pattern and practice, because in that case, certainly the data that I have is limited. It does give some information.

Failing to give any information seems to be worse than having a little information, though it's limited. Getting information that is biased, or that is on fifty observations here and there, is the worst case. It's worse than no information.

So I think the advantage in bringing this forth into the publicly-available peer reviewed literature would be to open up this as a forum, rather than having these biases in the courtroom go untouched.

Q (BY MR. HUMPHERYS) All right. Now, I understand about your concerns for the courtroom. What I'm talking about is, would you, today, write a peer review article and publish it, and give your opinions to your peers, based solely upon the information you've received from State Farm?

A Subject to the caveats that I mentioned before?

Q You mean explaining that you don't have sufficient information?

A No, explaining that I don't have sufficient [209] information on first party, I don't have sufficient information on bad faith, the fact that I can't make a very good judgment on how State Farm does their business in general, but I can make a judgment on how they seem to be processing their claims, their bodily injury settlements.

Q Okay, I understand. And yet you would give those opinions here for a fee.

A What do you mean? Just a minute. I gave those opinions, I would give those opinions under a refereed thing. What does "and yet" mean?

Q And yet?

A You said, "And yet."

Q Well, you gave your opinions without any qualification before I came up and started cross examining.

A That is correct. But I did give my opinion on bodily injury.

Q And now that you have more information on cross examination, now, before you would give your peers those opinions, you would qualify them as you've just described.

MR. SCHULTZ: Objection, Your Honor, it misstates his testimony. It's been asked and answered.

THE COURT: Overruled. You can answer the [210] question.

THE WITNESS: No. I believe -- I've written several papers, and going through, qualifying under what conditions the data you have holds up, and what it does not hold up as, is a practice that I have to follow, otherwise it doesn't get published.

Q (BY MR. HUMPHERYS) Have you evaluated in any form the traumatic effect on an insured like the Campbells when they are subjected to an excess exposure?

A No.

Q Statistically that's not something you deal with, is it?

A It is not.

Q And to you, even though there are seven of which we do have a record of here in Utah, that, to you, is statistically insignificant?

A Say that again. What is statistically insignificant?

Q The seven of which we do know about here in Utah, that's statistically insignificant?

A It is statistically insignificant. It is, for the persons involved, it is important.

Q It is significant?

A It is significant. In any system, no matter how good State Farm tries to be, or how reprobate, [211] whichever they're trying to do, there will be the people that fall through, there will be a case here and there. Though that isn't a pattern and practice, it certainly could happen.

Q I'd like to ask one final question. We've had some testimony here from a number of witnesses that the State Farm personnel prepare self-serving memoranda or documents in the file, they take various slants and biases in the file in order to portray a particular position.

Assuming that were true, wouldn't you expect an insurance company that would use self-serving documents to make themselves look good in a bad faith case, would also use self-serving statistics?

MR. SCHULTZ: Objection, it's argumentative, Your Honor.

THE COURT: I'll allow him to answer it. Overruled.

THE WITNESS: It's okay?

THE COURT: Go ahead and answer it.

THE WITNESS: Insurance companies are constantly under audit. Auditing opinions, or auditing actions of bad faith usually isn't done. The thing that the auditors look at is compliance to accounts, whether a reserve is adequate, whether the premium is calculated [212] in an appropriate way.

So I believe that if the data that we have is based upon data that the company uses in their collective cognitive decision-making process, since that data is also presumably audited, or at least the end result is audited, I would be less inclined to believe that they have altered the data.

Q Tell me who's audited State Farm in the past twenty years.

A Who has audited? The government audits them every year.

Q That's your testimony?

A That is my belief.

Q Did you know that Mr. Ovard testified that, to his knowledge, State Farm had not been audited as long as he could remember?

A That is -- No, I didn't know. That's amazing.

Q And he's a regulator here in Utah. Did you know that Mr. Rogers, who is a regulator in Illinois, said that in the past fifteen, twenty years, they'd never audited State Farm?

A Didn't know.

Q Your opinions are no better than the information that's provided to you, are they?

[213] A That is correct.

MR. HUMPHERYS: I have no further questions.

THE COURT: Any redirect?

MR. SCHULTZ: Yes.

REDIRECT EXAMINATION BY MR. SCHULTZ:

Q What do you mean by the word "audit"? Are you talking about a formal market conduct study, or do you know what a formal market conduct study is?

A I do not.

Q When you say "audit," what are you talking about?

A I'm talking about whether or not the data, the actuarial decisions, the reserve, is in compliance with what the state has set up. If the state does an audit.

Q You were asked some questions about the reliability of the data. I want to -- I just want to make sure that we're clear on one thing, or that the jury is clear on one thing, Mr. Tolley. You were asked to analyze third-party bodily injury data only; is that correct?

A That is correct.

Q And is it your understanding that the Campbell lawsuit is a third-party, or was a third-party [214] bodily injury case?

A I under -- Yes, I understand that it was.

Q Is it your understanding also, at least Mr. Humpherys asked you this, that in a third-party bodily injury case, it is State Farm's insured who is getting sued. Or the claim is made against State Farm's insured.

A Yes, I understand that.

Q And so in that situation, in all of these claims, numbers that are up here, that's what we're talking about.

A Correct.

Q And we're talking about a question of whether or not State Farm protected its insured against whom a claim was being made, or against whom a lawsuit was filed; is that your understanding?

A I understand that.

Q Now, State Farm settles, or gets dismissed 98.4 percent of all the claims in the state of Utah in fifteen years brought against their insureds.

A Correct.

Q In your opinion, is that an indication that State Farm has a pattern and practice of failing to protect their insureds?

MR. HUMPHERYS: Your Honor, leading.

[215] THE COURT: Sustained.

Q (BY MR. SCHULTZ) Given the type of case that we're talking about, a third-party bodily injury case, does the fact that -- What is indicated to you, as far as pattern and

practice of State Farm, in protecting its insureds, what is indicated to you by the fact that they settle or dismiss 98.4 percent of all third-party bodily injury claims?

A Based upon that data, it is my opinion that State Farm works for the benefit of the insured, in that however they make their offer, or however they make their settlement, they do so in a manner such that very few of the insureds will go to court.

Q Are you here testifying truthfully, giving your honest opinions?

A Yes.

Q Did you come into this issue biased, or were you neutral when we asked you to look at the documentation?

A I was not biased toward State Farm. I don't have a State Farm policy, but I wasn't particularly against them. I mean --

Q Did you look at the data with an open mind?

A Looked at the data with an open mind.

Q Okay.

[216] A Tried to see what patterns they were. I was interested in what patterns would emerge.

Q Now, when you come right down to it, Dr. Tolley, when you have a total enumeration of all the numbers like this, and the results, would you -- Let me ask you. Is this objective data, that you can look at and form conclusions from?

A To the extent that data is gathered in the normal practice of business, that would be data that I, as a statistician, would have a reliability on. It is objective.

Q Now, have you been supplied any data, or given any specific evidence that would suggest to you that these numbers cannot be relied upon?

A I have not.

Q And Mr. Humpherys asked you, for example, do you know anything about how long a case was in litigation, or do

you know whether State Farm pushed this case right up to trial before making an offer? You don't know that, do you?

A I do not.

Q Another thing you don't know is, you don't know -- Well, let me ask you this. Do you know whether a case might have taken a certain period of time to get to trial because the defendant was out of state for a [217] year and a half on a mission?

A I do not. I illustrated an example where promptly could be in control of someone beyond State Farm.

Q And whether or not a case could be settled might be, and when it could be settled might depend upon how reasonable the demand is. Is that true?

A That's true.

Q You mentioned that pie charts can be deceptive. Is a pie chart that has two things illustrated in it, is that typically considered a deceptive chart?

A Two colors?

Q Right.

A Usually not. Usually pie charts with multiple pie slices is. However, it is important that in a pie chart, you include the, either the percent that is associated with each slice of the pie. I've seen data where you just have a pie chart and it's red, blue, green, and yellow. You can't tell what percent is orange of the whole thing.

Q Did you -- Have you seen some of the pie charts that have been presented to this jury?

A I have.

Q By State Farm? And have they included a [218] statement of the percent with each --

A The ones that I saw had percents. It is important for the jury to pay attention to percents.

Q Now, you were asked about the seven excess lawsuits, correct, that have been determined?

A Correct.

Q And we'll have another witness come in and explain how that was determined. But let me just ask you a question. We had 29,497 total third-party BI claims over the last fifteen, over the fifteen-year period in Utah. Now, if we were to say that one sheet of paper represents one claim, are you familiar with how many sheets of paper there are in a ream?

A Yes, a ream is 500 sheets.

Q And how thick is a ream?

A Depends upon the type of paper, but bond paper, about an inch and a half thick.

Q How many feet of paper would we have if each of those 29,000 claims was represented by one sheet of bond paper?

A You'd guess that we have 59 reams, so you'd have ninety inches, seven and a half feet.

Q How tall are you?

A I'm six feet.

Q Stand up, would you?

[219] A (Indicating.)

Q I'm standing on a quarter-inch riser, here. So if we stacked all those up, it would be a foot and a half taller than you?

A Yeah, about like this.

Q And if we had seven sheets of paper that represented the seven excess claims, and we set that next to you on the floor, is that a sort of a rough bar graph representation of the comparison of all BI third party claims?

A Seven and a half to this? Yes.

Q To excess?

THE COURT: You're not going to try to put this in evidence, are you, Mr. Schultz?

MR. SCHULTZ: Not at this point. Thank you, that's all I have.

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EXCERPTS OF TRIAL TESTIMONY OF DAVID WELLS, JULY 26, 1996

[Vol. 30, R. 10285, commencing at p. 123]

* * *

DAVID M. WELLS called as a witness by and on behalf of the Defendant through deposition testimony, having been first duly sworn, testified as follows by deposition:

[124] **DIRECT EXAMINATION BY MR. BELNAP:**

Q Would you state your full name, please.

A My name is David Mark Wells.

MR. BELNAP: Line 15.

Q (BY MR. BELNAP) Where do you work?

A I'm counsel to State Farm Fire and Casualty Company.

* * *

[125] * * *

Q (BY MR. BELNAP) What is your understanding of the use of the Excess Liability Handbook by State Farm Fire?

MR. HUMPHERYS: Your Honor, and I would object for lack of foundation.

THE COURT: Is there foundation laid in the --

MR. BELNAP: There was. I mean we could go back and read the whole deposition, Your Honor, but Mr. Humpherys has that right, himself, to, since he was taking the deposition.

MR. HUMPHERYS: Let me just indicate he said he'd never seen the Excess Liability Handbook, and he had seen the memo, and that's allegedly obsoleting it. And that's what gave him notice that there was such a handbook. So I object to the foundation.

MR. BELNAP: He's seen the handbook. It was -- He talks about its obsolescence in these questions that I'm asking, Judge.

THE COURT: All right, well overruled, then.

MR. BELNAP: Would you read your answer at line 20?

THE WITNESS: My understanding is that it was a document that was in existence from 1972 to 1979. It [126] was created, or put out by the fire general claims department, that it was withdrawn from use in 1979, and it dealt generally with the topic of excess liability claims. That's my understanding.

Q (BY MR. BELNAP) If it had been obsoleted in '79, why was it again referred to in the '86 memo which is, what, seven years later?

A My understanding of the '86 memo is it gives a complete listing of all the general claims recommendations, stating that some of them were obsolete in 1979, others were being obsoleted by that memo. It was more or less a complete listing of all of them, so to have a complete source for that.

MR. BELNAP: I'd like you to skip over to page 62, line 21. There was two questions asked there, and I'm asking the second one.

MR. BELNAP: Do you recall that handbook ever being in use?

MR. HUMPHERYS: And I raise the same objection, lack of foundation. He testified previously that he knew nothing about the use of the handbook.

MR. BELNAP: Your Honor, there's testimony through this deposition about his experience and his basis for it. And that objection was not raised in the deposition.

[127] THE COURT: Overruled.

MR. BELNAP: Your answer?

THE WITNESS: Not in my experience, no.

Q (BY MR. BELNAP) Do you recall that it was obsoleted --

MR. BELNAP: Going over to page 63.

Q (BY MR. BELNAP) -- contemporaneous with the time that it became obsolete?

A Yes.

Q Tell me how you became aware that it was obsoleted contemporaneous with the memo?

A By reference to the memo.

Q What I mean by "contemporaneous," meaning, you became aware back in '79 that it was no longer to be used?

A That's right.

MR. BELNAP: That's all the questions that I have. And I'd move at this time, Your Honor, and I don't, just so the record's clear --

MR. HUMPHERYS: Hold on, may I cross examine the witness?

MR. BELNAP: Yeah, but I want to move -- stay put -- for the admission of 66 and 67-D, Your Honor.

THE COURT: Any objection?

MR. HUMPHERYS: I think they've already been [128] admitted into evidence, Your Honor.

THE COURT: I think they have been, but for the record --

MR. HUMPHERYS: We do object to them as to their authenticity, but the court's already ruled on that.

MR. BELNAP: Well, when they were first offered, Your Honor, there was an objection, and we just want to make clear that they're in and admitted.

THE COURT: They're received.

MR. HUMPHERYS: All right, Mr. Wells, I have a couple of questions to ask you. Would you please turn to page 49.

THE WITNESS: Okay.

MR. HUMPHERYS: Okay, starting on line 11, I think we were talking about the Excess Liability Handbook.

MR. BELNAP: Which page, counsel?

MR. HUMPHERYS: Forty-nine.

Q (BY MR. HUMPHERYS) Were you able to locate a witness that knew something about it?

A Yes.

Q And who was that?

A Tracy Moredock.

Q If I recall from his deposition, he said the [129] first time he'd seen the memo was the day before his deposition. Was he the only person you could find that had any knowledge of it?

MR. HUMPHERYS: And you can skip to the answer on the next page, line 4.

THE WITNESS: You are talking about the handbook. He was the only person that I could find that had information concerning the book that he could testify to. It's true that he had not seen it, according to his testimony, until sometime just prior. But being a 1972 document, I could not locate anyone else that had actual knowledge.

MR. HUMPHERYS: I have nothing further of this witness.

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EXCERPTS OF TRIAL TESTIMONY OF ROBERT F. WILLIAMS, JULY 23, 1996

[Vol. 28, R. 10283, commencing at p. 28]

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ROBERT F. WILLIAMS called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. BELNAP:

* * *

Q Will you please tell this jury what your name is, and what city you reside in?

A My name is Robert F. Williams, I reside in Chicago, Illinois.

Q Mr. Williams, I'd like to briefly go over your background, and I'd kind of like to start at the present, and then we'll jump back and work to the present again. Are you currently employed?

A Yes, I am currently president of Cohassett Associates, a management consulting firm based in Chicago, that specializes in document-based information [29] management, records management.

Q And how long have you been in that business?

A I have had that company for twenty-six years, now.

* * *

[30] Q Now, going forward to the present time, in terms of records management, you're appearing here today as what this jury has heard from others as an expert witness; is that your understanding?

A That is my understanding. I'm here as an expert witness.

* * *

Q Now, could you tell the jury what records management is, and what you do as a consultant, and then after we go through this area I'm going to talk briefly about some of the companies that you've worked for that the jury may be familiar with, both locally and abroad. So what is records management?

A Records management is the orderly preservation of information. Information, like energy, in our society, is really the essence of how we conduct our daily activities. And records are the evidence of those activities. They're created in a broad spectrum [31] of different ways, from personal driver's licenses to engineering drawings, to computer output.

And this evidence is needed in American business, these records are needed in American business, because of the large volume of information that is involved in transacting business. We have a need to have a corporate memory.

* * *

[40] * * *

Q Okay, thank you, Mr. Williams. There's been discussions in this case, questions asked other witnesses, "Why can't State Farm simply put its 2.5 billion records that it creates a year onto microfilm?"

Could you explain to the jury whether or not microfilm on a company-wide basis, for all of their records, is feasible when you're dealing with the volume and size of records that we're talking about with State Farm?

A Using an alternative media, such as microfilm, or optical disk, does save space, but there is a cost to putting those records on the film, or on [41] the optical disk. So that if that process of creating the film, or creating the disk is not done in the regular course of business, this is a substantial add-on cost. I mentioned the back file conversion at America First being a substantial component of the total system cost, there, as an example of this.

In the case of State Farm, where there are not just the two and a half billion new documents being created each year, but the 1.6 billion that are being judged to have no longer any value, and therefore could be discarded, if you took the perspective that these records could be put on microfilm or optical disk, we have to realize that, in addition to saving space, which, yes, that would occur, there is a huge cost to doing that. We're talking about 20 and 25 cents per document.

Now, when you take that times 1.6 billion, you are talking a cost annually of over $400 million to put these records all on that type of alternative media.

Q Let me stop you, there. So on microfilm, did you say that that's 25 cents per page?

A I said 20 to 25 cents is a typical range in terms of pricing.

Q And then to do that with these records would be in excess of $400 million?

[42] A Correct.

Q Okay. Now, if microfilm was used to keep records, can you tell the jury, to the extent any of them haven't used microfilm and sat down to a reader, what problems are created in trying to find records once they've been microfilmed? On a large-scale basis.

A The ease with which you can find records is a function of how specifically you have indexed the record. Did you index them to a group, what we tend to think in the profession as a book, chapter, or page?

"How specifically could you find it?" is a function of the level of specificity of the indexing. Now, the indexing must be done at the time the image is captured or created on the film, or the optical disk. It typically is not very efficient to do it at a later point in time.

* * *

[43] * * *

Q Now, do you know, Mr. Williams, from having been involved with your other clients, and locally here with America First, what is involved to go back and create electronic images to put them into a computer, of old documents, and what kind of expense you're looking at, there?

A The expense is very significant. And it's an expense, not only of indexing, as I have already discussed, but we must also appreciate that in the [44] normal course of business, we have a lot of staples and things that are bringing documents together, and the preparation cost to get ready to capture that image frequently can run two to three hours for every hour of actual capturing that you're doing.

So that the total cost, in the case of State Farm, would be equal or greater to the number that I gave you for microfilming, depending on, again, the level of specificity.

* * *

[47] * * *

Q And Mr. Williams, when they're looking forward and they create a retention period, if the program is run -- Well, let me ask you this. Having reviewed State Farm's program, its manuals and whatnot that we talked about on Friday, can you tell us whether [48] or not that program discriminates between keeping records that may help State Farm in the future on some unanticipated action, or may hurt State Farm in the future?

A As I evaluated State Farm's records management program, there was no effort on the part of State Farm, there was no evidence that I could see, where there was any discrimination based on the content of the record. Records retention is defined by category of record: Policy applications, claim files. It is not defined by the content of the documents in any series.

* * *

[51] * * *

Q Okay. Having reviewed State Farm's -- Let me ask you this, first of all. On Friday Mr. Christensen held up in his hand a PP&R booklet from 1979. Did you hear that testimony?

A I saw him hold it up, and I did hear that testimony, yes.

Q And he has indicated that that document came to the plaintiffs in this case through an ex-State Farm employee. And do you have an understanding, Mr. Williams, whether or not, in the course of discovery in this case, whether State Farm has made available through a deposition process the person who wrote that book, Mr. Don Holdebeck?

A It is my understanding that that person has been made available to this case.

[52] Q Now, once a document like that has been identified, through whatever means, in a case like this, and we are in court, here, taking testimony, with the court reporter taking this down, does this proceeding become a matter of public record when those types of documents are discussed?

A Yes. Documents are created in the course of a legal proceeding, not necessarily all of those documents in an original context. Some of them are received as evidence, the documents that are reflecting the testimony of the witnesses are original to this particular case.

Q Okay.

A And so those all come together to reflect the complete and accurate history of this particular legal matter.

Q Now, with respect to a manual, using that as an example, I'll represent to you in this case there have been introduced as exhibits the 1987 revision of that '79 manual, and then the 1992 revision of the PP&R manual, that talked about changes in that program as it evolved. Are you aware of that?

A I am aware of that.

Q Now, from a business standpoint and a legal standpoint, if the manuals -- we're not talking about the [53] fact that we're in court now and they've all been discussed as a matter of public record and they've been verified through depositions -- but if the manuals have been superseded, if the manual, let's say, the '79 manual has been superseded on two occasions, is there a business, or compliance need to keep the old manual?

A Let's address that both from a business and a compliance standpoint. First, from a business standpoint, it is essential that those who are using any manual use the most current version of that manual. And accordingly, it is important that all old versions of any manual be withdrawn from circulation and discarded.

Now, there may also be a business historical reason why somebody would want to keep a master copy, a single master copy for some period of time.

Q And let me stop you there, if I could.

A Yes.

Q Excuse me. Do you have an understanding, based upon Mr. Cochran's testimony and your review of this program, whether, under the current State Farm records management program, a master copy of manuals will be kept?

A I do have an understanding, they will be kept, and they will be kept for a period that is substantially longer than any regulatory requirement.

[54] Q All right. Now, I butted in on you, excuse me. Continue.

A The second part of my answer dealt with compliance. And various regulatory entities, including certain state insurance departments, may stipulate a retention schedule for manuals after they have been withdrawn from use. This master copy, if you will. Not all the working copies.

And so typically in older, in former years, I might say, we would recommend that be a two-year retention. Given the growth and the importance of manuals, and how activities have taken in the course of my professional career, that retention schedule has been expanded and we, too, would recommend exactly what State Farm is doing, that is a ten-year retention.

* * *

[58] * * *

Q I'd like to just move to one final area, and that is to talk about opinions that you've formed in this case, other than what you've already said.

First of all, have you had an opportunity to review the manuals and materials that State Farm has put together for their records management program which culminated in a manual, I believe, that's been introduced into evidence, 154-D, that's dated June of '95? Have you had an opportunity to review the program from its birth, so to speak, in the '93 time period, up to the manual?

A Yes, I did have an opportunity to look at that manual, and some other related educational documents. And I had an opportunity to visit, on site, [59] to a very free exchange, query people about different parts of the program, and in that sense, make what I thought was a reasonable test to bring to myself a sense of completeness in my research and my conclusions.

Q Now, having done that, Mr. Williams, can you tell this jury whether or not you have an opinion that this program is a bona fide records management program, and not some sham program to get rid of documents?

A I believe very definitely that this is a bona fide program. I believe it is an exemplary program, one that, well, very frankly, could be used as a standard for others. It's unique in terms of it being better than many in several different ways.

Q Can you tell us how?

A First of all, I was very impressed with the materials, those manuals that were created. The clarity with which they spoke to the key subjects that are a part of records management, I felt was excellent. Very frankly, it, in some respects, was better than the work we provided our clients in that clarity.

Q Did you create this program yourself?

A No, we have never had any consulting work with State Farm.

Q On this program.

A On this program, or any other matter.

[60] Q Okay. Let me just see if I can tick through these a little quicker. And that is you told us, in your opinion the manuals and the written word has good content, and the program appears to be bona fide. I'd like to ask you, does the fact that there is auditing of this process, is that a positive or a negative, in your opinion?

A That was another key plus, in my mind. Many records management programs are put forth by companies, and frankly, they aren't audited, and the compliance level is not as great as if you do have auditing. And the auditing at State Farm was not the records managers auditing themselves, it is done by the internal auditors. And as we all know, those are a group unto themselves, independent.

Q And does that help, in one way or the other, there be consistency in what is kept, and not selective keeping?

A Definitely. It provides for consistency in all aspects of the program, not only the administration of retention schedules, but also in the degree to which the program is responsive to any queries that might arise from litigation to extend those retention schedules.

Q Now, does the fact that the program requires [61] a certificate to be filed when documents are disposed of or

recycled, as Mr. Cochran talked about the process that they're recycled, does the fact that there's a certificate that someone has to sign, is that a positive or a negative?

A That is very positive, because it brings about a certain sense of personal accountability, which is always desirable, not just in records management, but in all activities within a business.

* * *

[66] **CROSS EXAMINATION BY MR. CHRISTENSEN:**

Q Mr. Williams, you testified a few minutes ago you've never done any work for State Farm?

A That is my testimony. I have not done any work for State Farm in terms of any consulting services.

Q You have --

A I did reflect in my deposition, and I would wish to reflect here, that State Farm has attended certain seminars that I have conducted, and in that sense, one could say their admissions fee and my honorarium, there was a small level of commerce. But it was not in any direct context.

Q I'm talking about when you and one of your senior people went to State Farm and tried to get them to give you a large volume of business. You did do that, didn't you?

A One of my associates and I --

Q Excuse me, sir, could you answer that yes or no, please? You did go to State Farm and try to get a large volume of business from them, didn't you?

A I did not go to State Farm to get a large volume of business.

Q You deny that you and one of your senior people made proposals to State Farm to update their [67] records system, and to pay your company for doing that?

A One of my associates and I were invited to come to State Farm and see.

Q Excuse me, sir, is that true or not? Is that true or not, what I've just said?

A Would you repeat your statement? In my understanding --

MR. CHRISTENSEN: Yes, Cecilee, would you read the question back to him?

(WHEREUPON the pending question was read by the Reporter.)

THE WITNESS: We made a proposal to State Farm in response to a request, a very general, small proposal at one point in time.

Q (BY MR. CHRISTENSEN) And you would still like to get business from State Farm from your company in the future, wouldn't you?

A I would view State Farm as other companies. If we can be of service, we would welcome the opportunity to do so.

Q And you'd do so at a profit, wouldn't you?

A We try and do our business on a profitable basis, yes.

Q And they're one of the biggest companies, not only in Illinois, but the country, aren't they?

[68] A They are a large company. I don't have a first-hand expertise to base comparative context, whether they're the largest, or one of the largest in Illinois or the country.

Q You're being paid $225 an hour for your work in this case; is that true?

A That is correct.

* * *

Q (BY MR. CHRISTENSEN) Is it your understanding, Mr. Williams, that the plaintiffs in this case are claiming that State Farm should never throw away any of those 2.5 billion documents that they apparently create every year?

A My understanding is that the plaintiffs would like to have access to records beyond the retention [69] schedules that have been established by State Farm, and we -- I'll stand on that.

MR. CHRISTENSEN: Would you read that question back to him, please, Cecilee?

(WHEREUPON the pending question was read by the Reporter.)

Q (BY MR. CHRISTENSEN) Is that your understanding, sir, of what we're claiming here?

MR. BELNAP: Asked and answered.

THE COURT: Overruled, he can answer that.

THE WITNESS: My understanding is that no one is asking for everything to be retained forever.

Q (BY MR. CHRISTENSEN) Okay, thank you. So when you talked about an expert that we presented that testified to that, you can't identify any witness we've presented that had said that State Farm should never throw away any of its documents, ever? We've never presented that in this case that you're aware of, have we?

A I am only aware of the testimony that I heard from Mr. Cochran on Friday in terms of the testimony that has occurred in this court.

Q You've never read any depositions in this case, other than your own?

A I have read some other depositions, but I've [70] heard no other testimony in the court, other than Mr. Cochran's.

Q Let me see if I can straighten out, in case we've got a misconception. Do you understand that the plaintiffs don't care what document retention program State Farm has, as long as it doesn't involve concealment, withholding, and misrepresentation of evidence? Do you understand that, or is that a new concept to you?

A I would not view that as a new concept. It has not been expressly stated from the plaintiffs' side to me.

Q The issue in this case, isn't it fair to say, sir, is not whether one document retention program or another by State Farm would

be better. The issue that's being presented that's relevant to the jury in this case is whether there has been concealment, misrepresentation, and destruction of evidence relating to this case. Do you understand that?

MR. BELNAP: Your Honor, I'm going to object to that as an improper question as framed. I realize this is cross examination, but that is a jury province and a court province for instruction, and it's not a question.

MR. CHRISTENSEN: Your Honor, he's been asked [71] to comment on our position, on what our experts supposedly said, and I believe he has a misconception. I want to straighten out and see if that changes any of his opinions.

THE COURT: You can frame the question as your understanding of the issue in the case.

Q (BY MR. CHRISTENSEN) All right, let me frame it as my understanding. My understanding is the issue relating to document retention and document destruction in this case, Mr. Williams, is not to try to look at State Farm's document management program and to whether there may be a better one out there. It's to determine and consider whether there's been concealment, misrepresentation, destruction, and withholding of evidence in this case.

Now, is that consistent with the understanding you had as you formed your opinions?

A My opinions were to present the profession of records management and its consensus of what records management should be. And to measure that consensus against the specifics of State Farm. That I have tried to do.

Q But not relating to this case.

A My opinion was asked relative to this case, and I am here today because of this case. But the view [72] that I have been asked to present is a big picture view of the overall quality of State Farm's records management program vis-a-vis the profession of records management.

Q So you're here to talk about records management program, not concealment or destruction of evidence.

A That is correct. I'm here to talk about the program, not the concealment of any evidence.

Q Do you know whether that's occurred in this case?

A I have no understanding on that matter whatsoever.

Q You're not suggesting that a large corporation or organization should not keep any old records at all, are you?

A I am stating that a corporation must retain records in order to have a corporate memory, and must do that in a responsible way that meets both its business needs and its legal responsibilities.

Q And isn't there a moral agreement, too? Sometimes you ought to keep old things, just because it's honest? It's the right thing to do?

A The issues really are very well defined by the state regulators. I don't think there's any moral [73] issues, here, or theological issues, or whatever. I think the issue of what is right to do is really well defined by the state regulatory departments, and they're integrating all the needs of policy holders, of the company, of employees, of the government.

Q You would agree, would you not, that insurance is a public trust?

A It is a form of, I would believe that insurance is a form of public trust, yes.

Q That insurance companies, because of the business they're in and the promises they make, aren't necessarily just like any other run-of-the-mill business, are they?

A I believe that all businesses engaging in contracts have this trust between the parties involved in the contract. Whether you are dealing with insurance as the service that you're providing, or whether you are dealing with manufactured products as the items that you are selling.

Q So you don't necessarily agree that insurance, the insurance business is special, maybe different from, say, an auto dealership that sells cars under contract, you don't agree that an insurance business has some special obligations because it's a public trust?

[74] A I believe that all parties have public trust. I have not really examined the issue as to whether there's a small difference in what that manifests, that public trust. Clearly we know the difference between insurance and cars, but in the contractual detail of that public trust, I'm not aware of something that would make insurance unique vis-a-vis manufacturing or other services.

Q You're not aware of that? For example --

A That would make it contractually unique in terms of the legal sense of public trust? No, I am not aware of that.

Q You wouldn't be surprised if the Utah Unfair Claims Practices Act said that, would you?

MR. BELNAP: Said that it was a public trust?

MR. CHRISTENSEN: That insurance is a public trust.

THE WITNESS: I am prepared to accept your word that it may be included within the phraseology of certain regulations or certain statutes. And I'm sure that that's true in other states. But I'm also sure that in the general commerce that occurs in all businesses, trust is a part of it.

Q (BY MR. CHRISTENSEN) Okay, let me move on. This record management program of State Farm that you've [75] been asked to review, is that the one that just came into being at State Farm? Like 1994?

A What I was asked to review was the current records management program.

Q Didn't that just come into being?

A It is a product of an established records management program that has been long in place at a regional, or somewhat

decentralized basis. What is somewhat new, and what occurred in the 1990s, is that State Farm felt that it could better serve its policy holders if there was some degree of central management to that program. And so what Mr. Cochran spoke of is a manifestation of that corporate commitment.

Q So is the short answer to what you've just said, yes, this program was instituted in 1994?

A The program that Mr. Cochran instituted, and the manuals that were prepared by him, were in the mid-1990s. The program as a whole goes back decades.

Q And you testified that part of the program is they keep a master copy of every manual.

A The practice today is to keep a master copy of their manuals for a ten-year retention after it has gone out of service.

Q When did that practice start?

A I believe that that has started within the [76] last couple of years, when it was viewed as a preferable course of action.

* * *

[77] * * *

Q Let me explore with you and see if you agree with me on some points why keeping documents is important.

[78] Generally speaking, a document is better than someone's memory from years later, isn't it? As far as accuracy.

A Typically that has proven to be the case. If the information has been recorded on the document. We do have to qualify it with that assumption.

Q Sure. And documents are especially important in lawsuits to help reconstruct what happened, aren't they?

A Documents have proven to be very valuable in lawsuits.

Q For example, in this case we've had, well, say, Wendell Bennett, an attorney who defended the Campbells clear back beginning in 1981, and he was asked to testify about things he did and didn't do that many years ago. You would expect, would you not, that his file would be more accurate than his memory?

A I'm not in a position to judge Mr. Bennett personally, or his testimony. I can only speak in a general context, that records have been very helpful in determining the facts.

Q Okay. Let me suggest to you that when I first started in this business, an older lawyer stressed to me the importance of getting documents for these reasons. He said documents are prepared at the time [79] when the person's memory is fresh, usually.

A At or near the time of the event.

Q Right. Second, they're prepared before there's a lawsuit, and there's a reason for a witness to shade his testimony one way or another. Would you agree with that?

A I've heard that statement made, and it is plausible.

Q In fact, sometimes if you have witnesses who aren't quite willing to be truthful, having the documents is the only way the truth comes out, isn't it?

A I'm sure that that has occurred in certain pieces of litigation in the annals of court activities.

Q Let me explore with you something else from your deposition, page 36.

MR. BELNAP: Your Honor, I'm going to object to this use of the deposition in this regard. There's been no foundation of a prior inconsistent statement.

THE COURT: Do you have a response to that?

MR. CHRISTENSEN: Yes, it's his sworn testimony in this case, he made some points that I'd simply like to emphasize with him.

THE COURT: Sustained under Rule 32 of the Rules of Civil Procedure. It's an improper use of a deposition of a non-party.

[80] Q (BY MR. CHRISTENSEN) All right, well let me ask you this. Do you agree that it's very important to understand that a successful quality records management program does not address the issue of the content of the documents? In other words, the program should not get rid of documents that are unfavorable to the company, and keep those that are favorable? Would you agree with that?

A From the records manager's perspective, records are retained on the basis of their category, their title. And therefore there is no judgment made with respect to the content. When a records manager is notified that a case is pending, or there's a discovery order, it is the law department who then makes the judgment with respect to the content, and defines what records within the records management program, based on their content, would be relevant for that case.

So it's important for us to distinguish between the records manager's responsibility and the parties in the case, the attorneys. The attorneys would be speaking to the content, the records manager would be speaking to the form of the record, the category of the record.

Q Okay. I think you misunderstood my question. I'm not talking about attorneys.

[81] A All right.

Q I'm simply talking about a record management program. It's not proper to try to design a program so that the evidence that's favorable to a company is preserved, and the evidence that's unfavorable is discarded. Do you agree with that concept?

A That concept of discarding unfavorable evidence, because you anticipated it to be unfavorable, or knew it was unfavorable, would be totally in contradiction to any quality records management program.

Q A records management program ought to reflect the truth?

A Records management ought to reflect the facts as they are contained in the documents.

Q And it would not be a proper records management program, would it, for a company to destroy old documents that revealed that it was doing some things that it shouldn't be doing, and then replace them with new, self-serving documents to try to create a misimpression. That wouldn't be proper, would it?

A To replace old documents with new documents after the fact is totally abhorrent to any quality records management program, and any professional practices by records managers.

Q Or any program that would slant the truth is [82] improper, isn't it?

A I'm not sure I understand the full question, there, sir.

Q Designing a record management program, if someone went back and looked at documents later and tried to figure out what really happened, they'd get a distorted picture, that wouldn't be proper, would it?

A If they got a distorted picture it wouldn't be proper?

Q If the program, if someone attempted to design one to accomplish that, that wouldn't be proper, would it?

A Oh, absolutely not. The program should not have that as an objective, or permit it as an exception, or anything that occurs within the framework of the program.

Q Now, you testified in your deposition that one of the important parts of a document retention program is responding to discovery in lawsuits, to provide information truthfully, promptly, and properly. Do you agree with that?

A I believe that my deposition reflected truth and correctness in being objectives of records management.

Q Certainly it shouldn't be designed to [83] stonewall discovery process, or to otherwise not produce evidence that is lawfully requested, should it?

A You know, the Association of Records Managers and Administrators speak very simply to that. Have the right information in the hands of the right people at the right time.

* * *

Q (BY MR. CHRISTENSEN) Didn't you testify that a lot of what you do as a records consultant is try to make sure people comply in their records management programs with the law?

A We seek to guide people in making sure that their records management programs are compliant. That is a correct statement.

Q In fact, haven't you written two publications on the legality of record management?

A I've written two documents, "The Legality of Optical Storage," and "The Legality of Microfilm," which detail the laws regarding the admissibility of that [84] alternative media, or records on that alternative media.

Q Based on your background, your study of the law as it relates to document management, do you know if it's a felony in every state to intentionally destroy, alter, conceal, or remove evidence?

MR. BELNAP: Your Honor, same objection as to foundation.

THE COURT: Ask him whether he has an understanding.

MR. CHRISTENSEN: That's what I just asked him, if he knew.

THE COURT: I'll allow him to answer that question.

THE WITNESS: My work, sir, has focused on how to do it right, not what the consequences are if you do it wrong.

Q (BY MR. CHRISTENSEN) You don't know the answer to that?

A I do not know the answer on a state-by-state basis, the way I know what is in my books. My books did not include that type of information, what the penalties were for doing it wrong.

Q Do you have an understanding of whether that's proper or improper?

MR. BELNAP: Based on his answer, objection, [85] lack of foundation.

THE COURT: Overruled, he can answer that.

THE WITNESS: Could I ask you to rephrase the question, or repeat it?

Q (BY MR. CHRISTENSEN) Yes. Do you have an understanding, as a document management expert, whether it's improper to destroy, alter, conceal, or remove evidence?

A I'm certainly aware that to destroy, alter, or conceal evidence, as the term "evidence" is used in a legal proceeding, is against the law.

Q Okay.

A What the specific penalties are, that, I'm not familiar with.

Q Now, I'm going to represent to you that a State Farm witness in a hearing held in this case admitted that at any given time there were a number of bad faith cases pending against State Farm. And that it was common in those cases for discovery requests to be made asking for things such as the State Farm claims manuals. I'd like to ask you to accept that representation as true.

If that's true, a proper document retention program would preserve, not destroy those manuals, wouldn't it?

[86] A It's very important, when we talk about preservation, to know when the decision is made. At the time a manual is created, the decision is made to keep it for a certain period

of time after it's no longer valid. If the litigation came up many years later, it is very understandable that that record would not be there.

You would have a situation under those circumstances, like the train coming to the station, in accordance with a schedule, and leaving on time, and then later a passenger showing up with a ticket, wanting to get on the train, but the train had already passed.

Under those circumstances I can understand readily that, in total compliance with the law, records could have been destroyed.

Q Okay, you've misunderstood my question. Let's assume we've got a bad faith case pending against State Farm, say, in 1980, and in that case manual X is requested, and it exists.

A And the request is in 1980.

Q Yes.

A And the manual is in effect in 1980.

Q No, but it exists, State Farm has it.

A In their file entitled "manuals"?

Q Wherever they've got it, they've got it. But [87] they have it, okay? It's requested in that case. If it exists and it's requested, it would be improper to destroy it while that request is valid, wouldn't it?

A The most truthful answer is, that depends. Let me give you the two scenarios. If the file was there, under "manuals," it would be incorrect to destroy it. If the file was there in another context, maybe it was closed litigation from another case, where it would not have been indexed, and therefore could not have been retrieved, it would not be correct.

In other words, we have a situation which -- Let me draw an analogy. If somebody asks you for T-shirts, we look in the bureau where they normally are, we may look in the laundry

hamper, but that's not where all the T-shirts are. There are T-shirts in the rag bag, because some of the old T-shirts are there.

If these records that this manual that you speak of was located in a closed litigation file, and it wasn't defined as a manual, it is very understandable that it might have been destroyed in course with the retention schedule ascribed to the closed litigation, not to the manual.

Q Okay, let me try again. Let's assume we've got a case in 1980, and it requests manual X, and State Farm knows they've got it, and they produce it. Are you [88] with me so far?

A They have it, they know they have it, and they produce it.

Q They produce it. And while that case is pending, another case is, in another state, is filed, and they ask for the manual. And a year or two later another case in another state is filed, and they ask for the manual, and that process continues. It would not be proper to destroy that manual during any of that time frame, would it?

A As part of the closed litigation, it would seem you would not, under the hypothetical that you've just outlined, in accordance with the manual at the corporate headquarters, if it was there, and they already knew it was part of the case, I would say that there's a possibility it could have been destroyed, but it would not have been bad faith, because they would have known it was already provided as part of the litigation.

Q If it's true what Ms. Ortiz has testified, that there are always bad faith cases, and in most of them they ask for the manuals, a responsible company would keep the manuals so that they could comply with lawful discovery requests, wouldn't they?

A And State Farm has expanded its retention [89] schedule, given the added importance of manuals, as litigation is moved

forward from the 1970s to the eighties to the nineties, whereby they are now greatly exceeding the regulatory requirements for the retention of manuals.

Q But you're not talking about the court laws, you're talking about insurance regs, right?

A I'm talking about State Farm Insurance, and I am talking about the regulations of the state insurance department that guide State Farm on this matter of the retention of manuals.

Q And that's certainly one set of rules they have to obey, is the insurance departments. The other set of rules they have to obey would be those of the courts.

A I would agree with that.

Q And it wouldn't be proper, under my example, would it, for a company, when the case is closed, to have a confidentiality agreement, make the other side return the manual, destroy it, and then represent to people in other cases that are already pending when that manual's destroyed, that it doesn't exist.

MR. BELNAP: Objection, lack of foundation, assumes facts not in evidence.

THE COURT: Overruled, you may answer.

[90] THE WITNESS: Let me respond to your answer by saying, you mentioned the confidentiality agreements. Those really go beyond my personal expertise, my knowledge. This is an understanding that clients have with attorneys, clients, or attorneys may have with each other, and clearly those need to be respected.

I'm really talking about the ongoing records management program and its ability to meet regulatory compliance requirements, and its ability, from the mass of records that are normally retained, to provide those that are part of that mass, to relevant litigation.

Q (BY MR. CHRISTENSEN) You would agree, would you not, that it wouldn't be proper to get back documents from one case, when others are already pending, where they've been requested, and destroy those from the case that's just closed, and then represent in the pending cases that the documents don't exist?

A That would be a practice that I would not subscribe to.

Q Okay, thank you. Now, let me move to another area. Let's assume that you have a case --

A And could I add one point on there? I think it's terribly important, in saying that, on the hypothesis that you presented, that adequate communication from one case to the other be made, that [91] known communication.

Sometimes I certainly have seen instances where a case, some materials from one case might be relevant to another, but it was never made known. And therefore they weren't available.

So if there was a conscious decision, there, to say these would be relevant, and we don't want to make them available, that would be an abhorrent practice. But if it was a case of ships truly passing in the night, because of large volumes, or something of that nature, we would say, not that it's good, but that it's understandable in some context, in an exception basis.

Q Now, you've talked about when Mr. Belnap was asking you questions about documents State Farm has produced in this case.

A Yes, I represented that a substantial number, I believe just under twenty-one, 22,000, something in that area, have been, in the twenties, there, have been proffered in this case.

Q How do you know that?

A Well, it was a response that was provided to me in response to a question that I posed, because I'd kept hearing

these terms "large volumes of documents had been provided," and so I simply said, "What are we [92] talking about in terms of orders of magnitude?"

Q So this is something that counsel represented to you?

A Yes, it was through State Farm's counsel, who I felt was an authoritative source in this matter.

Q Okay. I assume counsel also told you that right at the time this lawsuit was filed in 1981, that the plaintiffs served their first set of requests for production of documents asking for things, such as claims manuals, claim school notes, and other things.

MR. BELNAP: Did you say '81? Did you mean '89?

MR. CHRISTENSEN: '89, I'm sorry.

Q (BY MR. CHRISTENSEN) Were you told about that?

A I am aware that a series of documents were asked for over a time. As I sit here today, I'm not prepared to answer what document was requested at what point in time, because I know that it was voluminous. And that was not the focus of my research.

Q Will you accept my representation that in October, I believe it was in August of '89, documents were requested. In October of '89 State Farm responded, and that the request included things such as a request for claims manuals, claim school --

[93] MR. BELNAP: Which request are you reading from, counsel?

MR. CHRISTENSEN: Our first request.

MR. BELNAP: Which number?

MR. CHRISTENSEN: I'm looking at request number 1.

Q (BY MR. CHRISTENSEN) Items containing information relating to the handling, adjusting, and settling of third-party claims, included but not limited to manuals, booklets, looseleafs, memoranda, audio and video tapes. Do you accept my representation on that?

A I accept that substantial bodies of requests were made, and you are accurately reading from a document that may have been the specifics of what that particular request were.

Q Now, I presume, as you were informed by counsel about document production in this case, that you were told that a few months after the request I've just referred to, there was a meeting held in Utah, where Utah management were instructed, pursuant to the Samantha Bird memo that I've just put on the screen. Have you been told about this?

A I am aware of that memo, yes, sir.

Q Does this memo bother you?

A It's a memo that I view as one of many that [94] I've seen in my professional life, where, basically somebody in the rank and file, call it cleanup day, throw-out day, would then speak to, in a motivational context to those to whom it was addressed, "You have permission, you have to use time to basically shore up the records that you have. Maybe it's moving them out to inactive storage, whatever that may be."

I, in reviewing that memo, did not in any context come away with the feeling that that reflected a corporate policy, or a corporate statement by a person who was knowledgeable about records management practices within the company.

Q Well, let me represent to you that this was an attorney inside the company at State Farm who gave the instruction reflected in this memo, and that the sworn testimony of the person who prepared this memo, Samantha Bird, is that they were told in the meeting that this came right from the regional vice president, one of the top officials at State Farm. Is that consistent with your understanding?

A I am not aware of who might have talked to Ms. Bird in terms of her preparing this. I would assume that anyone preparing this would have counseled with colleagues, whether they be superiors or peers.

Q Do you understand that Mr. Moskalski was [95] behind this, the regional vice president?

MR. BELNAP: Your Honor, I'm going to object to that question as argumentative, and also as a matter of disputed evidence, and misstates the evidence from Mr. Moskalski.

MR. CHRISTENSEN: That's true, Mr. Moskalski denied it. Samantha Bird said they were told these instructions came from him. So you can hear both sides.

MR. BELNAP: I object to that characterization of her testimony, Your Honor.

MR. CHRISTENSEN: Well, the jury's heard it.

THE COURT: Okay.

Q (BY MR. CHRISTENSEN) You interpret this as a records management expert, Mr. Williams, as simply a cleanup day memo?

A As I testified, I do not view this as a records management expert, I do not view it as somebody who has ongoing records management authority. I think it's very similar to many I've seen using other phraseology, that is simply trying to get the troops to clean house.

Q All right, well maybe you haven't read some of what's in it. Let's read it. "Please get rid of old memos, claim school notes, old seminar or claim school conference notes, and any old procedure guides you may [96] have. They are trying to avoid having to come up with old records when the request for production of documents comes in and they request all training manuals, memos, procedural guides, et cetera, that are presently in the possession of your claims representatives and management. Apparently they had a request like this in Texas."

Did you know Mr. Moskalski came from Texas just a few months before this memo was prepared?

A I have no knowledge of Mr. Moskalski's career.

Q "And each person had to surrender all their old junk. I guess corporate is not even going to keep old CPG guides, old claim manuals, et cetera. We will only have what is currently in effect. That way if they subpoena our claim manual for U claims for 1987, for example, we will say, 'We don't have it.' This should be easier than trying to produce it or having to defend it."

That's not a cleanup day memo. That's a "get rid of the evidence" memo, isn't it?

A I would disagree with that characterization. Because I believe, given that this person was part of the organization, could well have been the assumption on her part that there was a corporate copy of these, and [97] that what she was speaking about, here, was those that are not current.

And it's an ongoing problem in American business, where people don't keep things current. They don't throw out earlier manuals, and therefore there is confusion as to the practices by which businesses operate. And so in that spirit, I could well understand that there was an assumption, right or wrong, that that official copy was elsewhere, and that this was front line clean out the drawers.

Q It says, "Corporate's not even going to keep a copy," doesn't it?

A They would keep it in accordance with their retention schedule. If -- Whatever that was at that time. I think it was two years. But that would be the inference that I would attach to that memo.

* * *

Q This case, this very case that you're an expert witness in, was pending when this memo was written. Okay?

A I accept that.

Q Some of the very materials described here had been requested pursuant to a formal request for [98] production of documents. Didn't you testify that it was improper to get rid of documents after they're the subject of a formal request for documents in a case?

A To knowingly get rid of them after you were informed that they were. I have no first-hand knowledge as to what Ms. Bird did or did not know about this case at the time she wrote this memo. I was simply shown this memo, and it was my impression that it was very analogous, as I say, to one of these other pep talk memos that I've seen over the years many times.

Q Would you read for the jury who signed the response to this document request for State Farm?

A There is the signature of Paul Short on the document that you're holding in your hand. I don't know what that document is.

Q Do you want to see the front of it so you don't have to accept it on faith?

A This is an interrogatory -- Well, it's -- I'll let you identify it.

Q Okay, it's the defendant's answers and objections and responses to plaintiff's first set of interrogatories and requests for production of documents.

Now, are you aware that the minutes -- These aren't the minutes, this is Samantha Bird's memo to her [99] own unit?

A Yes.

Q But the minutes of the meeting show Mr. Short was present at that meeting. Were you aware of that?

A I was aware that -- Some minutes of certain meetings have been shared with me. I do not believe that those are the minutes of the meeting that you're referring to, but I would have to check what I actually saw. It was some time ago, but I believe that it was not this meeting, sir.

Q Okay. Well, let's clear that up. Do you see where the

document up on the screen says, "Yesterday in staff meeting," it begins right there?

A Yes, I can read that.

Q And you see the date on the document is 4-6-90?

A Correct.

Q So that was a staff meeting held on April 5th of 1990. Do you accept that?

A I will accept that that is correct.

Q Now I'm going to show you the minutes of the staff meeting from April 5th, 1990.

A And where did this staff meeting occur?

Q What office? It occurred in Utah?

A State.

[100] Q Okay.

A Then I'm quite sure that this is not something I've seen before.

Q Oh, okay. "Those in attendance for our staff meeting held April 5th, 1990 at the Murray service center." You probably don't know that Murray's a suburb of Salt Lake?

A That is -- I am unaware of that fact.

Q Do you see Mr. Paul Short listed?

A I see his name as a person to whom these minutes were sent.

Q And do you see him also listed as a person present at the meeting?

A Yes, I do see.

Q Do you see his name listed?

A I do see that he was listed as being present there.

Q Do you see Samantha Bird also listed as being present?

A Samantha Bird is listed as being present at that meeting, yes.

Q So we've got Mr. Short signing, a few months before

this meeting, State Farm's request for production of documents in this case asking for some of the kinds of documents described here, we've got Paul Short [101] present at the meeting where this took place.

A Now, I know that he signed a document that you have shared with me. I don't know what that document contains with respect to what was between page 1 and the last page. So when you say I know, that isn't correct.

Q Okay. Well, then let's clear that up. Would you read request 1 that I've highlighted in yellow, please.

A "Request 1. Produce a complete copy of defendant's claims procedures manuals, including amendments and deletions, that would apply during the period of 1981 to the present time. Claims procedures manuals should include any written, recorded, video taped, filmed, computer data, or otherwise reproduced guidelines, procedures, instructions or other items containing to information relating to the handling, adjusting, and settling of third-party claims, including, but not limited to manuals, booklets, looseleafs, memoranda, audio, video tapes, motion pictures, and such other items, regardless of whether or not they are bound together."

Q Okay.

A And I repeat, that is the first time I have read those words.

[102] Q Now that you see that, you would admit that this is completely improper, isn't it, what's going on, here?

* * *

THE WITNESS: It would appear that some people could interpret this as a pep memo. It would also appear that some people could interpret this, given this added evidence, in another context.

Q (BY MR. CHRISTENSEN) So let me repeat a question

and I'll move on. Does anything about this bother you, now that you know the facts?

A I think it is probably a document that, because it has multiple meanings to multiple parties, or could have had multiple meanings to multiple parties, should have been certainly more carefully phrased, if it was a pep memo, to speak in those terms. If it was anything other than that, I just don't think -- I think it may blur the clarity of whether or not it is a pep cleanup memo, but I don't think it obviates the possibility.

* * *

[103] * * *

Q Now, I think in your deposition you said that on an optical disk, a fourteen-inch optical disk -- Does that look like a disk like you could rent to watch a movie on? Have the same kind of appearance?

A The outward appearance is somewhat similar. There are smaller ones analogous in size to what you use for your CD and audio.

Q A 14-inch disk you could keep 100,000 pages?

[104] A There are certainly 14-inch disks where at least that much, in the way of document-based information, could be contained.

Q So you could probably keep every claims manual State Farm has ever had on one disk. Keep it there in the legal department, so it's available when information is requested in lawsuits, couldn't you?

A There is no question that the capacity of optical media would permit State Farm now to put all their records on optical media.

I think it's important, in saying that, to also make the point that optical media hasn't been around that long. It's relatively new. Kind of started coming into popularity ten years

ago, and so I would say the option for State Farm to do that probably isn't more than four, five, six years ago.

Q But microfilm's been around for a long, long time, hasn't it?

A Microfilm is something that has been around, let's say, since World War II, on a highly popular basis.

Q And State Farm has had a microfilming program for many, many years, haven't they?

A They have had a very extensive one.

Q And you can get, what, between five and [105] 10,000 pages on one roll of microfilm that's about this big?

A It is possible to get that many. If you're dealing with eight-and-a-half-by-eleven documents, we speak of those being reduced at a 24-X reduction in order to retain clarity, and that would bring it down to more like 2,500 documents. If you're talking about checks, which are much smaller in size, you can get more, and you also can use things like thin-base films and others that can bring you much closer to that 10,000 figure that you spoke of. Possible, but for the regular documents that we're talking about, you're speaking more in terms of 2,500.

Q But you could get every claims manual State Farm has ever had, if you used microfilm, easily in a desk drawer of corporate legal counsel, couldn't you?

A Well, frankly, I'm not privy to how many manuals they've had in all of their different varieties of business. I think I prefer to answer that, instead of saying yes, you could have all of them, you could get a lot in there.

Q Okay, many, many thousands of pages.

A Yes.

* * *

[108] * * *

Q (BY MR. CHRISTENSEN) Now, you testified, sir, also, that the current State Farm program is an extension of what has been occurring at State Farm for many years with some refinements. That's not your exact words, but that's the meaning I took. Is that a fair statement?

A That is a fair interpretation. It is a refinement of what they have had in place.

Q I'm going to show you what's been marked as Exhibit 155-P, which I'll put on the screen. The subject is retention of records. Purpose, do you see the statement, "State Farm must strive to maintain a thorough and consistently-applied inactive records destruction program. It is our best defense against costly judgments in court resulting from improper document storage and destruction." Have you seen this document before?

A No, I have not seen this document before.

[109] Q Would you agree with me that a fair reading of that document would be that State Farm views records destruction as its best defense against judgments in court?

A Well, it states, "it is our best defense," so it would be difficult to say that another interpretation could be given to it. I think it's important to note what they are saying, what you should do, as well as the opinion, at least, of the writer, there -- and this is an operation guide, I don't know that this is a corporate policy or something from within the field -- but I think certainly the first sentence is very much in line with records management practices, to do it thoroughly, do it consistently.

I am, as a professional, somewhat surprised that opinions such as are contained in the second sentence would be incorporated into a guide, because a guide is not typically a place where you would render opinions.

Q You're talking about the sentence, "It is our best defense

against costly judgments in court resulting from improper document storage and destruction"?

A That is a judgmental statement which typically is not found in quality manuals. I note that this is from 1992, and maybe this is something that has [110] been rescinded in the interim as just being not reflecting their practices.

* * *

[111] * * *

Q I'm going to show you what's been marked as Exhibit 156. All right, this is a document that's part of an operation guide it says reporting punitive damages. "Any payment that includes punitive damages. "Any payment that includes punitive damages --"

MR. BELNAP: Your Honor --

THE COURT: Just a minute.

MR. BELNAP: May I just have -- I would like to make an objection that there's no foundation for this. The foundation in this case is that operation guides are State Farm Fire and Casualty documents, and [112] that is undisputed from the testimony of the witnesses. And so as to this defendant, I'm going to object to foundation.

Q (BY MR. CHRISTENSEN) This was a document that was Exhibit W, Your Honor --

MR. BELNAP: What was that?

MR. CHRISTENSEN: At the March 5th hearing. I'm probing the extent of his opinions on what records should properly be maintained and not maintained, and I think this one on punitive damages is clearly relevant to the issues of this case.

THE COURT: Anything further?

MR. BELNAP: No, I've stated my evidentiary objection, Your Honor. It's undisputed that it's OGs, or operation guides, are fire documents.

MR. CHRISTENSEN: This man is here to testify about

fire and auto's retention program, as did Mr. Cochran. They're the same.

THE COURT: Establish that foundation again for the court.

Q (BY MR. CHRISTENSEN) Yes. The document retention program you've reviewed applies to fire and auto, as well as the other State Farm companies; isn't that true?

A That is a correct statement. It was a [113] corporate, including subsidiaries, program. It is my understanding that the program has been phased in, and as reflected, I believe, in a portion of Mr. Cochran's testimony, there may be one or two elements that are still in the phasing process, but the intent of the program certainly is corporate-wide.

Now, as to what element of the State Farm family of companies was phased in at what point, that, I'm not prepared to provide information on.

Q Okay.

THE COURT: Overruled, I'll allow him to testify on it.

* * *

[116] * * *

Q Now, you testified that it costs about 25 cents a page to put a page on optical disk?

A If that page is eight and a half by eleven, and if it is reasonably clean in terms of the quality of the documents. Engineering drawings, for example, are much more expensive, because they're very large. Checks are somewhat less expensive. But I felt that that was a number that was representative of the types of things most prevalent at State Farm when I used it.

Q You're not suggesting that State Farm doesn't have the money to put its claim manuals on optical disk or on microfilm, are you?

A Clearly State Farm has the ability to manage their manuals

correctly, whether it's on paper or [117] optical media or microfilm. Media is not the issue.

Q Okay. Now, you testified, as Mr. Belnap --

A And I'm underscoring in that last question, if I may, that that pertains only to manuals. I wouldn't want to have that confused with all the records that we spoke of earlier on the 1.6 billion. That is just simply not a prudent course of action.

* * * *

EXCERPTS OF TRIAL TESTIMONY OF HAROLD C. YANCEY, JULY 25 & 26, 1996

[Vol. 29, R. 10284, commencing at p. 142]

* * *

HAROLD C. YANCEY called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. HANNI:

Q Would you state your name, please.

A Harold C. Yancey.

* * *

[151] * * *

Q Now, Mr. Yancey, during this period of time that you were involved in claims, did our firm handle some of those claims for the insurance companies involved?

[152] A Yes. Your firm was, did most of the defense work for us in this particular area.

Q In 1985, you said you were asked, I think you said you were asked by Governor Bangerter to become the insurance commissioner?

A Yes.

Q And did you accept that appointment?

A I accepted, yes.

Q How long did you serve as the Utah insurance commissioner?

A About seven and a half years.

Q That would be from 1985 until --

A To January of 1993.

* * *

[185] * * *

Q Mr. Yancey, based on your experience in the insurance industry, your experience in handling claims, your experience as a regulator for seven and a half years, and what you learned about State Farm during the time that you were a regulator, do you have an opinion as to whether or not, here in the state of Utah, there was, State Farm engaged in any kind of a pattern or practice of cheating or deceiving insureds or third-party claimants? Do you have an opinion?

A Yeah, I do.

Q Will you tell us what that opinion is.

A During the seven and a half years that I served as commissioner, none of my staff ever brought to my attention any evidence that there was a pattern and practice on the part of State Farm of deceiving or cheating people on claims. I also, through my own observation, did not find any evidence to that effect.

* * *

[192] * * *

CROSS EXAMINATION BY MR. CHRISTENSEN:

* * *

[197] * * *

Q And to reiterate something I think is significant, during those years that you were an insurance claim man and also did other things with the insurance company, Strong and Hanni were your lawyers.

A That's correct.

Q And, in fact, Strong and Hanni have been your personal lawyers; isn't that true?

A On a very minor item.

Q So your answer is just --

[198] A Preparing a will.

Q So were they your lawyers, or weren't they?

A They were.

Q Now, you said that the governor had asked you to be insurance commissioner. That is a job that you sought out, is it not?

A No, I did not seek the appointment.

Q And isn't it true that Mr. Hanni supported you in getting that appointment?

A I don't know of one thing that Mr. Hanni did to help me get that appointment. We've never talked about that.

Q You charge $150 an hour?

A I do.

Q That's what you're being paid for your work in this case.

A That's true.

Q You've done other expert work for Strong and Hanni?

A Yes.

* * *

[199] * * *

Q All your expert witness has been for defendants?

A That's correct.

Q You've never testified against an insurance company?

A Because I've never been asked to.

Q But you never have?

A No.

Q Is this your first experience as an expert witness in a bad faith case?

A Yes.

Q Now, you have been listed as an expert for State Farm in a case in Arizona; isn't that true?

A I read that someplace, but I have not been contacted by State Farm.

Q So State Farm is confident enough in what your testimony will be they've listed you without talking to you?

A They probably have made a list of potential [200] witnesses.

Q Mr. Yancey, you have been so willing in supporting the positions that Strong and Hanni has taken in cases where you've been hired as an expert by them, that you even tried to testify in a case where the court disqualified you because of a conflict of interest; isn't that true?

A That's true. But you have to understand that in its true light.

Q The court ruled that because the case at issue had been investigated by the insurance department when you were insurance commissioner, that you had a conflict of interest.

A The court did not actually rule. The plaintiff's attorney called that to the attention of the court, and the plaintiff's attorney indicated that he would provide the statute and the law that would apply, and that was never provided to the court.

But as a matter of courtesy, I agreed to step down because of that issue.

Q So you didn't testify.

A I did not testify.

Q Because of the conflict of interest. And was that purely voluntary, or did the court preclude you from doing that?

[201] A We volunteered not to include my testimony, and the court was going to get the documentation from the plaintiff's attorney, which I doubt that they ever provided.

Q You would agree, would you not, that you can have a conflict of interest if you, as an insurance regulator, tried to take sides in a case where your office has had some involvement on an official basis?

A Well, it would depend on how you define conflict of interest. In that particular case, I had not been involved at all.

One of my staff people may have been involved, but I was not directly involved, and I guess you could argue that I didn't have a conflict.

Q Normally, under ethical standards, if your firm or your office has a conflict, you have one; isn't that true?

A That's true.

* * *

[202] * * *

Q Now, Mr. Yancey, your deposition was taken back in '94, and again just a few weeks ago, wasn't it?

A Yes.

Q And you were aware that State Farm had designated a large number of witnesses near the end of the discovery period, and that we were taking depositions every day to try to get those concluded in time for this trial.

A I'm aware of that.

Q And you're aware that we'd requested that we see documents that experts were going to rely on before those depositions so that we could be ready.

A I assume you did that. I have no direct knowledge of that.

Q And when I took your deposition just a few weeks ago down in Strong and Hanni's office, I asked you [203] if you'd brought any file or materials with you, didn't I?

A You did.

Q And you told me you hadn't, didn't you?

A No, I told them that I didn't have them with me.

Q Well, let's look at what you said. See beginning on line 16 --

MR. HANNI: Which deposition?

MR. CHRISTENSEN: This is the second one. The one a few weeks ago.

Q (BY MR. CHRISTENSEN) This is page 3.

MR. HANNI: Do you have your deposition, Mr. Yancey, with you?

THE WITNESS: I do. Page 3.

Q (BY MR. CHRISTENSEN) Do you see there on line 16 where I said, "And I'm going to do that, just get right into this. Did you bring a file and any sort of materials with you today?"

Your answer was, "I didn't."

That wasn't true, was it?

A I didn't have it with me. You will recall that later in the deposition I went and got the file and provided you with the information.

Q And when you told me you did not bring it [204] with you and we were sitting in Strong and Hanni's conference room, your file and those materials were sitting in Mr. Hanni's office, right next to the room, weren't they?

A That's correct. But I interpreted your question to ask if I had the file with me. And I responded that I did not have the file with me, in the room where the deposition was being taken.

Q You didn't want me to ask you questions about those things, did you?

A No, that's not true.

Q You didn't disclose until I suggested we take a lunch break for you to go to your home and get those, that they were actually right there in the office, did you?

A I didn't disclose that, no. But you'll recall that when you asked for the information, it was provided to you rapidly.

Q Now, it's been your sworn testimony that you have no criticisms of State Farm's conduct in handling the Campbell matter; isn't that true?

A That's true. When they made the decision to try the case.

Q Well, you said you didn't have any criticisms of their conduct in handling the Campbell matter at all, [205] didn't you?

A Well, I also mentioned through, not only before trial, but during trial.

Q That's still your testimony.

A Yes.

Q You have no criticisms of any of Wendell Bennett's actions?

A No.

Q Do you have criticisms of State Farm's conduct after the trial?

A Only one slight criticism, and that involved the area of that bond, and the timing on when Mr. Hanni was retained to represent State Farm directly.

Q You're talking about Wendell Bennett's conflict of interest?

A Yes.

Q But in spite of that, you have no criticisms of Wendell Bennett, even though he was acting with a conflict of interest?

A Well, I just testified that there's a period of time after a judgment is rendered by a jury when there has to be a transition between the defense attorney, and if the company has a separate interest, then they have to retain their own attorney to protect that interest. There's a period of time when that [206] transition has to take place.

Q Didn't --

A And in most cases it doesn't happen overnight.

Q So it's okay to act against the best interests of your client for a short period of time; is that what you're saying?

A I don't think there's any evidence that Wendell Bennett acted against the interests of Campbell for that short period of time.

Q Not even on the supersedeas bond?

A Well, eventually that whole situation was resolved amicably.

Q Now, in your trial testimony last October, you testified that you concluded Campbell was an honest and truthful man.

A I felt that he was.

MR. HANNI: Which page are you reading from?

MR. CHRISTENSEN: Trial page 1,831 to 1,832.

MR. HANNI: Do you have a copy of the trial transcript, Mr. Yancey?

THE WITNESS: Yeah, I do.

Q (BY MR. CHRISTENSEN) Well, do we have to read it? Wasn't that your testimony?

A Well, I don't recall every word that I said [207] during trial.

Q So do you deny saying that?

A No, I don't deny saying it.

Q Let me ask you today, is it your conclusion that Mr. Campbell was an honest, truthful man?

A I believe that he was.

Q In fact -- Let me move on. In your deposition you testified that you were assuming the Campbells were being completely truthful.

MR. HANNI: Which deposition?

MR. CHRISTENSEN: First deposition.

THE WITNESS: I have no reason to believe that they were not.

Q (BY MR. CHRISTENSEN) But then you testified that you chose to believe Bennett instead of the Campbells, where their testimonies disagreed, didn't you?

A That's true.

Q You chose to believe Bennett on the issue of whether Campbell was adamant about the case being tried.

You're aware that Campbell said he didn't care very much if it was tried. He just wanted to know what his risks were, and if he had no risk then it was up to State Farm if that case was tried. Do you recall that testimony from Mr. Campbell's deposition?

[208] A Yes.

Q And you chose to believe Bennett instead of Campbell on that issue?

A I chose to believe Bennett, because I don't think hardly any, any defense attorney, any experienced defense attorney would make those statements.

Q What, that there was no risk?

A Right.

* * *

[211] Q You're aware that Mr. Bennett testified, both last October, when State Farm was trying to prove the decision not to settle was reasonable, and admitted it again in this trial, that he did tell Campbell he had plenty of insurance. Are you aware of that?

A I'm not sure exactly of Mr. Bennett's testimony.

Q Would you dispute that he said that?

A No.

Q Do you want me to find it?

A No.

* * *

[235] * * *

(The jury left the courtroom.)

* * *

[241] * * *

THE COURT: All right, let's hear argument on this other witness.

MR. BELNAP: Judge, I think I can make this short, because we have a written proffer we would like to provide to you. Is that acceptable?

[242] THE COURT: Sure.

MR. BELNAP: Okay. I don't have that with me today, but we can bring it tomorrow. But this is our view of the reason why we ought to be allowed to call as rebuttal witnesses, witnesses

on the subject of Ina DeLong's testimony about the Loma Prieta earthquake, and the fact that she allegedly had documents proving that State Farm had cheated homeowners out of $175 million in that earthquake situation.

Now, Mr. Crandall had asked her on cross examination a number of questions about why she left State Farm, had she had a relationship with a contractor, had they breached ethical obligations of State Farm, had she accepted gifts from him, had she ridden in his truck to various jobs involving that earthquake, and he did ask her those questions.

But we do not believe that opened the door to allowing her to testify about how State Farm allegedly cheated. But Mr. Christensen held in his hand a report that thick, and had her identify if, in that report, as he waved it to the jury, if there was evidence that State Farm had cheated $175 million worth out of policy holders.

Now, the fact of the matter is, Mr. Hernandez from the California State Insurance Department received [243] that report from Ina DeLong, and an investigation was done, and he found, and the department found that to be without merit. That would be the witness that we would like to call on that small, isolated issue.

We would also like to call a Mr. Gordon, who was her divisional claims superintendent down there, who will support that same issue, that those allegations were not founded.

THE COURT: Now, is this new? I've never heard of Gordon before.

MR. BELNAP: I mentioned Gordon last week. I had mentioned Hernandez before, Your Honor.

MR. CHRISTENSEN: I don't recall Gordon either.

MR. HUMPHERYS: I don't either.

MR. BELNAP: Last week, or Tuesday, I mentioned Gordon. He is the divisional claims superintendent that was

involved in those same stack of allegations. And we would like to proffer him. We believe this testimony could be handled in less than a half of a day, probably two hours, on that very limited area for direct and cross. And I would move to be able to do that, and I think it's proper rebuttal to Ms. DeLong's statement about the $175 million.

THE COURT: Okay.

[244] MR. CHRISTENSEN: I remember how that testimony came out a little differently. I'll acknowledge it's been quite a few weeks ago. But as I recall, Mr. Crandall, the California attorney, had a very aggressive attack on Ms. DeLong as his cross examination approached, and several times kept asking her, "Isn't it true you left State Farm so you could become a $200-an-hour witness? You could get your $200 an hour fee testifying, and isn't it true that's why you really left State Farm?" Over and over again, among other things.

He also, in trying to impeach her, used fire company documents, depositions, at least one, I think, from a fire case, and so forth. We had stayed out of the issue because of the court's prior instructions. He not only opened the door, he opened a flood gate with the attack he did on this witness. And it seemed completely fair to me, and the court so ruled, that she was entitled to explain why she did leave State Farm after that kind of cross, which she did.

We didn't put those documents into evidence. State Farm has deposed Ms. DeLong a number of times, she's produced those very documents numerous times. Mr. Crandall and State Farm knows Ms. DeLong and her testimony better than we do.

[245] And here we are, for the case to about conclude, and they want to interject new witnesses. The court knows it's our view that there's already been too much interjecting of witnesses into this case by the defendant. I was deposing witnesses on Sunday a few days ago that they were allowed to put in. If they say they could do this in short order, that's not fair.

We've had no discovery on it, no opportunity to come up with our own witnesses. I am confident, based on everything else we've seen in this case, that if we had the opportunity to do discovery, to have State Farm produce its files on the earthquakes, the PP&Rs of the people involved, and get to the bottom of this whole thing, we would find plenty of evidence corroborating Ms. DeLong.

I think she also testified that going to the media with this information forced State Farm to reopen the files on many cases. And I don't know what their proffered evidence is, but one explanation could easily be, if there wasn't anything done about it, it's because State Farm's hand was forced, and they were forced to go do it anyway. If they're going to have witnesses, we need discovery, we would need our own California people.

Tomorrow the evidence ends. I don't think it's fair to interject this in later, especially right [246] here at the end of the trial, and especially after our experts have all testified.

MR. BELNAP: Your Honor, may I just, so to speak, have the last word?

THE COURT: You may.

MR. BELNAP: Judge, I will check what I told Your Honor on Tuesday, and I'll live by that in terms -- But I thought I did mention Gordon. I mentioned Hernandez the week before, but if I didn't, I'm sorry.

But nevertheless, Ms. DeLong, if not directly, certainly in several of her answers, indicated that, to the contrary of what Mr. Hernandez would testify to, that this was kind of an open-and-shut situation of wrongdoing, and that it was determined it was wrongdoing, and an independent person with that department in California looked at it, and investigated it, and it was determined that her position was not factual. And I'll submit it.

MR. CHRISTENSEN: Your Honor, one other thing. I think -- and again, this is several-week-old memory -- but I think Mr. Crandall asked her about that on cross.

THE COURT: I'm going to deny the motion. My reasons are as indicated by the plaintiffs. I think it's well to note that it's very late in this case to be [247] bringing up new witnesses. Ina DeLong is well known to the defendants, and it seems to me that they could well have anticipated this, particularly could have anticipated it, since Mr. Crandall's the one that opened the door and brought up the fire cases after the court made some effort to limit at least the substantive use of fire cases.

That issue was, of course, a difficult one through the trial, because there were relationships between the fire and the auto companies. But notwithstanding that, I remember making a clear point to Mr. Crandall that he was opening doors when he launched his very aggressive cross examination into the fire area, and it seems to me that for him to invite that kind of an enlargement of the case, knowing full well more about Ina DeLong than anybody in the courtroom, from his prior experience with her, and then to use that as a basis to bring in two new witnesses after the plaintiffs have closed their case, and virtually defendants have closed its case, seems to me to be utterly unfair and extraordinarily additional burden on the jury, that has now sat through almost two months.

The court had some hopes of limiting this case, and is not casting any fault any direction on its inability to do that, other than the fact that it has [248] happened. I'm somewhat saddened by the fact that it's taken us so long to complete the case, but I'm also, we did tell the jury two months, but I didn't tell them any more than two months. And I think to add an additional burden in this case would be unfair to the jury, to say nothing of what burden this new evidence would present to the plaintiffs to now do further discovery and then seek further examination.

And so with those highlights, the court will receive the defendant's proffer, but is ruling and denying the motion.

MR. BELNAP: Your Honor, can we -- Given the totality of the situation, that there was not -- and I've reviewed the transcript, there was not questions into the merits of the dollars until after she raised it -- I would like to ask for a restriction on closing statements on referring to that dollar figure in closing arguments.

THE COURT: I don't have a problem with that. Do you have any intention of using those numbers in closing?

MR. CHRISTENSEN: I don't know. We haven't really thought about that.

THE COURT: Well, I don't think any reference should be made to anything she had to say about [249] earthquake damages unless it's -- You get the last shot. If that door is opened by the defendants, I think you ought to come up and raise that with the court for your final argument. But --

MR. CHRISTENSEN: Well, I think we have to --

MR. BELNAP: If we do, would you take your gun out and shoot me, Your Honor?

THE COURT: I don't think I'll have to. I think you've got a room full of folks that --

MR. CHRISTENSEN: Well, we ought to have this much latitude. Obviously they're going to be attacking the credibility of our witnesses in closing, and --

MR. BELNAP: Why don't you wait and see? Maybe we'll agree with everything you said.

MR. CHRISTENSEN: If they'll stipulate everything Ina said was true, I will not touch it.

THE COURT: I'm going to allow full argument, but I think that area, of those numbers, that's, I think that's a no-no, unless there's direct provocation from the --

MR. CHRISTENSEN: We'll stay out of the numbers unless they open it, but I would at least like to be able to say

something like, "She left because she felt that she needed to, to correct an injustice," or to deal with one, or something like that.

[250] THE COURT: I don't have a problem with correcting an injustice. But that's different.

MR. CHRISTENSEN: How about a $175 million injustice?

THE COURT: I think I'd have a problem with that.

MR. CHRISTENSEN: All right.

THE COURT: All right, we'll be in recess. And again, I invite you to get together on the jury instructions. We'll have at it tomorrow as we begin, and try to get as much of it done, and then we've got some time, as I said, on Monday morning, we'll finish up whatever else we had.

* * *

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* * *

THE COURT: We're on record in the matter of Campbell versus State Farm Mutual Automobile Company. The jury is not present. I understand counsel for the defendant wishes a conference out of the presence of the jury.

MR. HANNI: Yes, Your Honor. Mr. Christensen faxed an article here -- and if I may approach, I'll hand the court a copy of it -- that he said he wanted to use in cross examination of Mr. Yancey, and we object to that being used at all.

In the first place, it was sent to us last night. Mr. Christensen yesterday sent us copies of a newsletter that Mr. Yancey was a part of when he was regulator. We don't have a problem with him using that, because it's a Yancey publication.

But this thing is total hearsay. It's something that is completely, it's just a newspaper article, or a magazine article of some kind. It's got a lot of highly inflammatory stuff in there. And if we get into that kind of thing, we're going to be hours and hours and hours with it.

It's sent by a Mr. Calvin Thur, one of, an Arizona network lawyer on this, so we object to it. It's total hearsay.

[5] THE COURT: Mr. Christensen?

MR. CHRISTENSEN: As far as the timing on it, it was apparently faxed to my office on the 24th, I think around 5:00 o'clock, if I remember what the fax said. Around 4:00 o'clock. I didn't discover it on the 24th. When I got back to my office yesterday afternoon my secretary showed it to me, and I faxed it to Mr. Hanni within thirty minutes of my getting it. As you'll see the date on it, is August, 1996, "Money Magazine," it's apparently just come out.

And so I sent it to Mr. Hanni. It does treat some issues directly on point of the issues that are coming up with respect to these regulators. As the court may recall, Mr. Crandall used newspaper articles in cross examining Mr. Prater, I believe it was, and at that time I said, "That's fine, as long as this goes both ways."

This isn't a newspaper article, it's a magazine article. But I think that would apply to the understanding earlier in this case. And as I say, it's got some significant things in it that I would like to use in impeachment of Mr. Yancey.

MR. HANNI: Your Honor, I'd just like to say that the articles that Mr. Yancey was a part of, they were served late. And I don't want to talk about us, I [6] don't want to object on that ground. Discovery's over in this case, and we keep bringing up new things.

THE COURT: Well, let me just ask you. On this Crandall matter, were the articles that Crandall used to impeach DeLong or Prater, were they disclosed in advance to counsel?

MR. HANNI: I don't even remember that. You'll have to respond to that.

MR. BELNAP: Judge, I don't know the answer to that. And I don't remember if they were. But they went directly to a statement that Mr. Prater had made that there was no fines in

the state of California from insurance regulatory aspects, and that's what he used them for. I'm sorry, I don't remember if they were disclosed or not.

THE COURT: They went up on the board. If I remember right, they indicated there was one elected commissioner.

MR. BELNAP: Garamendi, I think, was the issue then, and he just was asking Prater if, you know, "Isn't it true that this thing happened against Allstate, and this one happened against Metropolitan?"

THE COURT: I remember.

MR. BELNAP: And that's how I remember it, Judge.

[7] THE COURT: What's in this that is important at this point?

MR. BELNAP: And Prater also, you know, they've had their shot with Prater at several articles that he supplied them that came in late, but so be it.

But they've already had their shot at that, and we've been restricted with other regulators from going, staying right within the confines of their depositions, because of the ruling that Your Honor made on the order of witnesses and the no rebuttal aspect of Prater. And I think that would be another basis that this shouldn't be brought in.

MR. CHRISTENSEN: Well, this ought to be viewed in context, too, Your Honor. I got a call from Mr. Belnap last night indicating that they now want to have Mike Arnold, their last witness, discuss class actions against State Farm. He had indicated, he left a voice mail the evening before, which would have been the evening of the 24th of July, on Mr. Humpherys' voice mail. I had Mr. Humpherys check that, and it was there. It was just after 8:00 o'clock on the 24th.

MR. BELNAP: And Roger, Rich and I had talked the evening of the 24th up until about almost 6:30 or --

MR. CHRISTENSEN: Yeah, I think he only left a few minutes before. Anyway, so the practical effect [8] was, we were informed last night. They want to get into class actions with Mr. Arnold, who has not been designated for that. We've not been allowed to get into the substance of class actions, simply to use them to bring up that they exist, and that these witnesses didn't know about them.

We would love to have put on some of the attorneys that handled those, or some consumer advocates, or some people to get into the merits of those and have them explain to the jury the different things State Farm is doing. And we were limited in our ability to do that. We've honored that.

To now have them, at the last minute, put on a witness, where we've had no discovery, I understand there's an attorney at State Farm -- and I simply know this through hearsay -- there's an attorney at State Farm that's over the class actions. And I'm sure there are a number more than we've discovered. We would love some discovery there.

But that's come up at the last minute, as well, again, with a witness not designated on it, and going beyond the scope. I think whatever is done with this article that is before the court right now ought to be viewed in the context of what's going to happen with Mr. Arnold later this morning, as well.

* * *

[12] * * *

THE COURT: What is it you want to do with him on class actions, counsel?

MR. BELNAP: Your Honor, obviously we did not raise the class action issue in this case. Mr. Christensen did. Mr. Arnold has personal knowledge of some of the cases that Mr. Christensen referred to, and has, was working in the state of California when the Krinsk case was being handled, and has personal knowledge of that, and --

THE COURT: Is Krinsk the parts case?

MR. BELNAP: Yes. And he was a property damage superintendent in California when that case and the Krusinski case and some of the other ones were being handled, and has personal knowledge.

And frankly, the record has been grossly misstated on that point. And we hadn't anticipated ever [13] needing a witness to get into those areas, anticipating, no way to anticipate that they'd be an issue, number one, number two, that the record would be misstated, which it --

THE COURT: What's he going to say?

MR. BELNAP: Well, Mr. Christensen represented in his questions to both Mr. Reynolds and Mr. Rogers, that, "You certainly can't know what you're doing, because 2 million people down in the state of California have been cheated." And that is absolutely untrue, Your Honor.

There are, there were 3,000, about 3,000 people that ended up making a claim in the Krinsk case. And of those, approximately 1,000, under the court rule set up in the settlement, were disallowed. And they've paid out a total of $77,000 in that case to resolve the some 2,000 people that said that they didn't like their after-market parts, and they sent out guarantees to another 1,000.

And Mr. Arnold has personal knowledge of that, the same with Krusinski. It was represented to Mr. Rogers, "Well, you can't know what's going on, because 80,000 people in your state have been cheated on after-market parts."

And in that case, 2,000 people made a claim, [14] and less than that have been found valid, and there's been $80,000, $87,000 paid out, and that case is over and done. There were 700 guarantees sent out to people, and only 300 and some-odd redeemed them during the time period that the court allowed.

And so I've got to have an opportunity to meet those things when, with two witnesses, and on five occasions it was stated there's millions of people that have been cheated in California, Illinois, and elsewhere. And he has personal knowledge of that.

We couldn't anticipate it at the time he was deposed.

THE COURT: Okay, Mr. Christensen?

MR. CHRISTENSEN: He couldn't possibly have personal knowledge. This is something that State Farm is simply going to have him relate second-hand info. I was relying on, for example, Illinois, Your Honor, the best evidence that I had. As you'll recall I used a Chicago Tribune article that said 80,000 people. He admitted he took the Chicago Tribune. Here's the article. It says, "The company said up to 80,000 policy holders could be covered under the terms of this settlement."

And I've got a -- I did not use this article on the screen, but I had a good faith basis for asking [15] the questions on the California settlement. I had more than one newspaper article that mentioned the figures of 2 million and 2.3 million. And I just had that in my hand. Let me find it again.

I am absolutely sure that if we were allowed to get into the substance of these cases, and put -- Here's my article from the LA Times, if I could approach the bench. From October of '95, that State Farm has agreed to settle.

Alleging the company cheated more than 2 million California customers by using inferior parts to repair their cars. Under the terms of the settlement, "Under the settlement announced Monday, about 2.3 million customers with policies between February 1, '87, and September 25, are eligible for car repairs, or for $35 each." So there is a good faith basis for the questions.

As the court will recall, as requested by counsel, I was very limited in what I could do. It was mainly just provide enough information to confirm that the witness didn't know that this was going on, and that's all we did.

If they're going to be allowed to get into the merits of this thing, we should have been given some discovery. For them to now say that they didn't know [16] until yesterday or day before yesterday about this can't possibly be true. This came up weeks ago. And if they want to get into the substance, then we ought to be free to designate some rebuttal witnesses who have personal knowledge, can get into the substance, and have some discovery, as well.

The other thing, Your Honor, is on their motion we were required to do our rebuttal before we concluded our case. And we agreed to do so on the condition they wouldn't change their testimonies. And with the understanding that we would have to present that evidence in that form, which we did.

They now want to change the rules on that, on the last day of the evidence. And it's not fair to do that. Mr. Prater, as you may recall, I think with the class actions, simply had my big book, and largely just read the names of the different states where there were some pending. We haven't been allowed to get into the merits, and I think it's not fair for them to, on the last day of trial, on essentially no notice.

Oh, and I've got another concern, as well. While Mr. Arnold also --

MR. BELNAP: Can I speak to that one also?

* * *

[17] * * *

MR. BELNAP: Let me speak to each of those. First, the easy one, Judge. On the aspect of some things that the company has done in terms of community service, we supplied timely a designation of exhibits, and they're in there in our exhibits that we supplied to them, these manuals and compilations of information were supplied to them when we designated exhibits.

We designated Mr. Kingman as someone that would talk to that area, but during the trial we even had a bench conference about the fact that we were going to cover some of our points with Mr. Kingman during their case, and we would have someone else cover those aspects later.

And we sent to counsel, this has been over a month ago, a designation that Mr. Arnold would be covering those areas that we set forth in our disclosure [18] to the court, that Mr. Arnold would be covering those areas. And so at the last minute, here, we now have an objection on this, and this has totally been out on the table, Your Honor, within the time periods. And the exhibits that we're putting in have been produced and disclosed, and it's not by any means a late situation. So I see that as a red herring.

With respect to the issue of these class action cases, Mr. Christensen, just as an example, said, "Do you know how many people were affected in this California lawsuit?"

Answer. "No."

This is from is the testimony of Mr. Rogers, and similarly to Mr. Reynolds.

"Would it surprise you if I told you it was over 2 million?"

And then he goes on to say, "We just looked at a class action where State Farm has agreed to pay millions of people, haven't we?" Referring to the California case.

And I'm not going to impugn Mr. Christensen's character, I don't intend to do this in making this statement. But if there's an allegation there was a good faith basis to rely on a hearsay account from a newspaper, the facts are a matter of court record as to [19] what has taken place.

We've researched it since that took place approximately a week ago, and we have the information, Mr. Arnold has personal knowledge on that, and he's confirmed his knowledge with State Farm that handled the case from their corporate department, that the allegations that have been made are incorrect.

The plaintiffs in their complaint allege that there were 2.3 million people that were involved. Well, what they did is they just took some statistics as to the number of property damage claims that had been handled in that time period in the state of California, and tried to extrapolate on those statistics.

The fact of the matter is, the court, in the California litigation, had State Farm, as they looked at the records, had State Farm send out 45,000 letters based upon what they could determine were people that had received after-market parts. With those letters went a claim application saying, "If you're dissatisfied in any way with those parts, here's a claim application which you need to file by a certain date."

The court also required State Farm to publish in four different newspapers on two consecutive running weeks a 1-800 number and a statement, "If you're out there and you're dissatisfied with any of your car [20] repairs, call this number, and you can make a claim by a certain date."

Having done that, there were then less than 2,000 people that the court found fell into the category that had after-market parts, and they've paid out $77,000, and sent out guarantees to some of the other people that didn't want repairs, just wanted to make sure that the repairs they had were guaranteed.

And if we're not allowed to meet those issues, Judge, we have on the record a statement that we have screwed and cheated millions of people. And it's not correct. And that's all we want to do, is set the record straight on that, and have the opportunity, which we had no way of anticipating or disclosing until that was brought up less than a week ago with those two regulators' testimony.

MR. CHRISTENSEN: Well, let me respond to that. They say they want to set the record straight. Repeatedly in this case State Farm makes self-serving representations through witnesses who aren't knowledgeable, and I can guarantee you Mr. Arnold

didn't handle those class actions. And when we get discovery and we get files and we get specifics, it's not what was represented.

And they, on the last day of trial, now, want [21] to make some self-serving representations that are contrary to the information I have, without any opportunity for us to find out if they're really true.

Again, the issue, there, Your Honor -- And they've put on multiple regulators, and they were designated late in the game, and we did the best we could to try to come up with a way to deal with that. The issue was awareness**.** Mr. Hanni elicited from these people testimony, and as I recall Mr. Reynolds, it was laid on pretty thick.

"If anybody would know if they're out there doing anything, I would. That was my job," et cetera, et cetera. And the court allowed me to get into it simply from an awareness issue.

And I had a good faith basis from the Times article that there were over 2 million people involved, and I think the figure I read was, what, $35 a piece? Well, that's millions of dollars. We haven't had the chance to do discovery on all these class actions.

I would love to have State Farm produce the information on those so we could get into those. We could put on witnesses. But this was limited to my being able to show that these people that claimed if anything bad was going on, they'd be the first to know, didn't know, and it was right in the public newspapers, [22] and it was right in the public records.

And we can probably deal with this, Mr. Humpherys suggests, with a jury instruction. I don't think it's fair now, to spring this on us, just on the last day of trial, and not give us the opportunity to rebut it, particularly with a witness who obviously has simply been prepped on second-hand to say what State Farm wants said.

On the PR stuff, it's true they provided some PR documents in their exhibits, but we weren't -- It was so late we didn't get to do any discovery, Mr. Kingman or otherwise, on this. And I don't know where they're going with it. We're going to be flying blind on this if they get into it.

MR. BELNAP: They filed a motion in limine on this, Your Honor. And you ruled.

MR. CHRISTENSEN: The court ruled you could use the exhibits, but I don't think the court ruled you could pick any witness you wanted, with no discovery, and say anything you wanted.

THE COURT: On the PR, I'm going to allow it. I think that there has been some considerable attention given to that, and I believe that they understand the rules on how far they can go with the PR information.

To me it's a just putting on a company [23] representative to put on essentially what the court has allowed in the earlier hearings, and whether it's Mr. Kingman or Mr. Arnold, in my mind doesn't make a significant difference.

MR. BELNAP: I do have one thing I'd like to say, very quickly, on the cases. When it said there's no discovery, there was an order in this case that cases be disclosed by a certain date. These class actions came beyond that time period. Now, so be it.

Mr. Prater talked about them, and they've been allowed to be talked about. But when you go into the merits, Your Honor, we have to be able to take this factually. To say that we're going to put up some self-serving information, I'll stand on the record, here, and say the information I have found is actually correct.

And if we can't have an opportunity, when this is a matter of public record that they themselves, if they chose to use the case, could have checked out, then we're sorely prejudiced, Your Honor.

THE COURT: Well, I'm also going to allow you to put on Arnold with respect to -- I think, again, we're talking about the plain vanilla facts, and not a lot of anything more than what you're prepared to state as essentially matters of public record that could have [24] been discovered if they had sought out more information. It seems to me that that's fair and reasonable.

Certainly the awareness point is still there, as I read it, because if there's an allegation of 2.3 million people cheated, and the insurance commissioners don't know anything about it, well, whatever point Mr. Christensen wants to make I think still stands.

But I think that you should be given a chance to say, "This is what really happened. This was the outcome." So I'll allow that. But again, I think we should be mindful of the fact that this is not the time to be introducing anything new, or trying to tie down the loose ends, get the matters that have been --

I'm allowing it because I think it does give State Farm a chance to get some closure to an issue that has been raised without the whole story being told, and I think it's fair to do that.

But I want to impress on you that I want it to be a very limited bit of testimony on the subject, and it seems to me that that's where it should stand.

And as far as the PR, also be mindful the court's ruling on that, because I don't want to open up some new areas that we're going to have to address later on through plaintiffs' desire for further rebuttal on that.

[25] * * *

HAROLD C. YANCEY the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

CROSS EXAMINATION BY MR. CHRISTENSEN:

Q Mr. Yancey, let me see if we can pick up where we left off. We were discussing the points that you found significant as you reviewed the various depositions and materials in forming your opinions on the settlement of the case against Mr. Campbell.

You mention additional items for consideration. "Farmers, in their investigation, did not feel Campbell contributed." You're talking about the report that Mr. Lithgow at Farmers made.

A Yes. I need to clarify an item.

Q Well, you can do that later.

A Okay.

Q If Mr. Hanni wants to ask you some questions. [26] I want to stay on track, here. Are you talking, when you say Farmers, in their investigation, did not feel Campbell contributed, are you talking about Mr. Lithgow's report?

A I'm talking about the correspondence that I saw in the file from Farmers, which indicated their evaluation of the liability.

Q You understand -- Now, you wrote this back in '94, didn't you?

A Yes.

Q And at the time you wrote this, you hadn't talked to Mr. Lithgow.

A No, I hadn't.

Q Do you understand that he was on State Farm's witness list for the last trial, but apparently nobody had talked to him until I called him a few days before trial?

A No, I did not know that.

Q You haven't read his testimony from the last trial?

A No.

Q Or this trial?

A No.

Q You don't know what he said in his testimony?

A No. I know what he said in his [27] correspondence.

Q Now, you did read his affidavit.

A Yes.

Q Okay. Maybe we could go with that. After reading that affidavit -- And in fairness, the affidavit that he signed was after you wrote this document, right?

A Yes.

Q Now that you've seen his affidavit, you realize that this really is not an accurate, valid point to make in support of this position, don't you?

A The important thing is, when I prepared that list of information, I knew that the time would come when Mr. Hanni would ask me what points --

Q Now, please listen to my question.

MR. HANNI: Now, let the witness -- I object to him interfering and not letting the witness answer the question, Your Honor.

MR. CHRISTENSEN: I've asked him --

THE COURT: I want him to answer the question that was asked. Let's have the question restated and be certain what he's doing is answering that question, and not stating a speech.

Q (BY MR. CHRISTENSEN) Now that you've read Mr. Lithgow's report, excuse me, affidavit, you realize [28] that this is no longer a valid point, don't you?

A Not completely, because the correspondence clearly indicated what they felt.

Q Well, we'd better look at Mr. Lithgow's affidavit, then. That's the one part of his sworn testimony you've seen. Is that true?

A I recall reading it a long time ago.

Q Okay. There is a copy of that, I believe, here in front of you, it's marked as Exhibit 117-P. Although it's not been received, it's been marked. You understand an affidavit is a statement under oath?

A Yes.

MR. HANNI: What's the date of the affidavit?

MR. CHRISTENSEN: The date of the affidavit is the 23rd of October, '95.

MR. HANNI: That's a long time after his deposition, right?

MR. CHRISTENSEN: Yes, and I think we've established that. But he said he still is not prepared to concede the point.

Q (BY MR. CHRISTENSEN) This lays out his background, his age, and he worked for Farmers for twenty-three years.

It says, "On approximately June 17th, '81, I was assigned by Farmers to adjust and handle a potential [29] claim by Robert Slusher against Farmers' insured, Todd Ospital, arising from an accident which occurred on May 22nd, 1981, in Sardine Canyon. The automobile Todd Ospital was driving at the time of the accident was insured by Farmers, and Todd Ospital was entitled to coverage under the Farmers policy as a permissive user of the car. I received a copy of the accident report, which is attached hereto as Exhibit A."

Then he goes on and says, "Farmers had fairly low policy limits on the automobile in question, with personal injury liability coverage of $30,000/$60,000. On or about July 9, 1981, I wrote the investigation report, attached hereto as Exhibit B, proposing that Farmers' low limit of $30,000 should be offered on the Slusher claim."

Then he goes on to state, Mr. Yancey, "At that time, I had only done a preliminary investigation. I had spoken with Mr. Campbell, had a copy of the investigating officer's report indicating Mr. Ospital was driving at an excessive rate of speed, and had done a limited amount of other preliminary investigation."

Then he goes on and says this. "Subsequent to my preparation of Exhibit B, I learned that there were witnesses to the accident indicating Mr. Campbell was primarily at fault. Based

on this, and additional [30] information I obtained after preparing Exhibit B, I concluded that Mr. Campbell probably was the primary cause of the accident."

He then says, "However, Mr. Slusher was very severely injured, and Utah had the law of joint and several liability at that time." That was true, wasn't it, Mr. Yancey?

A Yes.

Q "There was some evidence upon which a claim of negligence against Mr. Ospital could have been based. Consequently, even though it appeared that Campbell was primarily at fault, consistent with Farmers' philosophy of not putting its insureds at risk, Farmers ultimately made the decision to make its $30,000 policy limits available for a settlement of the Slusher claims.

"As more information became available, it appeared to me that Mr. Slusher's claim had a value of several hundred thousand dollars, perhaps as high as a half a million dollars, and it was my professional judgment that if there was any risk of a finding of negligence on the part of Mr. Ospital, it would not be proper not to make the $30,000 policy limits available to settle the claims against Mr. Ospital, even though it appeared Campbell was primarily at fault."

Then he finally says, "My preliminary report, [31] which is attached as Exhibit B, should not be construed as indicating that I ultimately concluded that Mr. Campbell had no fault in the accident, nor as my final evaluation of Mr. Slusher's claims, or of the claims against Ospital and Campbell. As more information became available, my view of the accident and the values of the claims involved changed accordingly."

Now, does that refresh your memory of what Mr. Lithgow said in his affidavit?

A Yes, but it also clearly indicates that Farmers paid their limit because they knew that Ospital had some responsibility.

Q Have you read Mr. Lithgow's deposition?

A No.

Q He signed an affidavit, the one you've seen. Is that all you've seen?

A Yes.

Q Are you aware that he was deposed and gave a deposition, and that he testified in the last trial, and he testified here in this trial?

A I was not aware of that.

Q And nobody's given you that information to read.

A No.

[32] Q And that he said he was busy at the time, and that it wouldn't have mattered to him if he had written, I think he put down $75,000 in that report, it wouldn't have mattered to him if he'd put down $50,000 or a million. He was going to simply put up the $30,000 of Farmers and move on to another case. It wasn't worth his time to do more. Are you aware that he's given testimony to that effect?

A No.

Q Now that you are aware of that, you would concede, would you not, that you really can't fairly interpret Mr. Lithgow's report as an admission by Farmers that they did not feel Campbell contributed to the accident.

A They wouldn't have paid their $30,000 if their own insured had not contributed.

Q All it would have taken was 1 percent on finding on Mr. Ospital, and they could have been responsible for the entire amount for Slusher under joint and several; isn't that true?

A That's true.

Q Now, before we move on, State Farm certainly didn't have Farmers' file to look at when it decided not to settle, did it?

A I don't think so.

[33] Q That came out years later, didn't it?

A Yes.

* * *

[36] * * *

Q (BY MR. CHRISTENSEN) I'm going to show you your notes that you gave in your depo, and please show us another list where you listed the evidence against [37] Mr. Campbell.

A There is no such list, because it's in the individual pages.

Q And when you did these you hadn't even read the Logan trial transcript, had you?

A I don't believe so, no.

Q Now, in your deposition, as you gave testimony that it was reasonable for State Farm not to --

MR. HANNI: What page are you on?

MR. CHRISTENSEN: I'm looking at my notes, Glenn.

MR. HANNI: Have you got a page?

MR. CHRISTENSEN: Well, I'm not there yet. I'll give you the pages as I get to them.

Q (BY MR. CHRISTENSEN) As you gave testimony it was reasonable for State Farm not to settle Mr. Slusher's claim against Mr. Campbell, you place value on those claims. You actually gave dollar value, didn't you?

A Based on clear liability.

Q And you did that, even though you had no idea what extent Mr. Slusher had sustained the loss of the use of his arm.

A I gave the values based on the information I [38] had received and reviewed.

Q And you had no idea what his, the extent of the loss of use of his arm was. Wasn't that your sworn testimony?

A I had not been provided that information.

Q And you admitted that was important information, that you didn't have it --

A I did.

Q But you gave opinions and values anyway.

A I gave opinions and values based on the information I had been given.

Q And you assumed that the loss of use of the arm was about ten to 15 percent of the arm. You apparently didn't know that there was a document of Mr. Slusher's doctor, Dr. Terry, indicating a 50 percent whole man disability. Isn't that true?

A I have not been provided with the actual medical reports.

Q Did you ask for those?

A No.

Q Was it your practice when you were handling insurance claims to put dollar values on claims without looking at the medical evidence?

A No, that was not my practice, and I didn't do it in this case.

[39] Q Yes, you did, didn't you?

A No, I gave a value based on no disability, and then Mr. Humpherys called to my attention the kinds of disability that Mr. Slusher had sustained, and in my deposition I raised those values based on the disability that Mr. Humpherys called to my attention.

Q You didn't know he'd injured his knee?

A Pardon?

Q You didn't know Mr. Slusher had a badly injured knee?

A No.

Q You didn't consider his knee in forming your opinions you gave in your depo.

A But I considered it after Mr. Humpherys called that to my attention.

Q But it didn't change your opinion.

A Yes, it did.

Q You still said State Farm was reasonable.

A The basis that they used to try the lawsuit was reasonable.

Q And you didn't know Mr. Slusher had injuries to his chest, to his shoulder, or to his clavicle; isn't that true?

A I knew that after Mr. Humpherys mentioned it.

Q And you didn't know Mr. Slusher had injuries [40] to his foot and his ankle.

A Not until Mr. Humpherys mentioned it.

Q Now, Mr. Yancey, before we move on, the basic concept of liability insurance is to protect people against risk, isn't it?

A That's true.

Q People don't buy liability insurance because they want the fun of going to court and seeing if they can win. They buy liability insurance to protect them against risk; isn't that a fair statement?

A That's true.

Q And so when you decide whether it's reasonable for a company to refuse to settle and go to trial, the issue isn't, "Is there a chance we can win?"

A That's not the issue.

Q The issue is, "Is there a significant, or a substantial likelihood we could lose?" Isn't it?

A Yes.

* * *

[46] * * *

Q Now, Mr. Yancey, at the trial last October, when Mr. Bennett was trying to convince the jury that his and State Farm's decision not to settle was reasonable, he testified that he told Campbell that the evidence showed that Ospital would have run right smack into Slusher, even if Campbell had stayed home that day. Are you aware of that?

A I don't recall that specific testimony.

Q That's -- Assuming that's true, that's a clear misrepresentation, isn't it?

A State that again.

Q Mr. Bennett testified that he told Campbell that the evidence showed that Ospital would have run right smack into Mr. Slusher, even if Campbell hadn't even been on the highway that day.

A I don't recall that specific testimony.

Q If that's true, that's a misrepresentation, isn't it?

[47] A It might be.

Q I'm going to show that to you. This is from the trial transcript, 982. First of all, Mr. Bennett was asked the question, "Did you honestly believe that a jury of eight people, viewing all of the evidence, all of the van drivers, the experts, and the physical evidence, would conclude that Mr. Campbell had absolutely nothing to do with this accident?"

And he said, "I honestly believed that."

And then it was said, "You thought that the jury would conclude that Mr. Ospital would have run his car smack into Mr. Slusher's van, even if Campbell had stayed home that day?"

And he said, "That was my honest conviction, yes, based on the evidence we had."

And then he was asked, "And that certainly was the way you advised Mr. Campbell, wasn't it?"

And he said, "That, among other things."

MR. HANNI: Let me see that again. Can you put it back a minute? What was the next part of his answer?

MR. CHRISTENSEN: His next part of his answer was, "If you want to hear it all, I'll tell it to you. And if you don't, I'll just answer your questions."

And I said, "Let's continue in an organized [48] way, here."

Q (BY MR. CHRISTENSEN) You certainly don't agree with that, do you, Mr. Yancey?

A Well, I think Mr. Bennett was probably being a little bit frivolous in his testimony. I think he had been asked once about what he had told Mr. Campbell about liability, and then the question was asked again in a little bit of a different context, and he was merely reiterating his first answer.

* * *

[53] * * *

Q You now, let me shift gears, Mr. Yancey. You're also here testifying as a former insurance commissioner.

A Yes.

Q You served as commissioner from '85 to '93?

A That's correct.

Q And you've relied in part in giving your [54] testimony on complaint ratios; is that true?

A Those complaint ratios were used to determine the standing of State Farm in the marketplace.

Q I'm going to show you a response to discovery in this case. I'll put on the screen State Farm's responses, answers and objections to plaintiff's third set of interrogatories and requests for production.

Interrogatory 3 asks, "To the extent not listed in the interrogatory above, for each third-party claim in Utah since 1980 --"

I'm sorry. I've got the wrong document, here. Let me move on. I've got the wrong document.

Are you aware that State Farm took the position in discovery requests when we asked to see their complaints, the complaints filed against the insurance commission against them, that they were irrelevant?

A I didn't know that they said that.

MR. HANNI: Ask that question again. I didn't --

Q (BY MR. CHRISTENSEN) Yeah. Are you aware that, in response to some discovery requests we made in this case, asking for the complaints made to the insurance commission against State Farm, State Farm took the position that was irrelevant?

[55] MR. HANNI: Hold on just a minute.

MR. CHRISTENSEN: Here, I can solve the mystery, I found it.

Q (BY MR. CHRISTENSEN) See where State Farm says, "In addition, defendant notes that it doesn't have a copy of the complaints filed with the insurance department back in 1980. It only has current general information of recent complaints. Such recent complaints would have no relevancy to a claim which happened over a decade ago."

A I think what they were saying there is if you're trying to directly tie the complaints to this case, then it is irrelevant. But it doesn't mean that you can't demonstrate from the documents the standing of State Farm in the marketplace.

Q Now, in your tenure, Mr. Yancey, your entire seven and a half years at the state insurance commission, you not only failed to discover any pattern or practice of unfair claims handling by State Farm, but you didn't find any insurance company whatsoever had displayed a pattern of unfair claims practices, did you?

A That's true. Now, not unfair claim practices. Pattern or practice of cheating insureds, I think, is what the issue is.

Q So you didn't find any company, out of the [56] 1,400 insurance companies doing business in Utah, in your whole tenure, you didn't find one of them had a pattern of unfair claims practices, did you?

A That's not true.

Q Well, let me see what you said in your deposition. Would you turn to page 85 of your second deposition, please.

A Okay. Line?

Q All right, would you look at line 13, please. Do you see the question, "During the time you were commissioner of the state of Utah, did you determine that any insurance company had displayed a pattern of unfair claims practices?"

A The key word there is "pattern." There were companies who violated the Unfair Claims Settlement Practices Act on individual cases. And those were dealt with by the department. But we did not find a company who actually had a pattern of going out and cheating insureds.

Q Not one company out of 1,400.

A No, that's right.

Q Not just cheating, but unfair claims practices. You didn't find a single one.

A Oh, yes, I just testified that there were occasions when the Unfair Claim Settlement Practices Act [57] was violated.

Q Well, State Farm --

A By companies.

Q State Farm did that, didn't they?

A Yes, they probably did.

Q So you could come into court for any one of those 1,400 companies and testify under oath that you did not find that they had displayed a pattern of unfair claims practices?

A And the key word, there, is "pattern." You have to understand that these companies who are given a license to operate in the state of Utah, or any other state, are bound by an agreement that this is a business of trust. And they don't want to write three or $4 million worth of business in the state and then have their license jerked because of their conduct. So they don't do it, as a pattern and practice.

Q Well, they don't do it that you discovered.

A I did not discover it. Nor did any of my staff.

Q I'm going to put on the screen a newsletter from January, 1989. That's your picture, there?

A That is.

Q You haven't changed much?

A It all depends upon your viewpoint.

[58] Q Let me read the underlined part. Is something that you wrote?

A Yes.

Q "In addition, we have legislative concerns and market conduct compliance concerns. There is still too much fraud, dishonesty, and misrepresentation in the marketplace. Consumers have inaccurate perceptions that need to be corrected. Companies have spent too much time worrying about bottom-line profits, rather than servicing their customer properly. Too many management decisions have been made on the basis of greed, market share, and selfish interests, rather than because they are right, fair, and would contribute to the stability of the industry."

Have I read that right?

A You have.

Q And yet in your entire tenure, you did not find one company displaying a pattern of unfair claims practices.

A You have to understand what the marketplace was like in 1989. January, 1989 is when that appeared in the newsletter from the department. There was a great upheaval that had taken place in the marketplace in 1989. General liability coverage was becoming extremely difficult to secure. Day care centers, for [59] example, were not able to buy liability insurance because of the inordinate high claims that had been rendered against day care centers.

And so what I was referring to when I wrote that, is that we needed to find a way to get the marketplace settled down, and we needed to find a way to provide coverage.

And consumers needed to be protected, and companies needed to stop looking so much at their bottom line, and start looking about the service that they could provide.

Q You were aware I was going to ask you about that, I gave Mr. Hanni copies of this yesterday.

A He gave me copies, and I assumed that you might ask.

Q Mr. Yancey, are you aware whether the insurance commission has done anything with respect to the Crookston case? Are you familiar with that case?

A I'm not.

Q Are you aware that while you were insurance commissioner, the Utah Supreme Court came out with a decision in Crookston versus Fire Insurance Exchange --

A I believe now I know something about that case.

Q You didn't know about it then.

[60] A When you say "then"?

Q When you were insurance commissioner, when it came out.

A I probably read something in newspaper articles or magazine articles about that.

Q The Utah Supreme Court is very close to the commissioner's office, they're both right up on Capitol Hill?

A That's true.

Q The Utah Supreme Court affirmed a trial court finding that Fire Insurance Exchange was guilty of fraud, and there was a significant amount of punitive damages that had been awarded were discussed in that opinion.

Did you look into that, as commissioner?

A No.

Q Where there was a finding of fraud against an insurance company, to see what was going on?

A You have to understand the fundamental bases on which the insurance commissioner's office operates. And once a case is in the judicial system, it's left there. There would be no purpose for us to start to interfere with a case that's in the process of being resolved in the judicial system.

Q What about once that's over?

[61] A Okay, once that's over, then if there is evidence that companies, that a company has mishandled something, or operated on the wrong basis, then of course the department tries to find out what that is, and tries to take appropriate action.

Now, I think in that case, the case itself solved the problem. I mean the judgment that was rendered against Farmers, obviously they're not going to do that same thing again, because of the size of the verdict.

Q So you just assumed that the court decision and punitive damage award took care of that.

A We did.

Q There was a second opinion in Crookston in '93, where the Supreme Court referred to conduct demonstrating a calculated and calloused attitude toward settling valid claims. Shouldn't that give the insurance commissioner some concerns that people other than the Crookstons had been mistreated?

A What time was that, in 1983? Or 1993?

Q I'm not sure. Do you want me to find it?

A I left the office in January of 1993, so just keep that in mind. I was not there after January.

Q Based on your experience, do you think the next commissioner would have followed up on that?

[62] A He might have.

Q He probably didn't?

A October '93? I had left in January.

Q That was after your time? Let me ask you about another case that you mentioned a few minutes ago. The case of Summers versus State Farm. This came out of the Tenth Circuit Court. That's the federal court that handles cases from Utah and other western states, right?

A That's correct.

Q This was 1988, this decision came out, that's while you were commissioner?

A Yes.

Q I'm now looking at page 703, I've underlined a part. It says, "In early 1986, nearly four years after Summers' discharge, State Farm, when preparing for trial, made a

thorough examination of records prepared by Summers and discovered over 150 instances where Summers had falsified records."

And then it goes on. What did you do to investigate this as insurance commissioner?

A We didn't do anything specifically to investigate the Summers matter, but you also have to remember that State Farm, when they found that kind of evidence, dismissed him, and he was no longer a factor in the marketplace.

[63] Q But you had -- Well, yes, he was. He continued as an adjuster working in other places, didn't he?

A I'm not -- I have no knowledge of that.

Q You never investigated Ray Summers at all, did you?

A No, because there was never any -- You know, if somebody wants to be dishonest and they're going to keep this all very secret, and that's what they're doing on a day-to-day basis, we're not going to go out and examine every adjuster's file to find out whether or not he's honest or dishonest.

Q Had you looked into this matter when it -- This published opinion came out in 1988 -- And by the way, that was the end of that court case, right?

A Yes.

Q You would have found over 2,000 pages of sworn testimony Ray Summers had given of different ways he claimed that he had cheated people during the years he worked at State Farm. You didn't find out about that, did you?

A No. May I just add that, here again, the way the commissioner's office is structured, we're not out as policemen, looking at all of the files of the companies, adjusters, investigations, claims. That's [64] not our role.

Q And, in fairness, I think that's true. Your staff is limited to do that, too, isn't it?

A Yes.

Q You don't know of any bad faith verdicts against State Farm? Isn't that your deposition testimony?

A I believe at the time of the deposition I was not aware of any. I've been made aware of some in the last few days.

Q But not as insurance commissioner.

A No.

Q You testified in your deposition that you were not aware of State Farm paying less than full fair value on any claim.

A Well, the proper testimony probably is that the amount of claims that State Farm handled, or any other large company, there probably is times when a file's been mishandled, there probably is times when a claim has not been paid properly, probably at times when claims have been overpaid. So just because -- We can't expect perfection out of the system. It's not there.

Q Didn't you testify in your deposition, taken just a few weeks ago, that you were not aware of State Farm paying less than full fair value on any claim?

[65] A Meaning that I was not personally aware of a specific file where they had done that.

Q Well, on page 16 I asked you the question, "Have you ever been aware of State Farm paying less than full fair value of a claim?"

And your answer was no, wasn't it?

A Yes. And when I said no, I meant that I did not have direct knowledge of any specific file.

Q I want to explore with you, Mr. Yancey, since you are here as an insurance expert, and as a former commissioner, and I think this is significant, what you consider fair treatment. Didn't you testify in your deposition a few weeks ago --

MR. HANNI: What page are we on?

MR. CHRISTENSEN: I'm not looking at a page right now. If we have to, we'll get it out.

Q (BY MR. CHRISTENSEN) Didn't you testify that if you had a person with a claim, a claimant, and they didn't know what their claim was worth, that it was okay for the insurance company to pay them less than what the insurance company knew the claim was worth?

A Are you talking about first party or third party?

Q Does it make a difference to you?

A Yes.

[66] Q You think an insurance company is free to take advantage of a claimant and pay them less than is fair in what, a third-party claim?

A No, that isn't what I said. The whole premise that you operate on, on first-party claims and third-party claims, is different. And you have to understand that right up front.

Q But you testified in your deposition, didn't you, that if somebody didn't know -- And by the way, most people that have insurance claims don't know what they're worth, do they?

A Here again, I don't know whether you're talking about first party or third party.

Q Well, let's say either one. Do you think people that get injured typically know what their claims are worth?

A Many of them don't.

Q And it was your testimony that it was okay if somebody didn't know what their claim was worth, for the insurance company to pay them less than the insurance company knew was the value of the claim.

A I think in that testimony I said something to this effect. I said, "As long as there is absolutely no pressure applied, that the claimant himself or herself is saying, 'This is what I consider my claim to be, this [67] is what I want,' and if that is clear, then there is, I see no reason why a company wouldn't voluntarily pay that amount. It is not the duty of adjusters to go out and

provide a seminar to every claimant on how he is supposed to present his claim, or how he's supposed to evaluate his claim."

Q Well, let's see what you said. I'm now looking at page 18 of your deposition. Now, to get this in context, for seven and a half years you were the person who was supposed to be protecting the public and claimants to make sure they were treated fair; isn't that true?

A That's part of the overall responsibility.

Q Beginning here where I've underlined, down on page, on page 18, line 23. The question was asked, "Let me probe that with you just a little bit. Assume you have got a claimant who has never had a claim before, and isn't familiar with insurance, and does not really understand what their rights may or may not be, and the claimant suggests an amount to the insurance company that the insurance knows is substantially less than what a claim like that is worth. Do they have a duty to pay what they believe the claim is worth, or are they free to simply pay this unknowledgeable claimant what the claimant has asked?"

[68] And your answer was, "If there is no pressure whatever applied on the part of the company for a claimant to accept less than what the claim might be worth in another setting, then if the claimant says, 'This is what I want, this is what I feel I am entitled to,' and the adjuster agrees with that amount, whatever it is, then there is a mutual agreement between the two of them, and the adjuster has a right to write out a check for that amount."

And then I asked you, explored that further, I said, "You said if the adjuster agrees with the amount. Assume the adjuster, in his own mind, knows the claim is worth more?"

Your answer was still -- I said, "Is your answer still the same?"

And your answer, "The answer is still the same."

So Mr. Yancey, as the person who is charged with protecting the public, it is your sworn testimony that it's okay for an insurance company to take advantage of an unknowledgeable claimant and pay them less than they know is fair.

A That's not what that says. What that says is that two parties, the company and the claimant, have arrived at a mutual agreement as to what that individual [69] wants to be paid. And if he's paid that amount, he's going to be totally satisfied that his claim has been taken care of properly.

Q Even if it's less than is fair because he doesn't know.

A It is not the responsibility of an insurance adjuster to go out and say, "Well, what do you want?"

"Well, I think my claim is worth $1,000."

And then you're suggesting that the adjuster say, "No, your claim's not worth $1,000. Your claim's worth $2,000 and I want to give you a check for $2,000."

Is that what you're suggesting?

Q Isn't that being fair if the claim is worth $2,000?

A It's fair if you paid him what he asked.

Q And if he asks for less than it's worth, then in your mind that's fair.

A It's fair on that particular claim.

Q Doesn't the unfair settlement practices regulation which you were obligated to enforce indicate that, both with respect to first-party and third-party claims, the insurance people are obligated to be fair?

A It says that in the Unfair Claims Settlement Practices Act.

Q It also says insurance is a public trust, [70] doesn't it?

A It does.

Q Settling an insurance claim is not like selling somebody a used car. Selling cars is not a public trust, is it?

A No.

Q When people buy insurance, they are buying protection and they're buying peace of mind, aren't they?

A Yes.

Q Let me move to another area. Some of the people we've heard in this court have talked about market conduct exams as being one way to discover unfair or dishonest claim practices.

Mr. Yancey, as far as I've been able to determine, and I could be wrong, but as far as I've been able to determine, there has never been a market conduct exam done on State Farm in the history of the state of Utah. Do you know anything different than that?

A I couldn't testify to the history of the state of Utah. I could testify to the seven and a half years that I was commissioner, but I was not aware, I don't believe the department ever did a market conduct exam on State Farm.

Q And that's not really surprising, and let me [71] explore why that's true. First of all, if I understood your deposition testimony right, you just hired a market conduct examiner shortly before you left in 1993; is it that true?

A No, that's not true. He was hired, I'm guessing -- I took over in 1985, I think he was hired around '87 or '88.

Q So you had one market conduct examiner?

A Yes.

Q For 1,400 companies.

A That's correct.

Q And he was a retired air force person?

A That's correct.

Q And he had to cover everything from advertising practices, to rates, to relationships with agents, to claims, the whole nine yards.

A You also have to understand that when you say 1,400 companies, probably there would be half of those, perhaps, that would be largely inactive. They were not writing very much business in the state. So it's a little bit erroneous to say that 1,400 companies are all out there writing a ton of business. They're not.

Q So we're maybe talking half that amount that are actually active?

A Yes. And a large number of those would only [72] be writing a relatively small amount of business.

Q Now, the other reason that I want to bring out with you with market conduct exams, and I think this is significant, it is at least within your knowledge, if I understood your deposition, the insurance commissioner in Utah only does market conduct exams on domestic companies; isn't that true?

A We're primarily concerned about the domestic companies.

Q And State Farm is not a domestic company, are they?

A No.

Q A domestic company is one that's headquartered in Utah.

A That's correct.

Q It's one like Bear River.

A Yes.

Q I guess Beneficial Life would be --

A Another example.

Q And so your main concern is with Utah-based companies.

A That's true, but we always had the prerogative that if we found practices on the part of a company that was not a domiciled company, that we could always do a target market conduct examination.

[73] Q But you -- Didn't you say in your deposition that you mainly looked at Illinois to be primarily responsible for State Farm?

A That's the common practice, that the commissioner in the state where the companies are domiciled has the primary responsibility to monitor that company.

Q And so for State Farm that would be Illinois.

A That's correct.

Q That would be Mr. Rogers, I think, that we met a few days ago.

A Yes. His department.

Q Would it surprise you to know that he testified they haven't done a market conduct exam on State Farm for about twenty-five years?

A It surprised me somewhat, but I guess you also, in the absence of a statute that would require them to do an exam periodically, then unless there was specific reason to do an exam, I guess you wouldn't do one.

Q Now, your chief concern as an insurance commissioner is to make sure companies stay financially solid. Isn't that true?

A That's one of the very primary concerns. Because you cause more disruption in the marketplace by [74] a company going broke and having 5,000 claims out there unpaid, than you do by doing all of this other stuff.

Q And you testified that you were better staffed on the financial side than for claims examination side.

A That's true.

Q It is true, isn't it, in your deposition you agreed with, apparently, what Mr. Ovard had told me, that because of limited staffing it just wasn't feasible to get involved in the details of very many claims.

A Get involved in the details, that's true.

Q And your staff had, was it two or three people -- I was a little confused -- that actually got involved in -- And I've forgotten the term. What's Mr. Ovard's title?

A I believe examiner.

Q Did you have two or three examiners?

A When I was commissioner we had two examiners on the property-casualty side, we had one on the health and accident side.

Q So these two examiners on the property-casualty side had to cover several hundred companies.

A That's true.

Q Now, you indicated that you had fifty-five people in the insurance department, and I asked you if [75] you've only got three as examiners, what do all the others do? And rather than taking the time to walk through that, it is true, is it not, that of those fifty-five people that were on your staff, you had a number looking at insurance forms, another dealing with people that want to register to do business, you had the financial people, you had support staff, secretaries and so forth.

A That's true, agents, licensing, and those additional areas.

* * *

Q Now, you've talked about complaint ratios. The insurance companies know these complaint ratios are going to be made available to the public, and it could [76] affect their sales of their insurance; is that a fair statement?

A The companies know that the department will publish those in a brochure form, and they will be widely distributed to the public.

Q I want to explore some of the limitations of those complaint ratios with you. You testified in your deposition that if someone complains, and that gets worked out between the company and the person that complained, that doesn't show up as a valid complaint. Isn't that true?

A That's true.

Q So if an insurance company wanted to manipulate those complaint ratios in those cases where somebody complained, they would keep it from going to a formal determination, wouldn't they?

A I guess if they had that kind of an ulterior motive. But they don't. When somebody complains, the department makes a decision about, "Is this a valid complaint? What can I do to help this person?"

We send a complaint form to the individual. That form comes back. The examiner looks at the information, picks up the phone and calls the company, and says, "Would you look at this XYZ file," or "Would you send us all of your claim file so that we can [77] examine it and make an independent determination as to whether you're treating this individual fairly or not?"

But usually the phone call precipitates the resolution of the problem.

Q And it doesn't show up as a valid complaint, then.

A That's true.

Q In fact --

A But the problem is solved.

Q Right, I'm not criticizing that, I'm just wanting this jury to understand the numbers. Your testimony was that the insurance department gets about 36,000 calls a year.

A That's true. That was to the consumer service division.

Q And so it's simply not feasible, in most instances, for the people, the three people that field those calls, to do more than simply encourage the company and the people to work it out.

A Well, that's not exactly true, because many, many of those people fill out a complaint form and send it to the department. And every one of those complaint forms is acted upon.

Q Now, have you had a chance to read the deposition of your predecessor, Roger Day, who was [78] insurance commissioner before you were?

A I did.

Q Do you recall him testifying that State Farm, from his view, had a consistent practice of being very reluctant for complaints to go to a formal hearing, and they would resolve them before that happened. Do you recall reading that?

A I remember reading that.

Q Is that consistent with what you saw?

A No. If you want me to characterize what I saw, it would be that it is -- Part of what he said is correct. In other words, any company, when the insurance commissioner's office picks up the phone and says, "We're now checking into this particular claim," we get their attention. And so they immediately look at their hold card and decide, "Is this person being treated fairly?" If they aren't, they step up to bat and take care of it.

Q Now, these complaint files aren't available to the public up at the commissioner's office, are they?

A That's my understanding.

Q And there's no record kept of verbal complaints. Just written ones.

A That's true.

Q You've never seen the complaint files on [79] these twenty-one State Farm valid complaints for, what, last year?

A I have not seen them.

Q You can't tell us about any valid complaints against State Farm?

A No, I can't.

Q You don't know if State Farm's practices are getting better or worse or staying the same; isn't that true?

A I don't know that. I assume if they're going to continue in the marketplace, they're going to take care of their customers.

Q Now, you indicated in your deposition you didn't have any idea what percentage of people that are treated unfairly actually complain, and you really don't have any way of knowing that.

A I have no way of knowing that.

Q You didn't keep track, or have any record, as commissioner, of how many lawsuits got filed against State Farm?

A No, we didn't. Or any other company.

* * *

[82] * * *

Q (BY MR. CHRISTENSEN) Mr. Yancey, let me see if I can expedite this and conclude. You mentioned you'd read Mr. -- Let me ask a prior question first.

There's been some testimony in this case [83] about State Farm's abuse of comparative negligence, meaning at times claiming people are at least partially at fault, and therefore their claim should be reduced because of comparative negligence.

Do you recall reading in Mr. Day's deposition -- Again, he was the Utah commissioner before you were?

A That's correct.

Q Where he did conclude that State Farm was abusing comparative negligence. Do you recall that in his deposition?

A I read it some time ago. I don't specifically recall that point, but he very well might have said it.

Q Do you recall him saying it seemed like they were saying --

MR. HANNI: Your Honor, I'm going to object to the use of Mr. Day's deposition. This is an indirect way of trying to get his testimony in. If they wanted him, they should have designated him as a witness. I object to it on that grounds.

MR. CHRISTENSEN: We've used depositions for cross of witnesses throughout this trial, Your Honor. And he's indicated he's read it. And as an expert, I think I'm entitled to probe what he's read.

[84] THE COURT: You can -- The use of it is not improper for the purposes that you've described, but we'll take those questions on a case-by-case basis. I'm going to overrule the objection, but I'll be mindful of what use that you make of depositions.

Q (BY MR. CHRISTENSEN) Okay. You don't recall Mr. Day saying that he believed that State Farm was assigning up to 15 percent contributory negligence --

A Comparative negligence.

Q Excuse me, comparative negligence, where at times there was no basis for it?

A I don't recall him specifically saying that.

Q You don't deny that he said it?

A No, I don't deny that he said it.

Q Do you recall Mr. Day --

A Let me just add this point. The assessment of comparative negligence to a given set of facts is not an exact science. There are so many shades of liability in a given case, so many disputes about liability, that every company adjusting claims has to assess comparative negligence based on their own good judgment. And what my judgment might be about that, and what somebody else's judgment might be about that, might be two different things.

So I'm just saying that comparative [85] negligence sometimes is a difficult statute to administer.

Q But he was describing things like 5 percent for getting up in the morning. Now, he said he was being facetious, but he said sometimes it got that arbitrary. Do you recall that?

A I don't believe that's true.

Q A company could abuse comparative negligence if they so chose, couldn't they?

A It's possible, yes.

Q You could knock 10 or 15 percent off a claim, and realistically the claimant can't do much about it, can they?

A Well, the only thing they can do is say, "I was not negligent," and not accept what the offer is.

Q But then they'd have to sue and get a lawyer, and for 10 percent it's probably not worth it, is it?

A Depending on the value of the claim.

Q Now, Mr. Day, do you recall him also saying that he was concerned because of the lack of the insurance commission resources that, even where they would address a specific complaint with State Farm, that State Farm may well have been going right back out and continuing to do it, and they wouldn't know?

MR. HANNI: Your Honor, I'm objecting again. [86] This is just an indirect way of trying to read in what Mr. Day had to say. It's not proper cross examination of this witness.

THE COURT: Overruled, I believe it is proper cross.

Q (BY MR. CHRISTENSEN) Given your knowledge of the department, that's a legitimate concern, isn't it? You wouldn't know exactly what a company was doing.

A No, you would not. But I would say that even if you had almost unlimited resources, you might have fifty examiners in the insurance department, but you wouldn't want to go out and examine every company's files.

Q No, that's not really your job, is it?

A No, that's not what you'd want to do, and that's not in the public interest.

Q You've not reviewed, at least as commissioner, you hadn't reviewed State Farm's manuals?

A No, I haven't. We haven't reviewed any company's manuals.

Q That's also something else insurance departments don't get involved in.

A That's true.

Q Now, I asked you, Mr. Yancey, if you were aware of any states where it was -- Your deposition, I [87] asked you if you were aware of any state where it was illegal to give an adjuster an incentive to pay less on claims. And you said you weren't aware of any where it was illegal?

A That's true.

Q Isn't it true that that's right in the Utah Unfair Claims Practices Act?

A It's true, that's part of that act.

Q But you didn't know that?

A Well, I don't recall, again, exactly what my testimony was, but I know that one of the provisions of that act is that it's not right and proper to offer an incentive to an adjuster to go out and save money. If I misspoke in my deposition, then I misspoke.

Q I asked you on page 99 of your deposition --

MR. HANNI: Which one is that?

MR. CHRISTENSEN: Second deposition.

Q (BY MR. CHRISTENSEN) Line 8, "Are you aware of any states where it is illegal to provide an incentive to an insurance adjuster to pay less than the value of the claim?"

And your answer was, "I'm not aware of any."

A Well, when I made that statement I was not thinking in terms of the Unfair Claims Settlement Practices Act. You sort of implied in the question that [88] this was a separate statute, and that there might be a separate law that prohibits that. I was not aware of any law.

Q Isn't the Unfair Claims Practices Act a law?

A It is, but I was not thinking of it in those terms.

MR. CHRISTENSEN: I think that's all I have. Thank you.

* * *

[106] * * *

REDIRECT EXAMINATION BY MR. SCHULTZ:

* * *

[108] * * *

Q Now, you were asked a series of questions [109] about whether or not an insurance person settling a claim should tell the person making the claim that the claim is worth more than what the person has asked for. Remember that context?

A I do.

Q I would like to show you some testimony from Mr. Brenkman, who was also referred to on cross examination, he's the Allstate claims manager that testified in this case. This is from his trial testimony here, our pages, I'm starting on page 87, but I don't think the pages are the same for both --

MR. CHRISTENSEN: I'm going to object to this as leading the witness, Your Honor.

MR. SCHULTZ: I haven't even asked him a question, Your Honor.

MR. CHRISTENSEN: Well, it's one thing to use testimony for cross. It's another thing to simply use a witness to read something into the record.

MR. SCHULTZ: Well, I'm going to show him the testimony and then ask him a question, Your Honor.

THE COURT: All right, proceed.

Q (BY MR. SCHULTZ) Now, let me give you the background just a bit. Mr. Brenkman had testified that his opinion was that there was about, that Slusher's general damage claim had a value, in his view, of [110] $100,000. Okay?

Now, starting here, the question is, "And although you've indicated that, looking back at it, your view was that Mr. Slusher had a claim that probably had a value of $100,000 in general damages. When Mr. Barrett informed you, or your counsel, that he was willing to settle for $65,000, you didn't -- I assume you didn't go back to him and say, 'Well, that's not enough.'"

And then I'm going to skip, he gave a long statement, there, that I'm not going to read, because it doesn't get to the point.

Then I asked him the question again, "Let me just ask my question again. To your knowledge, did anybody from Allstate, or representing Allstate, ever tell Mr. Barrett that they didn't think $65,000 was enough for his client to take in settling with the estate of Ospital?"

And he says, in his answer, "That they didn't think it was enough? As I understand the thing, some discussion occurred, a plaintiff presented a total offer of $90,000. The cut line of that was $30,000 Farmers, $35,000 Allstate, $25,000 State Farm. Frankly, the offer was a bargain, and at that point in time I did not want to go back and counter, I guess, offer, and saying, [111] 'No. I'm willing to pay less than $35.'"

And then I say, Question. "No, my question is, did you tell Mr. Barrett that that wasn't enough for his client to take from you?"

And his answer is, "Well, no. He's the adversary. His position is to present our case and argue and demand what he needs to do. And my position is to settle my client's risk. And frankly, my client owed him nothing, so why would I instruct him that he needs to be charging me more? No, that was not part of it."

Now, having seen that testimony, Mr. Yancey, is that consistent with your view of whether or not, in a third-party claim, the insurance company has an obligation to tell the claimant that they see the value potentially as higher than what the third-party claimant has asked to take?

A They have no obligation to do that.

* * *

[112] * * *

RECROSS EXAMINATION BY MR. CHRISTENSEN:

Q The testimony that Mr. Schultz read had to do with Allstate settling with Mr. Slusher. And by the way, you understand that when Mr. Brenkman said the value had $100,000 in generals, he also indicated he thought it had a value of several hundred thousand more for lost wages and other things. Do you recall that?

A I don't recall that specific testimony.

MR. SCHULTZ: I object to that.

Q (BY MR. CHRISTENSEN) Anyway, that was the setting where Mr. Slusher had an attorney, and the facts [113] were on the table, right?

A Right.

Q My question to you that we put on the screen was, somebody who had never had an insurance claim before, didn't know what their claim was worth -- we didn't say this -- but you knew I was talking about somebody without a lawyer, right?

A I surmised that.

Q And in that setting, would it be fair to simply take advantage of their lack of knowledge? That's not really comparable to the situation where someone's in a lawsuit with a lawyer, and everybody has access to the facts, is it?

A It's not exactly comparable, but this is why I continued to ask you the question whether or not we were talking about first party or third-party claims.

Q But the Unfair Claims Settlement Practices Act says a claimant is defined as both first and third party, doesn't it?

A It says that, but that's not the practice up and down the street.

Q But that's the law.

A That's not a law, it's a regulation.

* * * *

EXCERPTS OF TRIAL TRANSCRIPT OF JURY CHARGE CONFERENCE, JULY 30, 1996

[R. 10288, commencing at p. 5]

* * *

(The following proceedings were held in open court outside the presence of the jury.)

THE COURT: Good morning, counsel. We're here in the matter of Campbell versus State Farm Mutual Automobile Insurance Company.

The jury is not present and this is a session that we have scheduled to complete the work on the jury instructions and also on the special verdict form. The court has received three submissions from counsel from each side this morning.

I want to commend counsel for the work they have done. It's obvious you have been putting a lot of effort into this and I think we have come some ways in getting this matter done.

I have created a working set of instructions which now includes all of the stipulated instructions. I don't have any problems with any of those that have been submitted on the stipulation.

I think probably the easiest way to do this is to just go through each of the party's sets. Since Plaintiff bears the burden, I'll start with the Plaintiffs' set. As soon as we are in an area in which [6] both sides have competing sets, then I think that the Defendant's set should be brought forward and considered at the same time. So I'm looking at both of them. And then when we've completed Plaintiffs', we'll go through Defendant's.

I made some decisions on some of the less controversial ones from each side, and I will just advise you of that, to limit argument, when we get to those. But most of these I'm

willing to hear what you have to say since there is obviously an effort to work out a stipulation and those stipulations haven't been agreed to on all of the areas.

* * *

[11] * * *

THE COURT: I'm not going to give it, based on the reasoning of Defendants.

Let's go to number -- What has been marked as number 3: Plaintiffs allege State Farm intentionally destroyed -- oh, this is the spoilation issue. I know you want to argue this one.

Go ahead, Mr. Christensen -- or Mr. Humpherys, whoever wants to argue on behalf of Plaintiffs.

MR. CHRISTENSEN: Your Honor, we argued this at some length and I think we briefed it before the trial, and as I recall the court at that time reserved the [12] issue.

THE COURT: That's correct.

MR. CHRISTENSEN: And as I understood the reservation, it was that the court wanted to find out if we could present evidence at the trial that a jury could reasonably find the documents and other evidence had been intentionally destroyed or concealed. I think we have clearly met that burden.

There has been quite a bit of evidence presented on that, and the one that the court's most familiar with, of course, is the Samantha Bird memo which Samantha Bird laid a very strong foundation for. And if her testimony is believed, the instruction to destroy and conceal, I guess -- I guess it was to destroy evidence -- came right from Mr. Moskalski, the regional vice-president, to send Janet Kamak as his emissary to Utah to instruct that this take place. And that occurred after some of the very materials which he ordered destroyed had already been requested by Plaintiffs in this case.

There is also ample evidence that those are the very kinds of materials typically requested in cases of this kind throughout the country.

The case law that we cited in our brief indicates an obligation by a corporation to maintain [13] records which they reasonably can anticipate will be requested. In our case they already had been, and we have Karen Ortiz's admissions in the March hearings in this case that the kinds of materials -- at least some of the kinds Moskalski ordered destroyed were usually asked for in bad-faith cases. There are always bad-faith cases pending.

In addition we've got -- we presented evidence that the '89 divisional claims superintendents' conference tapes were in the library, as were the '86, and they claim they're destroyed. We presented an index of what was covered in the '82 conference. Mr. Kingman admitted he had -- he had been to the '95 conference and it was video taped. They represented these have been destroyed.

And of course we have the evidence -- and I think it was Mr. Camella admitted in the Shasberg case they kept historical claim files on all the manuals that went back. And the evidence is that those have now been destroyed. We don't have the claim manuals from the time frame of the excess liability handbook, which we believe would show, if they existed, that the same improper instructions found in part five of the excess liability handbook were contained in the auto claims manual as well.

[14] Those are some examples -- I'm sure there are others -- of the kinds of evidence that have now been presented in this case to support the spoilation instructions.

MR. HUMPHERYS: Your Honor, let me just add, too, in their new program, the records retention program, they claim they have hold orders which are designed to keep

requested documents. In 1994 we made a number of requests including PP&R's, and there were no hold orders on this case. And that was express testimony by Mr. Cochran, even though they have been expressly requested. And as a result we don't have some of the PP&R's that preceded the time period that they're requesting.

So it's very widespread. It's not just I wanted to add that specific item on hold orders which even in their own program they say is designed to prevent destruction of evidence. They failed to do a hold order in the Campbell case.

MR. BELNAP: Your Honor, we have marked as Exhibit 193-D a photocopy of Article 11 and Article 12 from the claims superintendent's manual, 1971 version. These were produced and talked about in chambers approximately a month ago, and we have given the entire claims superintendent's manual that is a 1977 version and [15] has the 1980 Article 14 in it, plus these Articles that have been the subject of this case, Article 11, Article 12 that were in force at the time of the accident.

We have marked as Exhibit 194-D the Article 14 that is dated March 1980. There had been in evidence prior to this the October 1981 version, and reference to that was that the October 1981 version replaced the March 1980 version. So we have those marked specifically. And those manuals have been produced, along with the complete auto claim annual, to the Plaintiffs.

With respect to this case, Your Honor, the case law, the majority position throughout the country on a spoilation argument is that Plaintiffs have to step forward and say what it is that they don't have that they need to prove their case.

All of the Plaintiffs' experts Fye, Prater, Roberts, the other experts, have all indicated that they have all the information they need to prove their case.

The testimony from Samantha Bird and those that were listed on the memo that she sent to her unit after the April 1990 meeting indicated that what they were talking about was old stuff that these people had in their drawers. And when Mr. Schultz asked Mrs. Bird the question, and also when Mr. Jensen was asked: Well, what is it that you threw away? Was it material that you were [16] using? Can you identify it? It wasn't current material. Nobody can say what was thrown away. It was old claims, notes, that kind of thing, according to her minutes and her memo to her people.

Therefore, Your Honor, given what we have produced in this case, what Mr. Fye has, that there's not been a showing that he doesn't have it, what Mr. Prater has, there has not been a showing that he doesn't have it, we don't think they have met the burden.

Now, in terms of the history files that they talked about at the January 1985 hearing before this court, an order was entered --

MR. HANNI: You mean '95.

MR. BELNAP: '95. Thank you --

MR. HANNI: 96.

MR. BELNAP: '96. Thank you.

THE COURT: Mr. Hanni stays on top of those dates.

MR. BELNAP: It's hard to keep straight.

January 1996, hearing when counsel at the table here, including our Mr. Prater were present, there were specific matters taken up in terms of discovery. That hearing -- this court entered an order for a search for a window and a production of manuals in the 1980 to 1984 time period. Those have now been produced either through [17] that search or through what was given to counsel a month ago, and there is nothing in what was given to counsel a month ago that would be prejudicial in terms of the fact that it's the same material that they have had before, Your Honor, in terms of what was germane to this case.

So the history files, when they have the manuals now that were in place, and they have had them through -- as shown by the documents 193 to 194-D to be the same materials that have been the focus of this case through their case and through their cross-examination in Defendant's case, makes spoilation entirely inappropriate on that point.

At the January 1996 hearing is when the court dealt with the issue of the PP&R's and what would be produced. At that point we immediately gathered up all of the mountain states' PP&R's that the court fashioned, based on their request, should be produced.

Now, prior to that there had been a much broader scope and a different request, and therefore we think the whole order issue is irrelevant to that because we went out immediately and got all those PP&R's.

Now, if you look at what has been produced in this case, they have complete PP&R's back to the time period in question on the people that handled this file, William Brown, Ray Summers, Bob Noxon.

[18] MR. HUMPHERYS: That's not true, counsel. We have two years' back there. We were given 1992 --

MR. BELNAP: You got 1981 --

MR. HUMPHERYS: -- And we had nothing until 81, '82, but there's a big gap in between when he was divisional and when he went to Colorado.

MR. BELNAP: I don't dispute that. I don't think that's what I was saying. They have the PP&R's of the people that were handling the file at the time period in question. That's Bob Noxon, Jerry Stevenson, Bill Brown, Ray Summers. They have all of those materials that were in place and Noxon's goes up to I believe through the end of 1984, and then there's a gap that goes up to the 1991 or 1992 time frame.

Other than that they have the complete PP&R's and complete PP&R's of a number of other people during that time frame which runs all the way from the 1970's up through the present time. So there is a complete -- if you're looking for a sampling and completeness from this region, there is a complete availability from a sampling standpoint. There may be some years that are missing on some people, but the people that are germane are complete.

And the other people that were on the claim committee, they have got all of Grant Cutler's PP&R's; [19] they have got the other people who were on that claim committee for the germane time period.

When we had a subsequent hearing and the court fashioned an order on the nationwide PP&R's and had each side pick the states, we immediately went out and got hold of those division managers'. Up until that point there was not a court order, and therefore there is no reason to get a hold order because we obtained all those division manager PP&R's that we were told to get.

So with respect to spoilation we do not think it's appropriate that issue go to the jury. There has not been a showing in this case that they don't have a document that they need to put on their evidence. They have had thousands of PP&R's that -- we have seen a number of them put up on the screen that support whatever theory they want to argue to the jury about average paid costs, indemnity, and all those things, Judge. So if you combine all the manuals that have been produced, documents of Fye, documents of Prater, the PP&R's, and these exhibits that I have referred to, 193, 194, there is not a necessary showing.

MR. SCHULTZ: Your Honor, can I just add one thing on the Excess Liabilities Handbook?

I think at least from my perspective the theory on that has changed since last fall. When that issue [20] came up in the first phase, the argument as I understood the Plaintiffs were making was that the Excess Liability Handbook, or at least part 5 of that handbook was the predecessor to Article 14 of the auto claims superintendent's manual. And at that time we had the June 1983 version of Article 14.

Now we know that the -- when I say the predecessor, I mean the immediate predecessor, the document that was in force and used by the auto company at the time of the Campbell accident in '81 and through the time of June '83. Well, we know that is not accurate. The auto claims superintendent's manual Article 14, there was an October '81 version that was in Mr. Fye's documents.

There was a memo introducing that October '81 version that indicated what parts from the March '80 version had been changed. And so we know that there was -- that the parts or the portions of part 5 of the Excess Liability Handbook that Plaintiffs have been so critical of were not included in Article 14 as it existed in March of '80, October of '81, or June of '83.

And the company should be judged by the documents in existence at the time this claim was being handled, not by a document that was produced in 1972. And Samantha Bird specifically indicated that if she was [21] going to handle a claim in 1981 she would look to the current version of the claims handling materials to do that, not to a handbook or manual that was put out in 1972.

And of course, in addition to that, we have the obsoleting memo of 1979 on the Excess Liability Handbook. Thank you.

THE COURT: Thank you.

MR. CHRISTENSEN: Your Honor, I should point out that the instruction we requested is the mildest one we're aware of in the ones that we looked at. It says that Plaintiffs

allege that State Farm has intentionally destroyed or concealed evidence in this case. If you find that State Farm has done so you may infer, and so on.

So the instruction requires the jury's finding. It doesn't say the court has found. It requires intentional destruction. There are jury instructions on spoilation that have a lessor standard. And there is ample evidence in this case of sterile documents that have been destroyed, and I have already outlined that.

And there are many PP&R's that we would like that we don't have, such as Kingman, Shorts, and Arnold and others, but I hate to belabor this.

[22] I think we more than met the burden of presenting evidence of intentional destruction. It's there, and the instruction simply tells the jury if they determine there has been intentional destruction or concealment that they can draw an inference from it. That's all it does.

MR. BELNAP: Judge, what would be the inference that we would be leaving with the jury? We're simply asking them to speculate on what document it is that Plaintiffs claim they need, and there is no standard here and that's why the cases say that, Judge.

THE COURT: Well, the court has made the determination, having heard arguments of counsel and is very conscious of this issue, not to give this instruction. I am relying on the arguments of Defendant, but I wish to articulate a little more what the court believes this instruction goes to and what it doesn't.

It seems the issue of State Farm's aggressive documents management program is before the jury. There has been a lot of evidence. This has come out about that as it relates to damages and any other issue in the case, and certainly counsel can argue the evidence that has been presented.

And certainly the issue of State Farm's reluctance or even bad faith in its discovery practices [23] in this case is before the court, and the issue has been reserved for the court to consider.

The court views the spoilation instruction, even of the nature that's submitted by Plaintiffs which the court recognizes is a mild version -- it's really not the most draconian instruction to be given -- is a comment on the evidence in effect and requires in the court's view a rather high showing, not only of a willful destruction but willful destruction of certain documents that are substantial evidence exists that are in fact -- that give every reason to believe are harmful.

And in this case, we certainly have gone through a lot of battles on the issue of documents, and the court entered some orders which were very much designed to put State Farm in a position of coming forward either with the documents that were somewhere, somehow in their corporate possession, or to acknowledge the authenticity of the documents that were in the possession of some other individuals such as Mr. Fye and Mr. Crow.

And it has certainly been the court's impression that State Farm did that and they were put under that obligation that that happened and we haven't had battles over authenticity, that the court can recall, of any substantial nature. And the documents that have [24] been produced that were thought to have been destroyed do not give rise to the worst inferences that the Plaintiffs would have us draw that they are harmful and that State Farm purposely destroyed in the face of an existing Discovery order to avoid their being seized in Discovery and presented to the jury. I just don't think there has been a showing that that has happened.

And the Bird memo certainly indicates an intention of getting rid of documents, but I am not persuaded what was destroyed by virtue of the Bird memo would be of a nature that would suggest the inference. And I frankly am of the view, whether it's relevant or not on this issue, that Moskalski didn't do it fully recognizing that there was a bad-faith case in which there as a discovery order and that was a way to get rid of documents that should properly be produced. I don't think that's what was going on in his head, and I don't know that that -- I say that as what my sense of the nature of that was and give that as further explanation of my ruling.

Let's move to number -- the next number I think was the replacement on the Bennett instruction that we have already dealt with. That takes to us what has been marked as Plaintiffs' instruction number 13.

MR. HUMPHERYS: Your Honor, just so that we [25] have an understanding on the spoilation, the court's findings thus far only dealt with the standard of whether or not the spoilation instruction should be given. I don't want, during closing statements tomorrow, some comment the court has found that there was no such instruction or intention.

THE COURT: You can argue the evidence. I am not saying that is not an issue before the jury. My belief is that an instruction is unnecessary. You can make your argument and State Farm can make its argument. I don't think I ought to be commenting on what the jury can or cannot do on that.

MR. HUMPHERYS: Right. That clarifies it. I just don't want someone to quote what you said as being evidence.

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EXCERPTS OF TRANSCRIPT OF PROCEEDINGS, JULY 31, 1996

[R. 10324, commencing at p. 2]

* * *

(The following proceedings were held in the Court's chambers outside the presence of the jury. Present were Mr. Christensen, Mr. Belnap, and Juror Hoskins.)

* * *

[3] * * *

(Juror Hoskins left the Court's chambers.)

* * *

[5] * * *

MR. CHRISTENSEN: And, Your Honor, I have one other matter. The court ruled Monday that we would be provided documents to back up the statements about the Illinois and California cases that Mr. Arnold testified about.

We obtained an affidavit this morning, Mark Knudsen, an attorney involved in the California class action on the Plaintiffs' side. According to Mr. Knudsen's sworn testimony the things that Mr. Arnold said simply aren't true about the California case. There has been no judicial finding that there are only 45,000 people rather than the 2 million plus figure.

He also indicates that the class and the time for claims has not expired. And, furthermore, he indicates that it's not a matter of public record how many claims have been paid and the amount spent. He has not been able to find out himself. State Farm has got [6] the file sealed and they asked and that has not been revealed.

It was represented this was all a matter of public record. I remember Mr. Belnap accusing me of not doing my homework, in front of the jury and with this testimony being presented, without

a chance for us to have any forewarning of what it would be or to look into the matters.

We have got a situation where Mr. Arnold has simply misrepresented to this court the California case. Counsel did give us an unsigned affidavit from an in-house State Farm attorney about the Illinois case that indicated that the size of the group of people with potential claims was 263,000. We thought the figure was 80,000. And I believe the number of claims that were submitted and paid that Mr. Arnold testified about did not match the affidavit.

There was a second affidavit from the same in-house attorney of State Farm apparently filed in opposition to an attorney's fees motion in the California case filed in '95 and it certainly didn't match what was said.

Your honor, we would like to either be allowed to read -- Mr. Knudsen's that I gave you there.

THE COURT: Knudsen.

[7] MR. CHRISTENSEN: Affidavit to the jury. Or we would like to have Mr. Arnold's testimony about these class actions stricken.

THE COURT: Mr. Belnap.

MR. BELNAP: Judge, I'm a little disturbed that that wasn't raised yesterday, because I had all my materials here, thinking that this was going to be an issue. And I haven't brought any of them today because it wasn't raised.

THE COURT: State on the record what you've got.

MR. BELNAP: Let me tell you what I do have.

State Farm sent me by overnight delivery -- which was at my office when I got back last night -- a stack of documents. And I'll get to those in a minute, Your Honor. But we had provided to counsel an affidavit of John Ashenfelter. We provided counsel on Monday a copy of an affidavit from him that he had filed in the -- in an Alabama case which counsel referred to on cross-examination of some of the Defendant's

witnesses with respect to an Alabama class action that they claimed was further evidence of cheating on the part of State Farm. And that case hasn't even be certified as a class -- because that affidavit was filed with and in connection with a motion in opposition to certifying that [8] case as a class and moving to dismiss it.

Tuesday morning, yesterday, I supplied a signed copy of an affidavit from Mr. Ashenfelter in the California case where he indicated in his affidavit by that point in time there had been, I think it was something between a thousand and 1500 claims that had been made in the case. The affidavit talked about the notice provisions with the newspaper. It talked about other things that we had mentioned in the case in talking with Arnold.

I have spoken to Mr. Ashenfelter since this was raised by counsel on Monday and he has indicated to me the following information about the California action.

Number one, the time for making claims has expired, absolutely, and that's in the document that Mr. Christensen has.

MR. CHRISTENSEN: I have never seen that.

MR. BELNAP: That is in the settlement agreement.

MR. CHRISTENSEN: I haven't seen the affidavit. I don't know if that's true or not.

MR. BELNAP: The time for changing claims in the California case is expired and the documents that were sent to me by overnight that are in my office at State Farm is a listing of the people that have made a [9] claim and have been paid in the California action. Mr. Ashenfelter indicated that the case calls for reporting to the judge, and there will be reporting on this. There has already been reporting on the case.

The only thing that has not expired on the California case is that they have sent out some certificates of guarantee to people that did not want to reclaim or claim their $35 cash payment and just wanted a guarantee that they could redeem it if they had problems with the car.

And the time for redeeming those guarantees has not yet run. That is still open. Everything else has run.

The case was sealed, Your Honor, at one point, when the parties proposed to the Court the settlement agreement, and put in affidavits from each side talking about having private statistics and opinions. The Plaintiff had an affidavit from John Hunter who indicated he estimated there will be 2 million people who would respond and become part of the payment class. That has absolutely been shown to be false and fallacious.

And Mr. Ashenfelter's affidavit filed in the Alabama case and in the Krasinsky case in Illinois talks about what State Farm's experience has been on a percentage basis or statistically how many people have [10] been dissatisfied, if any, with these parts.

And so we have evidence that there were 45,000 people that were mailed from the data base that was used, the same data base that was accessed in part of the Krasinsky case in Illinois. The basis of the settlement in Krenz was adopted from the way they put together the settlement in the Illinois case and the documents there are a matter of public record. They go through the affidavits talking in the Krasinsky case about the mailing process that was used, the publication process. Data base that was accessed to determine from the data base who had received after-market parts.

And so to say that there is no evidence to back up what we said is absolutely not true, and I have documents back at my office that we can supply to Mr. Christensen, in addition to what we have done.

And, Judge, I would have liked to have had a witness to go into more of these class action cases that have been reported to me from various lawyers at State Farm that run contrary to newspaper articles or representations that Mr. Christensen put up on the board. So I'm taking the position, Your Honor, with the support and backup, that what was said is

inappropriate and to either move to strike that or to add to the evidence with this affidavit. I think it's entirely [11] inappropriate and should not be considered, especially in view of the late hour that we have got here. And that is sprung on me this morning when I just figured what we had given Roger yesterday solved the concern that he had, and I don't have any of those materials with me today and we have a jury waiting.

MR. CHRISTENSEN: We haven't seen materials. There has been representation that there has been a judicial determination there are only 45 that you had. That is apparently not true.

The reason I didn't bring it up yesterday -- I gave Mr. Belnap a copy of this affidavit yesterday -- is because we went last night until I don't know what hour, and I just had the sense that the court was not going to be receptive to -- particularly with all of us being in urgent need to get out of here and prepare for today -- to bring that up.

MR. BELNAP: Judge, there has not been a finding of the 45,000. The Krasinsky case formed the basis of the amended complaint. The Krasinsky case formed the basis for the settlement structure in Krenz, and in the Krasinsky case the documents set forth exactly how State Farm is going to try and determine who the class is that these are going to mail to from their auto text system; it references right in those affidavits.

[12] THE COURT: It sounds like the critical question being raised is Mr. Christensen's concern that it hasn't been verified to his satisfaction that the class consists of only 45,000. Is that fair to say?

MR. CHRISTENSEN: That's one of them.

MR. BELNAP: Well, the class definition was anybody --

THE COURT: Well, number of claimants.

MR. BELNAP: No. Let me try and make myself clear.

The Plaintiffs tried to define and certify the class as everybody in the state of California, '87 to '94.

THE COURT: That had a State Farm policy.

MR. BELNAP: That had their car repaired.

THE COURT: Okay.

MR. BELNAP: And they estimated that would be somewhere around 2.8. Okay?

THE COURT: All right.

MR. BELNAP: Then State Farm followed the Krasinsky guidelines that the parties used in settling the Krenz case, went to the same data base that was used in the Krasinsky case determining who should be mailed to, and it was agreed that State Farm would make the mailing and send out a claim form, which they did to [13] 45,000 people. And I can -- you know, that is undisputed in terms -- we can get terms. We can get Mr. Ashenfelter on the phone.

THE COURT: What do you have in your office that would show that? What have you got?

MR. BELNAP: I don't have anything in my office right now that would show that. Yesterday I was caught between time zones between talking to him in Illinois and the law firms in California were not in their office by the time I had to be in court, the Palo Alto law firm.

But the mailing was made and it is undisputed that there has to be -- this is all done pursuant to a settlement agreement. There has to be reporting back to the judge that certain steps have been followed, they have been -- the time for making claims has run and State Farm has a list of everybody who has made a claim and it's that 2,000 some-odd people.

MR. CHRISTENSEN: My concern is, one, the representation that there has been a judicial finding that there was only 45,000. It sounds like that is not true. Besides the mailings there were published notices and another things completely left out of the testimony. There was a lot of benefits

to State Farm policyholders that came out of the settlement besides simply the repair of the cars.

[14] MR. BELNAP: Why didn't you ask the questions?

MR. CHRISTENSEN: Because I was ambushed by this.

MR. BELNAP: You had the document in your own file that says they're going to pay to CAPA -- they were also -- CAPA, that's certified auto parts. They agreed as part of the settlement over the next five years to pay three and a half million dollars to CAPA, which was the same ratio they paid in the Krenz case.

MR. CHRISTENSEN: The representation was this was all public record.

MR. BELNAP: It is.

MR. CHRISTENSEN: And the attack on me that I hadn't done my homework. I understand the attorney in California couldn't give us documents to show what he's saying without that, and we still haven't seen the backup documents.

MR. BELNAP: The parties' settlement agreement said the file would be confidential until the settlement was approved. The file is not sealed. I talked to Mr. Ashenfelter. It is not sealed. Anybody can look at the file.

If it was sealed how did Mr. Christensen get a copy of the settlement agreement that he's got? It's not sealed, Judge. He's got a copy of the settlement [15] agreement and a copy of the pleadings from the case.

MR. CHRISTENSEN: We got it from Plaintiffs's counsel. He could give us that, but the specific numbers that were represented, he said he couldn't give us; he didn't know them himself.

MR. BELNAP: Well, in terms of balancing, Mr. Christensen has today been able to say that we cheated millions of people and to have his day with the regulator saying that, and we have had our opportunity to go in and say otherwise, and he was talking about ambush. Judge, if he has documents that Plaintiffs'

counsel has given him, you know, over a month ago or whenever it is, then, you know, they ought to be a little more informed about what's happened.

THE COURT: I don't think I'm prepared to take the action that you requested, Mr. Christensen. Is there something that you can formulate that Mr. Belnap can supply you during the course of the argument, or something that you need to have the Court do in the next half hour?

MR. CHRISTENSEN: Well, I think we can have the jury told that there was no judicial finding that the class was 45,000.

THE COURT: What was the basis for establishing the class of 45,000?

[16] MR. BELNAP: The auto text system. Now, the class, just like in Illinois, when they mailed out 80,000 letters, Judge, and then they made a second mailing of 60 some-odd thousand, that was based upon, in Illinois upon the agreed procedure they would use their data base to determine in good faith who had received those parts.

Now, if they missed anybody in that, that is the reason that both of those courts ordered that there be substantial notification in the newspapers.

To say if you have had these parts and you are not satisfied with them call this 1-800 number, and I think the most probative issue, if we're talking about the class, is who has made a claim. And that's undisputed. In both of those cases we're talking less than 3,000 people in each of those cases.

MR. CHRISTENSEN: I think it's disputed. I don't think your guy's numbers fit what the testimony was, but the discrepancy there I'm not so concerned about because it's not a large discrepancy.

The other thing, apparently the Illinois group of people, the potential claims was 263,000 not 83.

THE COURT: Is that true?

MR. BELNAP: These cases in the Ashenfelter affidavit, in one of his affidavits he mentions there may be 263,000 people, but when they did the checking and in [17] the actual affidavits that are filed with the court by the people who ran the computer data base as a matter of public record, they went in and said this is what we found and based upon that their certificates of mailing that are filed and everything else in the Krasinsky case that talks about that.

So I think what's germane is he had his opportunity to say we cheated millions of people. It's undisputed there's less than 3,000 people in each of those cases that made claims, and at least a third of those made claims was what they call facially invalid under the standards set forth by the court.

THE COURT: Do you intend to argue the class action case?

MR. BELNAP: I don't intend to argue the specifics. I can't say, depending on what they say.

THE COURT: I just want to know, if they say nothing, are you going to say anything?

MR. BELNAP: No. I think I would say in talking about the regulators that they don't do that and the evidence in this case is that they don't deal with judicial issues.

THE COURT: Where are you with respect to arguments?

MR. CHRISTENSEN: Mr. Humpherys is going to [18] treat that part of the case. Given the time crunch we were under last night, I don't know exactly what he's going to say about it. I'm sure I can give you some input on it.

THE COURT: I'm just wondering. I'm hearing very different perspectives, and we're late in the day. I'm not sure that my going into court and saying it wasn't the judicial determination of 45,000, but instead it was under the order of the Court and the settlement agreement there was -- that was a number that was actually given notice.

MR. CHRISTENSEN: Well, we don't even know that. There's no verification for that and I don't think it happened. I don't think there was any judicial finding of 45,000.

THE COURT: I'm accepting your statement, but I'm also accepting what Mr. Belnap says, that there were 45,000 mailings, plus notice in the newspaper by some determination of the Court or by the parties, given the settlement agreement.

Isn't that what you're telling me?

MR. BELNAP: That's what I'm telling you.

THE COURT: I could certainly order Mr. Belnap to supply an affidavit to support that, as part of our post-trial concerns, but in terms of dealing with it this [19] morning -- I guess you could argue that you ought to tell them what Mr. Humpherys -- what Mr. Belnap has told me is the way in which notice was given, but is it really worth -- is it really worth it at this point?

MR. CHRISTENSEN: Well, we submit it. We have a jury waiting.

Can that affidavit be part of the record, Your Honor?

THE COURT: Certainly. You can file whatever you want.

MR. CHRISTENSEN: Thank you.

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EXCERPTS OF TRANSCRIPT OF PLAINTIFFS' CLOSING STATEMENTS: ROGER P. CHRISTENSEN, ESQ., JULY 31, 1996

[R. 10324, commencing at p. 21]

* * *

THE COURT: Who of the plaintiffs' counsel will be arguing first?

MR. CHRISTENSEN: I am, your honor.

THE COURT: Mr. Christensen, we'll be taking one break before our noon recess, so let us know when it's convenient for you.

[22] MR. CHRISTENSEN: Okay.

Ladies and gentlemen of the jury, I'm sure this is the part you have looked forward to the most, not so much because you want to hear from us again, but because it's the end.

We do appreciate your patience in this exceptionally long trial and express our appreciation on behalf of our clients and ourselves for your service.

This case, as you no doubt know by now, is about abuse of power. It's about abuse of people. It's about how and whether we in this community will tolerate the kind of misconduct that the defendant in this case has demonstrated against people whose money they took for years, promising them, if they were ever in need, that they would be treated with all the duties that the law imposes on someone who takes someone's money in exchange for the promise to protect them.

I show you a photograph from the night of the accident which occurred so many years ago. When you first look at this photograph, you see Todd Ospital's car, Ospital car. That

case has been tried. What I would invite you to look at in this photograph is the picture of a very distraught individual standing there just before dark. That's Mr. Campbell.

The reason people take part of their money [23] every month or every six months and buy insurance is because anyone can make a mistake like Mr. Campbell made. Or even if someone doesn't make a mistake and someone else thinks they did, they can find themselves accused and in a lawsuit. And that's why insurance is purchased. And that's why it's so much a part of our lives.

This has been a very long, hard fight for the Campbells to try to deal with the things that were done to them. It's the Campbells' one chance to try to make a difference, not only in how they're treated but in how others were treated.

It's interesting to me how life casts us in roles that we don't expect. I'm sure none of you, a month, months ago expected to be playing the roles that you're playing, to be sitting as the people with the ultimate decision in what perhaps is the most important bad-faith case in the country currently.

I think we're fortunate to live in a country where ordinary people like the Campbells can go to ordinary people like you to seek justice and actually fight the kind of power and wealth that we're talking about here. That's not unusual in this country.

Now, let me talk to you a few minutes about the purpose of insurance. Years ago when there was a [24] tragedy, when somebody's log cabin burned down, the whole community pitched in and helped rebuild the cabin. And that was the way that people dealt with tragedies and unexpected events.

Later someone had the idea of let's get a group together and let's all put in some money every month or every so often and if each of you in the group will give me your money and we'll form a pool, a fund, so that when somebody has a

tragedy -- and we don't know who it will be -- needs money, it will be there.

However, since one person was going to hold the money there had to be a special relationship of trust in this concept. The person that was receiving and holding the money would soon be far more wealthy than anyone else, and there was a real opportunity for abuse in this concept, and so special laws developed.

Insurance is not like any other business, for someone's free to make as much profit as they can and to deal any way they want with people. It's a public trust, and the law imposes special duties, and you had those read to you a few minutes ago by the court. There is the duty to fairly evaluate, to thoroughly investigate. There's the duty of good faith and fair dealing.

In a case like the Campbells' where they had been sued and State Farm had the obligation to protect [25] their interest, there's the fiduciary duty to zealously protect the interest of the insured. Says as zealously as the insured. In this case State Farm, would protect its own interests. And you have now seen for two months just how zealously State Farm protects its own interests. Well, they had to do at least that much for the Campbells.

An insurance company is not free, like other businesses, simply to act in its own financial interest. And if you look at what is being marketed here, peace of mind, security, if you have trouble, we'll be there. Because of this an insurance company is not free to treat a claim as they would someone on a used car lot.

Insurance companies invite trust. If you look at their slogans -- one of the documents presented last Friday -- "like a good neighbor."

Another, says "Fast, Fair, and Friendly." Another says "You're in Good Hands." These are all indicative of what

the insurance carriers are inviting people who pay for their product to believe and expect and what the law imposes they have to deliver.

Because of the large amounts of money that insurance companies deal with and the large number of claims, there is a real temptation to begin acting in a company's self-interest. And that's no secret. If [26] you're processing 14 million claims a year, there is a real temptation to reap millions and millions of dollars of extra profit by taking an unfair advantage of some of those claims.

One place where the insurance companies and the insureds are in direct conflict is in an excess-exposure case. A few weeks ago that term probably didn't mean much to you and now you're probably tired of hearing it. But in a case like the Campbells' where the limits were 25-50, and that's what it was going to take to settle, it's tempting for the insurance company to say, well, if I have to pay 50 to settle, and if that's the limit on the policy, why not roll the dice? And if I win, I save 50,000. If I lose it's the insured's problem.

It's from a purely self-interest financial situation. It's a good gamble by the insurance company because they're not gambling with their money. They're gambling with the policyholder's money in this kind of a case.

Because of this clear conflict, which is completely inconsistent with this concept of peace of mind and security and we'll take care of you if you have a problem, the law of bad faith developed and with that the law imposed the fiduciary duty.

However, let's assume that you had an insurance [27] company that had discovered playing this game with excess cases, rolling the dice, was profitable and they still wanted to do it, well, since it's illegal, they would have to hide what they're doing.

As it turns out that's exactly what State Farm concluded. You have seen a lot of battle in this case over the Excess Liability Handbook. And the reason why is it tells a great deal about State Farm.

You heard repeatedly the representation that that handbook was strictly fire company. Here's a part of the handbook. You can see who the author of this particular part is. It's Russ Hume, senior counsel for State Farm Auto Insurance Company -- right out of the Excess Liabilities Handbook.

And it's part of what the State Farm attorney wrote. They analyzed 222 excess claims with a total exposure of $32 million and then go on to brag about -- They say we're very proud how, by various devices they were able to pay a little less than $2 million.

They won some of the cases. They rolled the dice and won at times. Other times they didn't and were able to settle for less after the verdicts. Some they appealed, and some they just plain wore down the plaintiffs and they gave up.

You know what's missing from this analysis? [28] It's also missing from this case, as you observed. And that's the concern over what happened to those 222 people. What did they go through in order for State Farm to reap those profits?

Now, this book analysis shows the motivation. Other parts of the Excess Liability Handbook explain how to play this profitable game minimizing the risk that you'll get caught.

And by the way, State Farm has claimed repeatedly in this trial and in this case that they don't keep track of excess cases. Baloney. If it was profitable in 1972, it's profitable now. And if they kept track of it then, they keep track of it now.

The handbook explains how to pad the file with self-serving documents. That term "self-serving" is used in

several places. One has an actual heading you have seen to make it look like the decision not to settle was legitimate, that they didn't know they were gambling.

The handbook also explains that a good way to get caught for bad faith is to disregard the recommendation of the trial attorney, the Wendell Bennett of the case, and not settle. And I will show you that briefly.

You can see, number two, disregarding the recommendations of our trial attorney. To deal with that [29] tell the trial attorney don't put an evaluation in the file. One of the clear duties the attorney has, they say don't do it. And sure enough there's not one in the Campbell file.

In one place in the handbook, it says: The percentage valuation of the dollar or the dollar valuation may be very detrimental to the file. Now, how would an attorney acting in good faith honestly explain what the risks are and what the financial risk is in the case? How is that detrimental to a file? Only detrimental if you're trying to hide something.

These instructions were carried out at the auto companies' '86 claims conference, the one conference we have the proceedings on where every claims management person of significance virtually in the whole company was -- went for training and they were told that documents in claims files, to avoid bad faith cases, should be written to the ladies and gentlemen of the jury.

This was also taught in a speech given by State Farm's associate general counsel for all of the State Farm companies in 1979, not too long before the Campbell accident. As part of that speech he said: It cannot be over stressed, however, that the proper manner of avoiding damaging materials from reaching plaintiff's counsel is not by attempting to logjam the discovery [30] process -- although you heard that State Farm certainly does that -- but rather by making certain such materials are not existent, ab initio. If the files and procedures

are to be subject to judicial scrutiny there must be absolutely no hint of disregard for insuring the public's interest. Sanitize your fills, right from the top of the company.

In spite of State Farm's denials, it's apparent this philosophy continues to exist. And the witnesses have testified that even though certain manuals may have been obsoleted that, orally, these practices which are so profitable, are carried on.

With respect to the Excess Liability Handbook -- and I will move on quickly -- the claim that has repeatedly has been made: It has nothing to do with the auto company; it was written during the time frame that the fire company began its claims department. The head of it is a man whose name is on the handbook -- came from the auto company where he spent his career. And there has now been evidence presented that portions came right out of the auto manual. My guess is if manuals had been destroyed we would find back in the same time frame an auto manual that looked a whole lot like this.

It's claimed that the Excess Handbook was obsoleted in '79. If you look at the memo that purports [31] to do that, that's buried on about the 8th page. They came out with another memo in 1986 purporting to obsolete it. The Campbell accident happened in '81.

Samantha Bird testified that Bill Brown, the one that was over the Campbell file, had the Excess Liability Handbook sitting on his credenza and asked her to read it. And that was later in the '80's when Samantha Bird saw it.

Let's turn to the Campbell case. I'm not going to subject you to the deposition summaries again. I hope by now you have them memorized.

We had an accident. The very night of the accident the highway patrol got two damning statements from eyewitness, Mr. Chipman and Mr. Gerber. And you have seen the blow

ups repeatedly. I'm not going to bring them out. They both put the fault for the accident on Mr. Campbell, had him on the wrong side of the road when the Ospital car arrived. The trooper made some errors in measurements, concluded Ospital's car was going over 80 miles an hour. That gave State Farm something to work with.

And so this case became subject to the excess-exposure claim we have been describing.

Summers, on July 18th, concluded in his first report Campbell created a hazard. On July 20th he met [32] with Parker.

And this is a significant document. This is a check dated July 20, '81 to Kent Barker, Highway Patrol, for $14. The reason that's significant is the way you get statements and materials out of a patrolman's file is you give him a modest witness fee. It's done every day. And he gives you what's in his file and answers your questions.

On July 20th Mr. Summers and State Farm had the Gerber and Chipman statements given the night of the accident. Summers investigated enough to know that Campbell was seriously at risk. He so reported. He recommended making the limits available for settlement. His boss, Brown, told him to change the report.

Remember a few months before in the Carlson case, that bazaar case where the boy went insane, three people had concluded the Carlsons were covered and there was a legal opinion they were covered. And Brown still -- and the committee that also looked at the Campbell case just a few months later said we're going to file a declaratory action and deny the coverage anyway.

Well, in that instance Brown couldn't make that stick because the Carlsons had a lawyer who wrote a letter demanding settlement, threatened for bad faith. His file contained reports from three people disagreeing [33] with

the decision. It was not one that was sanitized that would meet the Excess Liability Handbook standards and the case was settled, although they made the Carlsons give up benefits under the policy to get it.

After Summers rewrites the report, as he is instructed to by Mr. Brown, he gets -- we begin the self-serving part. Noxon writes him a memo and says how great his report is and said: I completely agree with your analysis of liability in this case and feel that this is definitely a case of no liability and we should prepare to defend the case. That's September 10th, with the Chipman and Gerber statement and other things already in the file.

Mr. Summers said to Mr. Brown when he was told to change the report: What do I tell the Campbells? Brown said: Go reassure them. And he says he did.

The first material misrepresentation to the Campbells, Ray Summers, an employee of State Farm, his actions are State Farm's actions, is going and lying to the Campbells about their risk. And Mr. Summers has admitted that in this case.

Now, we had a claim committee report that concludes, and they check the final box on the report, there is not going to be -- there is no reason to honor any claim by Mr. Slusher, and the file, even though this [34] is done in September, doesn't have the Gerber and Chipman statements in it. Summers said he was told to remove that sort of thing.

Now, State Farm obviously knows who to go to when they want a fair job done by an attorney and who to go to when they want something else. And Wendell Bennett had a long history of working with Ray Summers and of doing what State Farm wanted.

Mr. Noxon writes on September 10th to Mr. Bennett. Mr. Bennett hasn't even seen the file: "You and I agree this is definitely a case of no negligence on the part of insured Curtis Campbell." Another self-serving statement.

Same day Mr. Noxon writes to Mr. Campbell, September 10, 1981: We definitely feel at this time there is no negligence on your part.

Mr. Noxon's direct misrepresentation to Mr. Campbell.

September 25th, Mr. Bennett, who admitted by that time he had the Gerber and Chipman statements, writes to Noxon at State Farm and says: Prior to receiving the file materials you and I discussed the matter and in reviewing it with you had pretty basically decided this was a case for defense, and based upon the information at hand we concluded Mr. Campbell had no [35] liability in this matter.

These letters make no sense unless you read the Excess Liability Handbook, and then they fit.

I went into this exercise using this poster. The things you want in a file if you're playing this game and the things you don't. And you will remember that. I won't take the time to review all of those.

Mr. Slusher's depo was taken. It's the only one the Campbells were present at. He indicated that he blamed Campbells. This was their first experience with a lawsuit. Bennett told them: It's no big deal. I can handle it. They leave on their mission. They're basically out of the loop until a few days before in '83.

He tells the Campbells it's no big deal. He writes a note privately to his file that says: Slusher is a dangerous witness. If he's believed Campbell is not only -- and I'm paraphrasing -- liable to Slusher, but would be liable to the Ospital death claim as well. Never tells Campbells that.

State Farm gets copies of both the depo and the depo summaries. Campbells don't. They're totally dependent on Bennett to know what's going on in the case. And you have seen the instruction that Wendell Bennett, under the law, was State Farm's agent in dealing [36] with the Campbells. You may remember that from a few minutes ago. Doesn't mean

he was a State Farm agent out selling insurance. It's a legal term. It merely means that his acts, his omissions, his knowledge, are deemed under the law to be State Farm's acts and omissions and knowledge. So when I talk about Mr. Bennett, I'm talking about State Farm.

Bennett doesn't write many letters to the Campbells. The few he writes he them tells them how the evidence is showing they have no fault and it's all Ospital's fault.

Mr. Humpherys wrote April 27, 1983, to Mr. Bennett, pointed out the unwise and crazy risk that State Farm was taking by refusing to even consider settlement. They were putting Campbell at risk. Said: I want to have a meeting with Mr. Slusher's attorney after a deposition in a few days. I invite you to join with us. If you won't, we'll probably settle without you.

Now, Mr. Bennett was obligated to send that letter on to the Campbells because they wanted the Campbells to have any -- they wanted to be able to document later that the Campbells had knowledge of settlement, to strengthen the file. But what does Mr. Bennett's letter say? Does he send Mr. Humpherys' [37] letter on to the Campbells? Does it say Mr. Humpherys is right, you are at risk and we ought to consider settling? It says Mrs. Humpherys is trying to spook you. Do you remember that letter?

The letters also along with the phone calls fostered Campbells' desperate need emotionally to believe he wasn't responsible for killing Todd Ospital or for ruining at least a part of Mr. Slusher's life.

Can you imagine having this experience with anyone? But for Mr. Campbell -- he's probably just been over and looked in this car. You have heard evidence that he had his own heartache. He was a good man. I don't think it's hard to understand where he was coming from.

You heard a lot of testimony that's common with clients. That's why lawyers and insurance companies have to be objective and tell them: You may be right. There are disputes in the evidence. You may be right, but you're at risk.

They meet with Mr. Bennett just before trial. He tells them there is essentially no risk. There is zero risk to Ospital and almost zero to Mr. Slusher. The Campbells testified the meeting with Bennett only lasted 15 to 30 minutes.

During the trial there were more chances to [38] settle that were brushed off. When the verdicts came back -- and we're going to talk about this in a little more detail -- the Campbells who were shocked say: What do we do?

And State Farm, through Mr. Bennett, says: Sell your home.

In spite of the word game, State Farm now wants to play with the letters that Mr. and Mrs. Campbells' attorneys Hogan and Jensen -- finally got attorneys after the verdict -- wrote demanding protection. There is no question that they were demanding take care of this immediately, protecting from all of the bad things that come with a judgement.

There were demands for the supersedeas bond being posted. They wouldn't do it. Wouldn't do it. Never did do it.

Eventually there was some understanding that since State Farm was an insurance company, would be good for the 25 or 50,000, they wouldn't need a bond. There never was an agreement on most of the judgement that Campbell was responsible for until ultimately there was an agreement signed in December of 1984.

There were some oral understandings that they wouldn't execute while they were still talking, but that's a far cry from commitment, and never happened.

[39] Let me quickly move to a couple other things. It's a challenge to try to cover a two-month trial in a short period of time, but I'm sure you're glad we have been given time limits.

Mr. Bennett, writing to Ray Stevenson of State Farm in December '83. Bennett now who is duty bound under the ethics of attorneys -- and their duties are even higher than the insurance companies' -- is to zealously represent the interests of the insured, not to allow any outside influence interfere with that loyalty. He has now joined State Farm in doing research to come up with a justification for not posting a bond for the full amount of the judgement.

He says in his letter he spoke with Glenn Hanni the afternoon of the 16th concerning the supersedeas bond and the like:

> "And I believe that he and I are pretty basically in agreement as to what has to be done relative to a supersedeas bond and we both feel that unless Mr. Campbell is able to work out some kind of arrangement with the claimants to limit his personal liability, that we will have to have Mr. Campbell participate in the posting of a supersedeas bond for the whole amount of the judgement or [40] both be exposed to execution pending appeal."

And he says there is an alternative. The alternative, he goes on to say, would be for State Farm to put up the full bond, but he says there's a catch.

> "However, in order to do that State Farm would have to guarantee the payment in full of the amount of the judgement in the event we do not obtain a reversal on appeal."

That's why they wouldn't put up the supersedeas bond. They didn't want to pay the full amount of the judgement if it was sustained on appeal.

And so they encouraged Mr. Campbell to cut a deal with Slushers and Ospital -- the very deal they now criticize -- so they wouldn't have to put up a bond.

In a letter dated December 19th, '83, from Bennett to Brent Hoggan, Campbells' attorney, he encouraged him to make such a deal, and then he said:

> "But if such an arrangement can't be worked out then Mr. Campbell is going to have to put up his property in order to post a bond pending appeal."

He then goes on to say:

> "I do not know what Mr. Campbell's Personal worth is. However, I'm generally aware he owns some property in Cache County. [41] However I do not know the value of that property and his other assets."

So the message to Campbell was we'll cover 50 and you're on your own for the rest.

Campbell sat in the office of Hoggan and Jensen and actually made a list of everything he owns in the world. And it wasn't enough. And State Farm claims in this case that there was no severe emotional distress, that Campbells are fabricating that.

I want to talk to you about the special verdict and some of the jury instructions.

I want to go first to question five, which is -- has to do with the fraud claim. And that is Instruction Number 29, if I numbered right. I want to point out some factors to you.

First of all fraud lists nine elements, although they overlap to some degree. It's fairly straight forward. The burden of proof -- and you have recognized already that plaintiffs have different claims. The burden of proof on some is preponderance of the evidence, on some it's clear and convincing evidence. I'm going to take just a second and talk about that.

Clear and convincing -- well, let me talk about preponderance first. That's Instruction 17.

[42] Preponderance is the lowest standard for burden of proof in the evidence. It simply means if the evidence -- if you could -- if evidence could be weighed this way, was 49 and 51, or it was a 50.1 and 49.9, then you've got a preponderance of the evidence.

Clear and convincing is an intermediate standard. The high standard in the law is proof beyond a reasonable doubt. And that's the standard used in criminal cases. That's the standard that has to be met to take away somebody's freedom, send them to jail.

Clear and convincing is the intermediate standard between preponderance and proof beyond a reasonable doubt. That applies to some of the questions. In others the preponderance standard applies, and it has been outlined for you on the verdict form which standard applies, as you answer your question.

You will notice that in a fraud instruction, which is 29, there is no requirement of finding a pattern and practice of misconduct by State Farm. In fact if you look through any of the plaintiffs' causes of action you won't find that even though it has been discussed a lot in this case.

That evidence was presented for a couple of reasons. First of all to help you decide intent. If there is evidence that somebody has been unfair or [43] dishonest with other people, it helps you decide the likelihood of whether they were unfair or dishonest at this time.

Another thing is, as it relates to punitive damages, that will have some bearing on the amount of those. But it's not anything that plaintiffs have to prove on any of their causes of action. You will notice the fraud instruction requires a representation was made or a nondisclosure. It's important. It only takes one, and I'm going to show you a bunch of them concerning a presently existing material fact, it was made, it was false, or the nondisclosure was misleading.

Remember State Farm and Bennett had a fiduciary duty. They are under a duty not to withhold information. See, nondisclosures are misleading. The misrepresentation or nondisclosure doesn't have to be made intentionally. We submit that they were. But simply to meet this standard of the law, if they're made with reckless disregard or reckless indifference, whether they're true or not, that's enough. For want of a better term, I kind of call that the just-don't-give-a-damn standard, don't care if it's true or not. You've got a reason to say it, you say it.

And the misrepresentation or nondisclosure is for the purpose of causing someone to act or not to act. [44] They in fact do. They rely reasonably on it and they're harmed; they have some economic harm. And those are the elements of fraud.

I would think the law could boil those elements down to significantly less than nine, but that's the way it's expressed.

Let me quickly cover with you some examples of State Farm's misrepresentations and misleading nondisclosures on the Campbells. First of all Mr. Ray Summers.

We already discussed this. He told the Campbells they were not at risk when he knew they were; the nondisclosure and withholding the adverse evidence. So you don't have to have both. Either of those would do.

Bob Noxon represented to the Campbells: Definitely feel no negligence on your part. Noxon, as you will recall, agreed with Summers earlier when he said we've got a problem here. And he was part of the changing of the file. And obviously Noxon had a duty to disclose the adverse evidence that he was aware of to Campbells and didn't do it.

The list gets a little longer with State Farm's agent, Wendell Bennett. Several times he represented that the evidence showed that Ospital's speed was the [45] sole cause of the accident. I think you will remember that he represented

the evidence showed that Ospital would have hit Slusher even if Campbell had stayed home that day. Do you remember that?

He had no risk of any verdict against him by Ospital. Even State Farm's own expert Mr. Nebeker said he would have never said that. He essentially had no risk of a verdict against him by Slusher. Remember he said you have a five-percent chance of getting any fault, and if you do it will only be five to seven percent -- where you've got multiple, multiple witnesses against Campbell, and Campbell's own testimony is adverse to him where he said he didn't get back in his lane until one second before there would have been a collision.

He told him he had plenty of limits. He was grossly under insured with $25,000; Mr. Slusher's medicals alone amount to that. He told him several times he didn't need a lawyer. Mr. Campbell asked him, did State Farm send him a letter or two saying you're free to get a lawyer if you want, but you will have to pay for it.

He asked Bennett: Do I need a lawyer? He said: I see no need. Both Mr. and Mrs. Campbell confirmed that. It will just be more expense.

He told them: Even though State Farm is paying [46] me, I'm your lawyer and I will protect your best interest. He told them he never lost a case in Cache Valley and he wouldn't lose this one. He said to Mrs. Campbell -- or Mr. And Mrs. Campbell: We have got a good Cache Valley couple and a good Cache Valley jury.

We got the court records and discovered Mr. Bennett, contrary to his representation he tried a hundred cases, had tried a fraction of that and lost most of them.

The very time he should have been telling Mr. Campbell to settle, he's saying Mr. Humpherys is just trying to spook you. He misrepresented the significance of Slusher's

testimony. We discussed that. During the trial he kept assuring Campbell, who was hearing a lot of the adverse evidence for the first time, it was no problem, we could take care of it.

And I'm sure there with other misrepresentations. Those are examples. Again you don't need to find all of those. You only need one.

Let's look at the nondisclosure. He should have told Campbell that it was in his best interest to settle, that he had nothing to gain from a trial. If it was settled State Farm would pay. It wouldn't be his money.

And one I left off of this that's important was [47] Bennett failed to do a written evaluation in the file, which would have, if done honestly would have alerted Campbell to the truth. He was not told he was seriously at risk for excess verdicts. He was told the opposite. He was told he was not seriously under insured. He was not told that he had a right to demand settlement and have Bennett make that demand for him. That's his lawyer.

He was not told about the law of bad faith and the benefits he would have from making such a demand.

Bennett didn't tell him where his true loyalty was. He didn't tell him, since he wasn't loyal to him, he better get his own lawyer. He didn't explain the law of joint and several liability to him where one percent fault can get you an excess verdict.

He wasn't told about the expert Dahle's adverse dealings and findings that we have from the tape recorded meeting.

He wasn't told about the problems with Parker's testimony, his problems with the measurements, and in his depo he acknowledged he had rewritten the police report because of Campbell's interference with Ospital.

He was not told that the adverse experts were a serious threat. Instead he was assured that they were no problem. He was not given a fair, honest evaluation of [48] the case.

And he was not told of money for all of these risks that are inherent in going to a trial I discussed at length with Mr. Nebeker. All material nondisclosures by someone who was obligated to disclose.

I want to give you some examples. One of the elements is reliance. I don't think there's any question the Campbells relied on what Mr. Bennett and State Farm had told them. They never asked that the case be settled.

Remember Mr. Campbell's deposition testimony you have seen two or three times where he told Bennett what's my risk? Asked him what's my risk? And Bennett told him essentially he didn't have any, he had plenty of insurance.

He said: Well, I bought insurance so that I wouldn't lose my property if I had a problem, but if there is no risk of that then it's up to State Farm. Do what you want.

He didn't go get an independent lawyer to advise him. Both the Campbells testified had they known they were at risk, they would have done that.

The third item is a very strong indication of the reliance. Do you remember the Campbells testified that they each brought property into their marriage? [49] After the lawsuit was filed, Mrs. Campbell deeded her home jointly to Mr. Campbell. Had they known they were at risk, they certainly wouldn't have done that.

Curtis' brother Don asked him if he needed an attorney; he would be happy to help him get one. And Curtis said, no, he felt good about Mr. Bennett.

There is direct testimony by the Campbells of their trust and reliance. That is certainly borne out by at least one of the letters Mr. Campbell wrote from the mission field to Bennett telling him he appreciated him and how good he felt about what he was doing.

At trial Campbell had some concerns about the adverse evidence. Bennett said no problem, and of course the Campbells' complete shock at the verdicts.

In one of your jury instructions you will find that the Campbells had a right to rely on people who were obligated under the law who owed the duties of liability to them that State Farm and Bennett owed.

We talk about the element of intent or reckless disregard of truth. Basically that issue is, was this an honest mistake in judgments or part of a plan. The fingerprints of the plan are all over this. Not only that, we have direct testimony from the very adjustor assigned to the file that that's exactly what happened.

Now, Ray Summers admittedly is not a bastian of [50] honesty, but both he and State Farm admitted he falsified documents in 150 files. His own secretary said she reported he was doing that sort of thing in the early 70's to management and was told that's good business leave him alone.

Is it really so hard to believe that somebody that falsified documents in 150 files may have falsified the report when he was so instructed in the Campbell file? Do you remember the outrage Mr. Bennett claimed, disclosed he claimed, or the disgust he claimed when he learned that Summers had falsified medical bills in the Gittens file, so he went to Cache Valley and got the file? And what do we find? After Bennett and State Farm knew that they tried to enforce the release. Even when Mrs. Gittens said, I was misled by Mr. Summers, State Farm still tried to enforce the release. And we found that in several files. It fits.

Not only that, Ray Summers' testimony fits the facts. Otherwise how do you explain these letters when they know of the adverse evidence saying there's no evidence against Mr. Campbell?

The failure for there to be a written evaluation in the file which is standard, it's not there. The manipulation of Dahle who privately said: I know you haven't asked for my opinion, but I think a good [51] explanation is Campbell pulled out

and he didn't look for a few seconds and when he looked up and saw Ospital it was too late. Instead of State Farm accepting that honestly, they manipulated that.

You have seen the financial motivation of why they would do this sort of thing, the concealment of evidence. If this was all above board and honest, why all the concealment of evidence that you have seen in this case?

The facts themselves fit. You've got a case that's a no-brainer. Somebody passing in a canyon, with all -- with multiple eye-witnesses against them, joint and several liability, low limits, bad injuries, a death. It's a no-brainer.

Remember Mr. Lithgow from Farmers Insurance took one look at this case and threw his $30,000 limits on the table.

But perhaps the best evidence of the dishonesty, the intent, were the witnesses themselves. You saw Mr. Brown. You saw Mr. Noxon. You saw them say things that didn't ring true.

Let's move to another area. The police representations or nondisclosures need to lead to harm. That almost speaks for itself in this case. Bennett admitted under oath that if Campbell asked him to demand [52] settlement he would have done it.

The Campbells both testified they didn't really want the case tried, that it was up to Bennett and State Farm. They did it because that's what they were advised. If there had been true disclosures and truthful statements to Campbells, they certainly would have wanted the case settled. They both said that. And you know from what you've heard in this case and common sense if Bennett had put a letter in the file demanding that State Farm settle, this case would have settled.

Even Yancey admitted in his whole career he had never seen an excess case not settle where the attorney on it said settle.

Mr. Stevenson admitted he had never seen that.

Plus, now that you understand how all of this works, if Bennett had done that and put an honest evaluation in the file it was no longer a case that State Farm could afford to play the excess exposure gamble game in. If Summers, Noxon, and Brown hadn't been part of it, the case would have been settled and gone in 1981.

So there are many grounds to meet the causation elements.

It's true that State Farm had the ultimate legal right on the settlement decision, but they wouldn't have bucked those odds. You saw what they did in the [53] Carlson case when they got a demand from counsel to settle. Also if they had been truthfully told to get their own lawyer or that it would be wise for them to have one, it wouldn't have had the same result.

Finally, some of the misrepresentation were made or nondisclosures were made jointly on the Campbells. Some were made to him, but certainly knowing they would be passed on to her. And you received an instruction on that.

I will suggest to you that's a long instruction, but that will help you with a number of the other questions, that clearly this special verdict, the evidence overwhelmingly supports yes responses.

Now, let me explain this one to you. The law of fraud requires some out-of-pocket loss. In this case the Campbells spent about $911 hiring legal counsel to try to help them protect their property after the excess verdicts, to protect their interests. The bills were sent to Mr. Campbell. But instructions number 37 and 36 shed light on that. Says if you find the services provided after excess verdicts by the attorneys were performed at least in part on behalf of Inez Campbell then she shares in that pecuniary loss.

Also, remember that the Campbells were like most couples. They commingled their money. The money [54] that went to pay those bills, certainly affected her.

Instruction 37 says if you find that the services provided by attorneys Hoggan and Jensen were performed at least in part to preserve the Campbells' property -- well, that's exactly what they were for, was to preserve the home they were living in. Then under Utah law both husband and wife are responsible for expenses for that sort of thing.

I don't want to spend a lot of time on that. It's somewhat of a -- but it is a requirement under the law of fraud. And that's what that is, is the legal fees spent to protect their property.

Now, let me move to the next area.

Would this be a good time for a break?

THE COURT: I think it would.

Ladies and gentlemen, even now I must admonish you until you have heard all the arguments of both sides that you're not to form opinions about this case, not to discuss the case among yourselves, nor allow anyone to communicate with you about the case, nor should you communicate with anybody about the case, not to begin your deliberations at this time.

We'll be in recess for about ten minutes. Stay close by after you have had your break so we can resume as quickly as possible. We have a lot of ground to cover [55] today. We're in recess.

(Recess taken.)

THE COURT: We're back on the record. The jury has returned to the courtroom.

Mr. Christensen, you may proceed.

MR. CHRISTENSEN: Yes. I would like to next talk about Special Interrogatory Number 3. That deals with intentional infliction of emotional distress. Jury instruction number 38 sets forth the elements of this. This is a preponderance-of-the-evidence standard.

The elements are outrageous conduct by State Farm towards the Campbells.

Two, State Farm intended to cause emotional distress or acted with reckless disregard of the probability of causing emotional distress.

Three, the Campbells suffered severe or extreme emotional distress which was caused by State Farm's outrageous conduct.

Let me begin first with the discussion of the first element, outrageous conduct.

First of all, State Farm's conduct -- and again that includes the actions of Bennett, Summers, Noxon Brown, Stevenson; those that were involved are all considered State Farm's conduct. It has to be viewed in light of the relationship of trust and the duties of it.

[56] State Farm, through its advertising and its dealings with the Campbells, invited them to trust them. This is a company that spends $40 million a year convincing people that they will be treated like a good neighbor if those people will simply give them their business.

We have discussed a long list of misrepresentations and nondisclosure. Certainly those are the epitome of outrageous conduct, particularly coming from someone in a position of trust. I would submit to you that violation of trust and deception is the worst kind of dishonesty. It certainly is dishonest if someone comes and puts a gun in your face and says give me your wallet, but there is certainly no deception involved.

Here we've got people who have been invited to trust and do trust. These people were trusting people themselves who were invited to trust and did, and that trust was violated; the epitome of outrageous conduct by someone who not only promised trust but someone who is bound by the law to deliver it.

The perpetration of fraud on Campbells and then just leaving them hanging, sell your home, sell your property, whatever the comment was, leaving the Campbells to deal with that; the concealment of what took place; [57] having their own attorney, who has complete duties of loyalty, working against them on the supersedeas bond, the very thing they needed to do to protect their property. Their own attorney was working against them, Mr. Bennett.

State Farm's refusal to put up the bonds. They didn't want to put it up because it would cost them money down the road. Yet, they're supposed to be zealously protecting the Campbells' interest.

The deliberate manipulation of the Campbells. As I mentioned, Mr. Campbell was in a particularly vulnerable emotional state. He had experienced the death of his first wife through a murder committed by an intruder in the home. At least certainly he knew something of what the Ospitals were going through and didn't want to believe, as a good man, he caused that, someone else to experience that.

Mr. Campbell had had a stroke a few years before, I guess 11 years before, and he testified he didn't deal with stress well after that stroke.

The age and the lack of experience of the Campbells, all those things were used to manipulate them. They were forced to go through a needless trial in Logan, to relive the horrors of that accident. I don't think that we, sitting here in this courtroom, can [58] appreciate quite what that means. That one photo I showed you gives you a little glimpse. Mrs. Ospital testified she has never been able to look at the photos.

I give you some idea of what that must have been like to be forced to go through that and confront the families. You buy insurance for peace of mind. There was no reason for that. Encouraging and actually forcing the Campbells to cut

a deal with Ospitals and Mr. Slusher knowing full well that, once they did, what they would put them through.

You have heard the evidence of how State Farm treats people that sue them for bad faith. That was the only avenue left to them to save their assets. And State Farm encouraged them to do it, knowing full well that once they did they would fight them every step of the way. And they certainly have. They would use their superior economic resources to try to wear them down. You heard evidence of that.

This is a couple that wanted to spend what years they had left in what some people call the golden years, not in litigation.

MR. BELNAP: Your Honor, I'm going to object to that. That's contrary to the partial summary judgement and Instruction Number 58.

MR. CHRISTENSEN: Part of the outrageous [59] conduct, your honor.

MR. BELNAP: It has been precluded from this case as a matter of alleged damages for prosecuting this action.

THE COURT: Let's move on and I'll refer the jury to the instruction on that.

MR. CHRISTENSEN: Okay. Thirteen, forcing the Campbells to deal with people they probably would never have been comfortable to deal with.

Let me move to 15, hiring an attorney who would give the appearance of representing the Campbells while secretly doing State Farm's bidding. If that's not outrageous conduct, I don't know what would be.

Mr. Stevenson testified there was no inquiry or expression of concern by State Farm after the excess verdict. He never even talked to the Campbells. He said he left that up to Wendell Bennett. You have seen what Wendell Bennett did.

I would submit to you that if this doesn't meet the standard of outrageous conduct, I'm not sure what would. I'm sure there were other things, but this is certainly nothing that should be tolerated.

I think the jury instruction dealing with outrageous conduct says it should be intolerable, it should offend the generally accepted standards of decency [60] and morality. Clearly, clearly does so. Exceeds all bounds of what is usually tolerated in a civilized society. I would hope that in this community and in any other, deliberately or recklessly taking advantage of the very people you agree to protect, I would certainly hope that offends what is usually tolerated in this community. I can't imagine what we would have if that was tolerable conduct.

Now, the next element of this cause of action is the Campbells had to have experienced severe emotional distress. A little heartburn doesn't meet this standard.

I'm going to show you Mrs. Campbell's trial testimony from this trial. You will remember that Mr. Bennett had flown a private plane to the Logan Airport to give his closing arguments, and the Campbells, after the excess verdict, were driving him back to the Logan Airport. Mrs. Campbell said:

> "They weren't talking very much. It was pretty quiet. We were in total shock. And I remember Curtis saying to him, 'Well, what do we do now?'
>
> "And he said, 'Go home. Well, I guess you better go home and put a for-sale sign on your farm.'
>
> [61] "And I commented to Curtis afterwards -- I remember him saying 'farm,' because I said, 'he thinks we've got a farm instead of just a home.'"

And then Mrs. Campbell described her own thoughts. She said, "I just thought, well, it sounds like we have lost everything."

She was asked about the effect, in the ensuing months, that she saw in her husband. She said:

> "He was devastated. I think he was more devastated about the fact that it was jeopardizing my property and my security than he was about anything because he -- as we went into our marriage he felt like he was giving me more security, like he was helping my life. And now it's going to be gone and he felt devastated about that."

And I think that's true of any responsible man in a marriage. She then went on to say:

> "We spent many, many nights never sleeping because we were discussing, just discussing the case, discussing what we had, discussing what we would do. We spent many, many sleepless nights.
>
> "Was the fear of losing all that you [62] had real? I mean was it something that was real to you and Curtis?
>
> And she said, "Wouldn't it to be to anybody?"
>
> She was then asked, "Well, I don't know. Counsel for State Farm suggested it wasn't a significant fear to you. And I want to have you describe, if you would, was it real.
>
> And she said, "Oh, I should say. We worked very hard for what we had."

And she goes on to say they're hoping they're getting to the point in their lives where they won't have to work forever to pay the rent, and then talked about the worry that their children would have to take care of them instead of them being able to help the children.

She testified it was still bothersome, those feelings they had from those first few months. An agreement -- there were negotiations, but an agreement was not actually signed for about a year and three or four months after the excess verdicts.

She testified, though, how she had other agreements. She had been through a divorce and her husband -- she has a divorce decree, legal document. She was to get the car, the home, and child support. The car got repossessed because her husband borrowed money on it unknown to her. She didn't get [63] child support such as she forced through court. And there was a foreclosure started on their home. And she described how Mr. Campbell had worked overtime to pay off that debt so that they could keep the home.

So she testified that commitments to her and to them didn't provide the complete freedom from worry.

Mr. Hoggan, who was one of the attorneys that Mr. Campbell met with a few days after the verdict, said that Mr. Campbell was in a very fragile emotional state. And Mr. Hoggan said he literally felt concern that Mr. Campbell would have a heart attack or stroke right there in his office. He said he was that concerned about his condition.

Mr. Campbell's brother Don described the serious deterioration in Mr. Campbell's health that year after those verdicts, mentally, physically, and emotionally.

He said he noticed it in Inez too, although not as pronounced.

In his deposition, which was read to you, Mr. Campbell described: I don't think anyone could dig up enough money to put me through the emotional stress and strain this has brought on me. I wouldn't sell for any amount of money what this stress caused me. Nobody could hire me to do it.

[64] He went on to talk about the embarrassment in the community besides the worry, the financial worries. The embarrassment of having the papers publish the large verdicts against him, that he had been found responsible for someone's death, someone else's injury.

There is a jury instruction that tells you that under the law if someone is more susceptible to stress and worry that

that's the -- the term is basically that the wrongdoer takes the persons as they find them. Mr. Campbell and Mrs. Campbell were not in a position to start over financially in life. They were more susceptible to worry. Mr. Campbell's stroke made him more susceptible and made it harder for him to deal with stress.

And State Farm has suggested there was really no reason for the Campbells to be upset. It's amazing to me that we're taking time in this courtroom to have to discuss that. Someone thinks they're about to lose everything and you've got the defendant suggesting that's not severe emotional distress.

But we presented evidence that it was real. That Ospitals testified how they struggled with the decision whether they should execute on the Campbells. They felt strongly that their son was not at fault, as he had been accused. They felt that was the one thing they [65] could still do for their son, was to defend him. They felt some anger, as anyone would. They wanted some closure. They wanted that done and out of their lives, and they knew that entering into an agreement with the Campbells would mean it would go on a number of years, no guarantee they would be paid. They wrestled with that decision over the months that it was being discussed.

Mr. Slusher said it was very difficult for him. He talked to his parents. He said he needed money for medical bills, a place to live, for school, because he couldn't work. And so he decided to go ahead and execute and get what he could.

He didn't want more court battles. He said the Logan trial was very hard on him. There was no assurance he would get any money if he made this deal. Finally he, after much more discussion with his parents, said he decided he would go ahead and not take the Campbells' property.

So it took many months to bring parties together who had a lot of reasons to dislike each other.

The threats to the Campbells' property was real and certainly their emotional distress was real. And there is no question and some of State Farm's witnesses admitted they know excess verdicts are very stressful on people. So meeting the requirement of the jury [66] instruction that a reasonable person would have known that severe emotional distress would result from defendant's conduct, that's obvious. When you're in the insurance business and you don't protect somebody, that's exactly what you're telling them they should buy insurance for and you don't do it.

The lack of peace of mind to the severe emotional distress is there.

You can consider as part of your consideration of the severity of the stress the mental suffering -- I'm looking at jury instruction 42 -- anguish, mental anguish, mental or nervous shock, unpleasant reactions such as fright, horror, grief, or shame. I submit to you that Campbell had been through all of that.

I'm now looking at Special Interrogatory 3, and I would suggest to you that the evidence is clear here. I don't know what's the next level beyond outrageous conduct, but I submit that's what we have got here. This goes beyond outrageous.

Mr. Humpherys is going to take some time now and treat some of the other issues. I appreciate your attentiveness. We'll have a brief opportunity for rebuttal at the end of the day because those are the rules that govern these kinds of lawsuits, that the plaintiff in closing statement gives a first statement [67] and then a brief opportunity for rebuttal. And so I'll get to speak with you for a short time again and thank you for your attentiveness.

* * * *

EXCERPTS OF TRANSCRIPT OF PLAINTIFFS' CLOSING STATEMENTS: L. RICH HUMPHERYS, ESQ., JULY 31, 1996

[R. 10324, commencing at p. 67]

* * *

MR. HUMPHERYS: It's good to talk to you and maybe after this day we can talk without the barrier of the law between us. But I've got a lot of things to talk about and I feel strongly about it and I have for many, many years, and so if the emotion of this case is apparent, I apologize.

This case is my clients', Curtis and Inez Campbell. Everything that we have tried to do has been for their benefit, to protect them, to help them. If I have done anything to offend you, I apologize for it's their case, not mine.

Roger talked to you about only some of the questions on the verdicts form. I would like to talk to you about some of the others.

One of the important things that we need to emphasize and that you need to be sensitive to are issues of fault for the 1981 automobile accident has been decided, all of the evidence was submitted, it has been ruled upon, it is not your decision. But what is particularly interesting in this case, State Farm desires to continue to pose the questions about why this verdict was the way it was back in 1983. And they do it for a [68] specific purpose. They are trying to raise doubt and questions in your mind. Yet, you have been instructed this is not your decision. You haven't heard all of the evidence that the Cache County jury heard. You didn't hear all of the evidence that the jury in October heard. They were deciding the accident issues. But they continue to raise these questions and have their experts give the opinions that somehow that verdict was improper. That verdict was decided back in 1983

by a conservative Cache County jury against a Cache County couple. You heard there were motions after that that were denied by the Cache County judge. You heard that the Supreme Court sustained the verdict, and you heard that the jury, last October, made findings specifically upholding that. And yet State Farm continues to present evidence in this case that somehow that verdict was not proper.

I suggest the questions they are raising are not proper for we were -- we are not here to decide that case and you have not heard all of the evidence. I wish you could hear it all.

Now, one of the questions you are asked to decide, number one, the court indicates it has previously been determined that State Farm breached its duty of good faith and fair dealings toward the Campbells. You find [69] from a preponderance of the evidence that such breaches were a proximate cause of the damages to Curtis or Inez.

The "proximate cause" is a term that sometimes people who are not educated in the law think it's "approximate cause," or like the word "approximately." It is not that word. It is a special legal word and in essence what it means is but for what happened would the consequences have occurred? Did the wrongful conduct naturally flow into the damages? Did they cause the damages? It's a legal cause. And you can answer that, if State Farm had not engaged in the wrongful conduct i.e., if they had settled the case when they had the opportunity before it went to trial, would there have been damages to the Campbells? And the answer is no, there wouldn't have been damages to the Campbells. Therefore, the reverse is also true, that there was a proximate cause of damages due to the breach of their good-faith duties to the Campbells.

Now, one of the things you have not fully heard regarding the trial last October, we read to you the judgement where the judge in the last paragraph made his rulings of law based

on the verdict, but on page two of the verdict, I believe it's Exhibit 47, the jury was asked to answer the following questions: Was there a substantial likelihood that there would be an excess [70] verdict against Mr. Campbell as a result of the Slusher claim? And they answered yes.

Was there a substantial likelihood that there would be a judgment against the Campbells as a result of the Ospitals' claim? They answered that yes.

They also answered that it was unreasonable not to settle either claim, and that's what the court used in making the determination there was a breach of the good-faith duties and a breach of the fiduciary duties.

If the jury last October found as a matter of law, which we must accept, that there is a substantial likelihood, why are we still having Mr. Yancey, Mr. Nebeker come in and testify that there was just no chance that we would lose? Meaning State Farm. That has baffled me and made me wonder about their credibility as a person as well as an expert. Nevertheless they have.

Now the next question, number two: It has previously been determined that State Farm breached its fiduciary duties toward the Campbells. Do you find from a preponderance of the evidence that such breach was a proximate cause of damage?

For all of the reasons that have been mentioned the answer has to be yes. Had they not breached this duty, the case would have been settled, there would have been no December 1984 agreement requiring Campbells to [71] litigate that bad-faith claim, there would have been no trial last fall and no trial today.

Now, one of the things that we're here for and that you have been addressing -- I guess I better -- Roger didn't talk about the proximate cause of the intentional infliction directly, but obviously everything that he was talking about

resulted in a proximate cause of the mental distress to the Campbells from the outrageous conduct.

Now, the last page of the verdict form is where I would like to spend the remainder of my time. Question number seven is asking about the general compensatory damages, not specials. The specials are $911.25. They're agreed upon. They are stipulated to. This question asks only for the general damages. And the Court will deal with the $911.25 separate from you so that is not a concern of yours. There is no question being asked for you to decide the amount of the specials. They are stipulated to.

Now, I'm going to do this in a little bit of a reverse order. I want to talk about the issues pertaining to the punitive damages and then I'll go to the compensatory damages, and I will explain the reason why. One of the elements or considerations of punitive damages relates to the compensatory damages and how they interrelate and the relationship of one to the other.

[72] In instruction numbers 59 and 60 and those that follow they relate to punitive damages. Now, there are two basic purposes for which the law has imposed punitive damages or allows punitive damages to be awarded. In our society we recognize that there are many things that are done for which there is no criminal law that applies, and no ability to punish someone criminally for, yet they are as reprehensible and harmful as many of the criminal laws which are passed. For that reason the law for centuries has allowed the award of punitive damages under certain circumstances, and there are two purposes for the punitive damages. The first is to punish the wrongful conduct, punish the wrongdoer. The second, which is equally important, is to correct the wrongful conduct, to act as a deterrent to deter the wrongdoer from doing this kind of thing and to deter others not to engage in the same wrongful conducts.

Punitive damages are not the same as compensatory and they must be separated. Compensatories -- the purpose of a compensatory award is to compensate for a loss for an injury or damage. Punitive damage is totally separate. And the reason I raise that distinction is because the law that applies is different.

As motions after this trial, which most [73] assuredly will be filed, and appeals, if any, they will be addressing punitive damages differently than compensatory damages. And if you find yourself saying, well, we don't need to award as much in compensatory because we have awarded a lot in punitives, or vice versa, you may end up doing the very things you don't want to do. And so it is important that you clearly differentiate these two in your minds when you're deciding them and decide them separately. There is some interrelation and I will talk about that in a moment.

Now, before we get into the standard regarding punitive damages, I would like to talk about the regulators. I find the testimony and the evidence that was submitted by the insurance departments and the regulators most interesting, for many reasons. Mr. Ovard, let's say for example he came in and said I find pattern of practice that State Farm cheats people, and then I ask him: Well, do you have any knowledge -- well, let's look at exactly what he did say.

At his trial testimony I asked him: Are you aware of anyone, a claimant or insurer, involving State Farm that was paid less than fair value? Claimant being -- and I asked, third party or first party, are you aware of anyone who's been paid less than fair value?

> "Answer: That would presume that I [74] had access to the claim process, that I had physically seen a vehicle, that I had been able to look at doctors' reports and so forth. No way.

"And you have no access to those?

"No way of evaluating that."

How could a regulator come in here and testify that there is no pattern of practice of paying less than fair value? And he admits he doesn't have access to the information, he doesn't even look at it.

Another curious part about this testimony, it was when Mr. Ovard did read an article about this case last October -- or the article I think that came out in November. He issued his own complaint, and in his form letter -- you recall seeing it. I won't put it up on the screen. And he admitted that this is a form letter he sends in all his complaints, or most of them: Your insurance representative enclosed this complaint concerning your company. We request the problem described in this report form be subject to an independent review in your office to ascertain the validity of this complaint.

So Mr. Ovard asked the very company that was engaging in the wrongful conduct to perform its own independent review to analyze whether it's been engaging [75] in wrongful conducts. We know the result of that. You have seen it. There was a self-serving letter that had little information in it and nothing else was done.

Now, what I found particularly interesting is in the complaint portion where he is asking State Farm to investigate, the allegation was, quote: "Allegations of altered claim file."

There isn't a single mention about what was done to the Campbells, any concern about how they handled the file with the Campbells. There wasn't any review or inquiry into whether or not they have breached their duties of good faith and fair dealing, and so forth.

I guess I'm having a hard time understanding how someone that comes from the industry and often goes back to the industry before they -- or after they close out their

regulating job, can come in and represent themselves as being more knowledgable about what goes on in the company than anyone else in the state, not having read anything, and doing this kind of an investigation.

Do you remember Samantha Bird addressing this issue? Samantha Bird says from time to time they would receive a complaint filed with the insurance department. She said she would then prepare an answer to the complaint. And then what happened to it? It got circulated up to her superintendent, one step beyond to [76] the region. And she said often times all of the bad admissions about what they had done in the file were removed before it was submitted. And then what happens to it after the Ovards of the insurance department look at it and say -- and read the self-serving letter without the negative comments and say, oh, I guess there's no merit. Just like they did in this case.

Do you know what makes their testimony likewise very, very suspect? He admitted there were only two regulators in Utah, with over 200 insurance companies that pertain to the property, auto and casualty.

You will find in Exhibit -- I don't remember the Exhibit number, but it's the ratio that is printed by the Utah Insurance Department. Out of all of the companies listed they found only 75 for an entire year. 75 valid complaints for over 600 insurance companies. Is that believable?

And then with State Farm 21 out of those 75. He said probably more than half didn't even relate to claims. So we can assume out of that 75 valid complaints more than half did not even relate to claims. He said probably ten or less State Farm. I find that also very, very curious.

As I recall, during jury selection we had nearly that number that raised their hands that had had [77] concerns and problems with State Farm in their dealings with them.

Another point that makes it very suspect, you read where 70 percent of the funding for the N.A.I.C., the national organization of these insurance commissioners, is from the insurance companies themselves. They come from the insurance company to a large degree and they go back. Mr. Yancey was a perfect example. He worked his entire life managing claims --

MR. BELNAP: Your Honor -- excuse me, Mr. Humpherys. I would like to move to strike counsel's comment about people who allegedly raised their hands and had comments about State Farm. That did not take place, and there was a questionnaire that was dealt with on both sides by counsel and dealt with by the Court, Your Honor. And that's an improper argument.

MR. HUMPHERYS: Your Honor, I think there were many of the comments in raising hands right here as a group, but I'll move on. It's not important.

MR. BELNAP: Your Honor, there was not. That was handled before we got into voir dire on the questionnaire aspect, and furthermore it's not evidence, Your Honor.

THE COURT: All right. I will strike the comments that were made about raising hands.

[78] MR. HUMPHERYS: All right. Let's move on.

As I was mentioning, Mr. Yancey came from the insurance industry. He served as a commissioner for a period of time, and what did he say his current position was or was about to be? Chairman of the board of another insurance company.

Do you think a commissioner is ever going to burn bridges when he knows he's going to be going back to the very industry he's regulating?

The only regulators of insurance companies are juries like you. You are the ones that hear, investigate and listen to the evidence and impartially make decisions regarding the actions of insurance companies.

As you recall none of the regulators or commissioners had performed any market studies on State Farm. Mrs. Bird testified that in all of the years she worked there she never and a regulator come and do any audits.

All right. Let's go now to the standard. Now that I've set the stage of why we have punitive damages, why were you important? Because you are the regulators. We do not have objective and effective regulators of the insurance industry.

Now, the standard is provided in instruction Number 59. It provides two sides, either one of which [79] would justify punitive damages. First a finding of willful and malicious. Now, you need to appreciate that "willful and malicious" does not mean that State Farm hates the Campbells. It doesn't mean that they actually intended to do -- to expressly harm to the Campbells. That is not the meaning.

"Willful" means what they were doing they were doing consciously. They understood what they were doing. They knew what they were doing. And "maliciously" means that they did it in a way that they knew harm would result, that the mental distress that the potential financial exposure would follow.

When you've got a situation where you've got insureds that are as trusting as the Campbells were, absolutely trusting -- the evidence overwhelming that they did nothing but trust what Mr. Bennett told them and what State Farm told them. You've got an insurance company that engages in lawsuits all the time, thousands of them. And all of them, including their executive officers admit that excess verdicts cause trauma to an insured. And you have got willful and malicious because they knew what the result would be and they willfully engaged in the conduct which resulted.

But the second part of the standard is willful indifference -- excuse me -- reckless indifference toward [80] or disregard of the Campbells' rights. Here there is no question. Reckless

simply means that you proceed in an unthoughtful way, unthoughtful or unconcerning way. Indifference means that you are not motivated or unconcerned about the consequences. You're doing it for your own motives and not as a result of consequences to someone else who may be hurt or injured along the way.

This is particularly evident that there was reckless indifference when you look at the post-trial evidence, the comment about selling your home; Wendell Bennett researching the supersedeas bond in order to get out of paying the full amount; the encouragement to enter into the '84 contract.

If you find fraud or if you find intentional infliction of emotional distress, automatically you have met the standard for punitive damages. Because contained within those elements are the elements necessary to meet the standard of punitive damages.

Now, regarding reckless. You will recall Mr. Fye; he was a long time ago. But he talked about how all claims personnel knew that excess verdicts will cause trauma, excess verdicts will hurt people financially and emotionally, especially an older couple like the Campbells. Stevenson admitted it.

Instead of any expression to protect the [81] Campbells following the verdict, there was encouragement to enter into that agreement which you know existed to this action today. No concern was expressed.

All of these elements together with everything else that we have heard clearly point to reckless indifference toward the safety and well-being of the Campbells.

Now, the court in that instruction has indicated to you there are seven factors which you should consider. We need to go through those because they are important. In any judicial review in any appeal of whatever award you make these seven factors will be looked at very, very heavily. And so I want to go through them with you.

They are not required. You don't have to make some finding in regards to all seven of them before you can award punitive damages. But they are to assist you in the measure of damage. The greater these considerations weigh against State Farm the greater the punitive damages should be.

Now, I mentioned at the beginning that there are two purposes. One is punishment and one is deterrence. Each of those has to do with one or the other or both. Now let's go through them and talk about them.

[82] First, relative wealth of the defendant. Why is it important that the courts instruct you to consider the relative wealth of the defendant? Is it a question that is worth asking?

You have seen these two exhibits regarding the surplus income of State Farm as well as the assets. The larger the wealth, the larger the amount is needed to punish. For example, a hundred-dollar fine to someone who is barely scraping, barely able to meet his or her bills, can be a very severe punishment. Likewise but on the other hand a hundred-dollar fine to a large company is a meaningless, absolutely meaningless, gesture. Now, look at the other side to correct the problem, to deter the wrongful conduct.

In a large corporation such as State Farm, what is it that creates a desire to change if the current course results in a fairly profitable activity? It is only money. That is what motivates State Farm, and that is what has motivated them throughout this case and other cases.

A small company worth a hundred thousand dollars would learn a very significant lesson by a $10,000 punitive damage award, but when you have $55 billion in assets, what does it take to get their attention? Do you remember Manuel Mandoza's testimony, [83] even though it was by deposition? He said to his knowledge they had never changed their claims practices despite lawsuits against them where they found them in bad faith and where there were punitive awards given.

DeLong, Ina DeLong, testified that she did her study -- excuse me -- that State Farm had done a study. They disclosed to their employees that they could take advantage of people because only a few would ever contest what the adjustor was offering to them, and out of that only a very few would ever file a lawsuit. And then in doing the math she said that they calculated only one in 10,000 people who they had cheated would ever take the matter to trial.

The vast disparity of resources is used to take advantage of people, or can be. And that's the reason item number one is a critical element to consider. It's meaningless to State Farm to spend a few million dollars in defending a case like that, hiring experts to out last a party, experts to out last a party because it discourages anyone else from doing that. It's an incredible disincentive when they do what they can do.

Mr. Fye, do you remember him? He said that two lawyers, two different lawyers, were assigned to him to follow him no matter where he went, where he testified. You heard at least about five law firms in this case that [84] have been involved. Many lawyers from each of the firms being involved, at least some of the firms.

You heard about experts that could cost literally hundreds of thousands of dollars to be able to review and analyze and go through this kind of information in order to give opinions. You heard about trips all over the country, depositions, hearings, appeals, thousands, tens of thousands of documents.

The disparity in the financial sides of the two parties is an incredibly effective tool to avoid being made accountable for wrongful conduct, and that's why the law says that you should consider that.

This factor weighs very, very heavily against State Farm. The second item: The nature of the defendant's misconduct. Now, that's where most of this case has been focused. On

this it relates to both punishment and correction. How wrong, how unacceptable has been the activity? Was it a widespread fraud or was it only an inadvertent error? Was it part of a scheme or only just an isolated incident? Was there a conscious awareness of what was going on? Was State Farm encouraging, endorsing, approving what was going on? How widespread is it?

There's something we need to make sure that you appreciate and realize. There has been some evidence [85] about pattern and practice. State Farm has asked a number of witnesses: Do you see a pattern and practice? They say no. Pattern and practice is not a requirement for you to award punitive damages nor to decide any of the other issues in this case. Pattern and practice is simply an element to consider how widespread is this wrongful conduct. Even one case is sufficient to award punitive damages.

Now, on the nature of the conduct, let me go back with you briefly to explore with you what has been going on. You will recall that the wrongful conduct that we are talking about here is not just what they did to Campbells. But it begins from the very corporate level, top of the corporate level where they begin to impose the profit motive into the claims department where it has no bearing and is totally unrelated and in fact is improper to do so.

You will recall some of the presidents' messages from the very top. Let me just give you one thing that you haven't seen, I don't believe, during the course of the evidence, but it's in part of the evidence in Exhibit 52. This comes out of their manual, the PP&R manual. I believe it was their 1987 manual.

Now, this is how they're explaining how they want action taken in the corporation. They first talk [86] about the president's annual plan. We talked about that. We have seen some of those. These are also called the President's Forecast. These are then

interpolated and converted to regional plans which are then in turn -- the division and department make their plans and then the unit makes their plan, and the individual employee makes a plan. What is going on in the PP&R program starts right at the top and goes down. This is not an isolated example or incident when we talk average claim plans and profit motives being built into it. The incentives are right from the top.

Now, what I found particularly interesting is in the last couple of years State Farm issues a memorandum and says we shouldn't have profit motives any more in our PP&R's. And then when you examine they will still have some in it. But remember what Mr. Prater said? He said we just had a deposition about two or three months ago of one of the claims personnel in management in Washington or Oregon, I don't remember which. And he said when that memo came out they just got together and said, okay, we won't put it in writing anymore. We'll do it orally. And that has continued to be done.

One of the things that we need to keep in mind is the philosophy of what is going on here from the [87] president on down. One of the things that you didn't see in one of these President's Forecasts, which I think is very indicative of the corporate philosophy and how this emanates from the top on down, where I have underlined -- and this is just part of a section regarding property and casualty, which is the kind of insurance we have here. Part of insurance we have here. The kinds of insurance we have here. The president, he says the most frequently advanced solutions -- he's talking about the problems they're having with the insurance company and so forth. And he says the most frequently advanced solutions are take all comers, reinsurance facility or beefed up unfair trade practices. And I'm focusing on unfair trade practices because that came out during a time when the states began to pass the unfair claims practices acts.

Some states called it unfair trade practices and Utah called them Unfair Claims Practices Act. The same thing.

Now look what he says: Either of these significantly disrupts a company's competitive market posture.

Why would being fair disrupt their competitive marketing posture? Why would the passage of an act which was designed to force insurance companies to be fair and to act in good faith disrupt the competitive marketing posture? There's only one reason, and that's because [88] they don't engage in that kind of practice without being forced to.

I think that was probably one of the most telling documents which evidenced the philosophy from the top on down. They resist and fight these kinds of things.

Now, we have attempted -- the difficulty of trying to show a nationwide practice and how widespread is immense. And I imagine if we took years we could call a whole lot more witnesses, and I'm sure you wouldn't have appreciated that, but what we did do this. We tried to pick some employees that have worked for State Farm, knew the inside. We tried to show from the records of the company both on a local level and on a corporate level. We tried to show by experts that have been involved nationwide the practices and how they are similar all over the place, all for the purpose of trying to demonstrate that this is not an isolated, but a widespread problem. And of course they attack us by saying, well, these witnesses are biased. They have got an ax to grind. The documents really don't mean what they say they mean, and the experts are hired guns; you can't trust them.

But there's one thing we have that has survived, and those are the documents. The documents [89] verified what the witnesses said. When we first heard Mr. Davis from Colorado, I have to admit the guy was a real mouth; he really talked a lot. And a lot of things he said I thought, my goodness, I just can't believe some of that -- until we looked at the documents

and they supported what he said. And then all of a sudden we had State Farm saying, well, that's isolated. That's just something that happened over there. If it did happen it wasn't company wide.

So what he did, we pulled out the Utah documents and they had the same competitions, the same claim savings, incentives and records. And at first the Utah people began to deny that. Do you remember some of the witnesses like Mrs. Smith, Rosa Smith, I think when we had that one memorandum up there, that said a competition involving certain units? And she said, well, competition really isn't a contest.

We heard things like that over and over again. The documents verify what the witnesses were saying.

Now, you may have asked yourself why on earth was this appearance allowance so talked about? Why did we spend so much time about the appearance allowance? Well, besides the fact that it demonstrates improper claims handling, I want to show you, to explain to you why it became very important.

[90] If State Farm would cheat on a fixed damage which is admittedly owing, they will cheat on general damages which are unfixed, which are difficult to determine.

If they will cheat on total losses, vehicles, meaning -- well, let me go to an example. Remember the superintendent of these Colorado employees testified he had one goal in his PP&R, to pay 66 percent of his total losses for less than book value. Total loss is where a car has been damaged beyond repair. And book value of course is what has been established all over as the value of that particular car. He had a goal of paying 66 percent less than book value. And that wasn't good enough. The next year his goal was to pay 73 percent of those total losses for less than book value. That shows the profit motive being interjected into the claims department. It is a fixed price, and they purposely tried to pay less than that.

That's why appearance allowance, collision loss totals, salvage, junk yard parts, and so forth become very important, because they show and verify that this profit motive circulates all the way through to the very bottom of this company.

Now, Mr. Summers, as Mrs. Christensen mentioned, is a dishonest man, and we're the first to [91] admit that. He was part of a scheme which defrauded our clients. We have no love for this man, and I don't want anyone to think because we called him we somehow identified with him and we want to parade him somehow as our champion. He was part of the reason we are here today. He is a dishonest man. He is a defrauder, the techniques he used to describe that were cheating people.

Now, once you've got someone like that that surfaces, what do you do as a corporation? You have got to do something. So what do you do? You immediately, when he starts making and starting to cause trouble about being forced to do dishonest things when he doesn't like it -- and he signed an affidavit in October of '81 with his wife that describes what he said he did in this very case -- and this affidavit had nothing to do with us. We didn't even know about it until recently. He signed that affidavit with his wife in October of 1982 and he explains it in how he was forced to change that report, and he did not like it because he knew the Campbells. He didn't know them personally, but he knew their circumstances and he didn't think it was right, and he was beginning to have second thoughts about continuing to engage in this kind of practice.

And so they attack him and immediately say, look, we're going to fire you -- or we're going to warn [92] you for making phoney papers, and then we can fire you so we can say -- if you ever accuse us of anything, we can say we fired you, we distanced ourselves from you, Mr. Summers.

Think for a minute. Their documents and actions belie that very point. As Mr. Christensen pointed out in the Gitten case, there was clear knowledge and admission that he had defrauded the Gittens, and yet State Farm continued to defend and to force the release which was obtained on fraud.

The other case, the Bear case, an identical one where they moved for summary judgement, there were many more. Summers' PP&R. Remember that? It said he is a great negotiator. He recently settled a case that had special damages of $7,000 for less than 8. When we want someone to negotiate a tough case we want Ray.

Do you remember the newspaper articles published by Bill Brown -- Mr. Brown the one that comes in and tries to belittle Mr. Summers -- just a year or two or three, whenever it was, before this incident? He writes this newspaper article praising Mr. Summers, talking about he never had a better claims handler than Mr. Summers.

Now, think about what happened when Mr. Brown came and he took these 12 or so, 10 or so files that [93] Mr. Summers said he had been dishonest in and was asked to be dishonest. He read every one of them and he came and he said there is nothing wrong in any of those files and State Farm treated everyone fairly. There wasn't even a hint that Summers had done anything wrong in those files.

Don't you find that inconsistent with everything else?

Do you remember Mr. Summers, he was asked to teach in conferences in the region and in Utah? One of the things he was asked to talk about was how to reduce penalties and how to reduce first-party contacts: And I was teaching about phoney conduct and how to do them.

Now, right on its face Summers could be lying. But what did Felix Jensen say, an employee of 33 years: Yes, I remember that meeting. I was there. I heard it. Yes, Mr. Summers did teach that.

And I said: How did that -- how did the others respond to that?

And he said: Most of the others or at least many of the other adjustors said they were doing the same thing.

Now, Mr. Summers may be dishonest, but there are certain things he's not dishonest on and that is about his dishonesty.

[94] (Laughter.)

And State Farm has never gone back to any of those people who he defrauded and acted dishonestly to and never made it right. State Farm has never given any evidence that they tried to rectify anything that Mr. Summers did. Why? Because they knew what he was doing and they approved and endorsed it. That's why.

Now, we have talked about, a lot about self-serving documents, and it has probably taken a far more important role and maybe at first you wondered why. But I hope now we can see why they are so important and why it is so reprehensible to have self-serving documents. First of all they build a claim file to fit what they want it to be, so that when juries like you review it, it doesn't have all the bad stuff in it so you can't point to anything in the file. Okay. That has been talked about.

But let's think about why, in other circumstances, it is so inappropriate. Do you remember their experts Mr. Yancey and Mr. Nebeker? They came and testified, and what did they say: I reviewed the file and I didn't find anything inappropriate. So another reason why they have self-serving letters in the file is so they can hire reputable experts to come in and say I read the file and I don't find anything wrong with it.

[95] Another reason why it is so reprehensible is because when the insurance department does request the file they don't go out and interview people. They look at the file, and

when they look at it they say it looks fine and we see nothing wrong with it.

Another reason why building a file and writing self-serving letters and so forth are so inappropriate is because when Bill Brown is called upon to review some files Ray Summers handled, and he has no personal knowledge about it, he can come to you and say I read the file and I don't find anything that was done wrong, and therefore Summers lied. Another reason why they build their files.

If State Farm is willing to build files, issue self-serving letters, don't you think they do self-serving reports. These B.I. reports are the most self-serving, unsubstantiated bits of documents and data that we have ever had. Absolutely no way to verify the underlying data. It's based on the, quote, win definition. And they didn't keep track of any other data. I'm going to go into that more in a minute.

I think clearly, item number two, the nature of defendant's misconduct is severe, it's widespread, it starts from the top and it permeates the bottom. And I must say again, and I said it in opening statement, there [96] are many good people who work for State Farm. There are honest people that work for State Farm. I think Mrs. Bird was about as honest as she could be. She tried to play it as straight as she could. But what happened to her? She said: I, essentially, could not take it anymore because I could not exist. I wasn't a team player when I was asked to alter the claim report. And she said, no, I won't. She continued to be accused of not being a team player, not cooperating, not getting along. And yet her subordinates, claims reps, loved her, thought she was wonderful.

So what did she do? She went to the upper management, the division manager John Martin, I believe, and she said: look. Here's what's happening. I'm not getting authority. I'm not getting what I need to pay claims. I've got these problems.

So Mr. Martin looks at the situation, comes down and talks to a few people, goes to her and says: I'm sorry. I find no evidence to support what you're saying.

What did Felix Jensen say? He was having such a hard time getting authority to pay his claims, fair value for his claims, that he finally wrote a letter to -- I think the president is what he said, but then he also said he communicated with John Mark -- yeah, I think it [97] was John Mark -- and that he explained the problems he was having getting authority. What was the comment? If you can't stand the fire, get out of the kitchen.

We're not talking about an isolated philosophy, but we're not talking about everyone at State Farm engaging in this. Many of them think that what they're doing is appropriate and they're being, in essence, subject to the propaganda that anyone that makes a claim is somehow a bad person, and therefore it's okay if you fight and resist.

Ina DeLong talked about that. Remember she said you're taught that you've got to not pay all of the claims so you can protect the money for the policyholders. And that's -- and yet why do we have the money if it's not to pay the policyholders for the claimants who have been injured?

Well, it's an interesting dilemma and an interesting event and phenomenon that occurs inside the corporation.

Number 3, the facts and circumstances surrounding the misconduct. Mr. Christensen has elaborated those in great detail. I don't think I need to go into that any more. The specific facts and circumstances surrounding the misconduct toward Campbells is reprehensible. This item goes on the measure of the [98] wrongful conduct, how serious is it, how egregious it is. And this is to assist you in determining the amount.

Fourth, the effects of the misconduct on the Campbells and others. This goes to punishment. No question that we

have heard about how the Campbells have been embroiled in litigation for 15 years, and who knows for how long after this. But what I would like to focus on is the word "others," "and others." The law recognizes that not all cases like this can ever get to a trial and not all people who have been injured pursue it. And so they allow you to look at the effect that the misconduct has had on others, Slusher, Ospitals, others who have not fought back, who have chosen not to fight, others who never knew they had been cheated, others that simply give up under pressure and can't stand the delay, others who reach the conclusion it's impossible to fight against a corporate giant.

How many others are there out there that have been cheated, that have been treated like the Campbells? Another area of the others, other insurance companies, and you may say, well, we don't care about other insurance companies. But we need to for this reason. You heard Mr. Fye and Mr. Prater talk about how, when a company engages in these kinds of unfair claims [99] practices, that results in paying less in claims. In order to fairly compete, another company has to engage in the same practice or else they can't compete. The premiums are higher. So what happens is it's a rippling effect. When a company engages in wrongful practices it forces its competitors to do the same thing.

I thought it was particularly interesting on the five excess verdicts that we did get information on -- whether they were accurate as being total -- of the total excess verdicts in Utah, we have no idea. But one thing we know, and that is every one of those -- remember when we wrote them on the chart? Every one of the verdicts which they tout -- State Farm touts as being fair full value, every one of them was compromised because State Farm wouldn't pay it. Not one time have they paid fair full value on any claim, excess claim, that we know about except one. The Campbells. Five or six years later they finally paid the full payments.

Maybe that's why they're bragging so much, is because that's the only one they ever paid and they keep asking over and over and over again, keep addressing that question. But it needs to be taken in context. Remember at first they were unwilling to pay any amount over their limits hoping that it would be resolved in some other way. Three years later they then again try to chisel off [100] the judgments, just like they did the other five excess verdicts. But the Campbells, Ospitals, and Mr. Slusher were unwilling to accept that chiseling. And then when they realized that an agreement had been reached where a bad faith claim was going to be filed, there was no way they were going to be able to chisel it down anymore, they said we better pay this because we're going to stand in front of a jury and we better have something to say, and so they paid it. That was the motivation. It was you.

The probability of future recurrence of misconduct, this goes to the correction of the problem. This is probably one of the most important ones because State Farm has been punished in other cases, and as you heard it has not resulted in a change of conduct.

To understand whether they will continue to engage in the conduct we must look at certain things, like their attitude. Remember Mr. Short, Mr. Kingman, almost all of the State Farm witnesses used the word proud: Yes, I'm proud of the way we treated the Campbells. We're proud of the way the Campbells were treated. We're proud of the way everyone is treated, I think is the way Mr. Short put it.

This shows a deep-seated problem with the misconduct. If they are proud of the way they handled [101] the Campbells, what about how they treat those who try to be honest? The Felix Jensens, the Samantha Birds, how do they treat them? How do they excel? How do they do within the company?

A lot of the people are honest and State Farm knows who's not, and when they need a job done they know who to go to or who not to go to.

Not one person has ever been disciplined because of what happened to the Campbells. That has been a universal song they have sung. All of them have universally said: Nothing was wrong with what was done in the Campbell file. No one did anything wrong. Everything was appropriate. Everything was consistent with company policy.

That shows an attitude. That does not show a penitence or a desire to change or a desire to be fair.

Mr. Moskalski was particularly interesting to me. Mr. Moskalski, in April of 1986 when his deposition was taken he sang the State Farm jingle: Nothing was ever done wrong. He has never been aware of any mishandling. He's not aware of any case where State Farm ever treated a claimant unfairly. He's had no criticisms of Wendell Bennett. He had no knowledge of anyone at State Farm destroying documents. No one has ever been disciplined. Mr. Noxon, Mr. Brown, Mr. Summers, none of [102] them were ever reprimanded or did anything inappropriate.

What did he do at trial? One of the first things he said was: We learned our lesson in the Campbell case. We're going to write letters now, what we call peace-of-mind letters.

I find that very interesting. The lesson to be learned was back in 1983. Why did it take 13 years to learn that lesson? Why was it that last October Mr. Moskalski, who is over this region requiring the State Farm lawyers to fight the Campbells in establishing that State Farm had acted in bad faith, why was it that two months before trial he is saying there is nothing wrong? But when forced and faced with the day of reckoning with the jury he stands up and says: Oh, we learned our lesson now. We're writing peace-of-mind letters.

And then we asked did you write any in these five excess cases in Utah? Well, no, but we will do it.

Isn't there something wrong there?

If a company is learning their lesson they should learn it based on principle, not because a jury is there about ready to rule on their conduct and he's pleading for mercy. That's a kind of deathbed repentance which is very insincere. If there had been a true desire to change, it would have been long before now.

[103] I suggest that there might be a little self-serving in that testimony.

One of elements regarding the probability or future recurrence of the misconduct is seen in that concealment of evidence, in their destruction of documents. Why would someone want to conceal? Why would someone resist an examination of their documents and of the evidence that doesn't forget? It's unbiased. It's written and it stays the same.

Felix Jensen -- and this was brought out specifically and read into the evidence during his testimony -- was asked, on line six: in terms of dealing with the claim files or any of the internal documents, do you ever recall him -- that's referring to Mr. Noxon now -- recall him modifying or changing documents to suit his purpose?

His answer: All the time.

Why are we having to do this modification and changing? Why was Mrs. Bird requested to change? Why was Mr. Summers requested to change? Why do we have post-its that have the controversial aspects of what's going on in the claim file? And why were they removed?

Remember at first it was just a buck slip and everyone at State Farm kind of made fun of that. That was some unique little thing to Colorado. And then all [104] of a sudden we found out from Felix Jensen and Samantha Bird and others that they did the same thing here in Utah. Do you remember

during Prater's deposition we put up one of the claim operations reviews, as I recall, and one of the criticisms of one of the new employees was tell Mr. Jones, or whatever his name was, to stop leaving the yellow post-its in the file, but to remove them.

That is not just an isolated example. You have heard how they have destroyed documents. And what I found particularly meaningful was when Samantha Bird produced that destruction-of-evidence memo. She then was attacked by State Farm. She then was claimed to have fabricated it or misstating it.

And corporate counsel called Felix Jensen and said, now, Mr. Jensen, so you have this memo? And he said yes. And he was told by the corporate office this memo does not exist; and Mr. Jensen said, yes, it does. I've got it.

Now, there is something about an attitude here that permeates an organization, and that's what we're talking about. What is it going to take to stop them from continuing to engage in this conduct?

This case has been a perfect example of why they don't want documents. If it hadn't been for the documents all we would have had would be self-serving [105] testimony by their witnesses, and they all pretty much sang the same tune: Never seen anything done improper, always paid fair value, and so forth. Never been any competitions, never been emphasis on claims savings.

And yet we saw claims savings all over in the documents. Every one of the things that we also need to appreciate is the reporting of data.

Again we're talking about the probability of future recurrence of misconduct. If State Farm is trying to lay their wares out and say; look at us. We're clean, or we were once bad but now we are clean. Why should we be destroying the critical documents? Why should we be concealing? Why are

we only doing B.I. lawsuit reports that are based on three percent of the total claims data? Why aren't we doing the same reports on first-party claims which is the majority, vast majority of the claims? Why don't they do data on how long it takes to settle claims, and all of those other things that we ran into?

If they are truly trying to convince you that they are a corporation which is trying to do their best, why don't they give us all of the data instead of their self-serving?

What I have learned, and I think probably all of us have seen it, if you put enough pressure on [106] someone, you put enough incentive on someone to put more hours in, to get wins because you offered enough, or whatever the objective is, if you emphasize it enough those reports are going to come in the way you want them, and it isn't because these reports are true. It's because of the emphasis.

Can you believe for a minute that every claims representative doesn't want to post a win and the supervisor wants that claims rep to post a win, and the divisional wants it, and corporation wants it? And all they need to do on the little form is say I offered more than the verdict. And there is no verification. There's no way anyone who looks at it -- there's no way anyone can ever determine the truth of that, but that gets converted to a win because of that high incentive. And then they tout that as being evidence of the fact of how well they treat people.

Why do they have to create every document to the ladies and gentlemen of the jury? Why can't they simply be truthful and tell it like it is? There is an attitude, there is a philosophy that they are hiding.

Relationship between the parties. Just a brief moment on that. We have -- the reason this becomes important is because if it's two big corporations fighting against each other, it's not that important, not [107] that big a deal.

If people have equal bargaining positions or equal resources, then reprehensible conduct is not quite as punishable and not quite as concerning to the law. And so the law has you evaluate the relationship. Here we have a fiduciary, a trust relationship, a reliance, a person with very meager resources versus a corporate giant. And why is this so important? Because when you violate a trust it's one of the worst forms of misconduct. It has the most devastating effect when you violate one -- when you're violated by one to whom you have given your trust.

To take advantage I think is as despicable an action as you can ever find.

All right. Now, the final item is number seven and we'll try and wrap up here in the next few minutes.

The amount of compensatory damages awarded. Why is that particularly important? The greater the compensatory award, the greater justification there is for a higher punitive damage.

Compensatory is a measure of harm. What is awarded in compensatory damage is an indication of how much harm has been done to a person. And so therefore one of the considerations is to measure what is the compensatory award versus what is the punitive damage award. There is no exact formula. It only needs to bear [108] a reasonable relationship.

Now, what I would like to talk to you about is after reviewing all of this, what is an appropriate amount for a punitive damage award? What will motivate State Farm? What will cause even the president to listen and to hear what is going on and to stop issuing -- to start issuing the President's Forecast. Change the improper procedures to create incentives not to engage in wrongful conduct, to create bonuses and salaries based on proper conducts.

Well, let me put this down for a minute. We have heard how they haven't changed their practices based upon a

number of cases that have found them in bad faith. I suggest the following.

A range. You heard a discussion about a range. I want to do a range for a specific reason. If we were to take, looking at the surplus one week's daily income, State Farm has averaged since 1977 a daily gain -- that's based on work days, not based on weekdays -- five days a week, 4,304,000 per day earned in surplus. Now, remember this is surplus. This is not income. This is after all of the claims have been paid and all of the money that has been set aside to pay the present, pending funds not yet resolved. We're talking surplus, extra over and above. If we take approximately one week of [109] their surplus income, that is $25 million -- that's not exact, and I'm not trying to be exact -- versus one month of their surplus income, which is approximately $100,000, a little bit less -- excuse me -- $100 million -- I think they make a little more than that. I will put this as one month.

Now, just looking at that for a minute, I want you to bear in mind the percentage points here. Mr. Tolley talked about statistically insignificant. If we look at one week's worth of their surplus income that is one tenth of one percent of their income. If you look at the one month's income, that is the equivalent of two fifths of a percent. Now, when I say "income," I am referring to all the surplus income. The amount of $25 billion.

Statistically insignificant according to Mr. Tolley. I suggest that it's not necessarily insignificant because I think these are the kinds of numbers it's going to take to get State Farm's attention. But what I would like to put this into perspective is that these numbers of 25 million to a hundred million, if you look at it in comparison to their assets of $55 billion, $25 million is only one 20th of a percent of their assets. Not even talking one percent. We're talking a 20th of a percent. A hundred million is [110] a 20th of a percent.

Now, those are huge numbers and I'm not going to pretend they're not. But they're not to State Farm.

Now, why the range? The lower the range, the lower on the range you go, the more you're telling State Farm it's okay to engage in this practice. The higher on the range -- and you're not limited by this range, the bottom or top. You may award more than that. But somehow the message has to be sent to State Farm that we will not tolerate that kind of activity in our society.

If we're going to correct wrongful conduct in a corporation that has demonstrated to you and me, the kind of attitude they have toward the law, toward honesty, toward payment of claims, toward their insureds, it's going to take a lot of money.

Now, I told you before that there was a relationship that the law required between compensatory and punitive damages. That is item number seven. I want to talk to you about compensatory damages now.

It is my duty to suggest to you what would be an appropriate figure for compensatory damages to compensate the Campbells for what they endured and lost and have been injured by.

The law cannot restore to the Campbells the years of peace of mind which they were hoping to purchase [111] when they purchased that policy from State Farm. What the law can do is, it can award a monetary award, and that monetary award is symbolic of what they have lost and what they have been injured and what they have suffered. It is a symbol of society, since society can't give back what has been taken from them, this is what we deem symbolically represents what you have been damaged. It is difficult. It is not easy. But it is your duty to make that. And I will give you suggestions to understand how and why.

Regarding the general compensatory damages, we need to understand what is involved in this. Mental trauma, you know that. We talked about mental distress. What we need to bear in mind as we evaluate this is some of the facts regarding the mental trauma. Stress is a killer. We have all heard that. I don't know if there could be any more of a stressful situation for an older couple than what they have gone through.

Now, you recall that Mr. Campbell already had his first wife killed. His third wife died of cancer; second wife left him, divorced him, when he had his stroke. And Inez in her sweet little way said I'm his last.

But they went through an incredible amount of suffering. You heard testimony about how Inez had to go [112] on blood pressure medication -- that is not an insignificant thing -- shortly after this verdict. The fear of losing absolutely everything you own. Can you imagine having to face that kind of a situation?

Remember Curtis had lost everything sometime before this and had struggled back and rebuilt. They had just taken the home out of foreclosure after working hard to pay off the bank. I won't go into that again. Mr. Christensen has reviewed it.

What is it worth to endure that kind of mental trauma and suffering? Now, I need to say at the beginning, on the verdict form there is a line for each of the two plaintiffs, Inez and Curtis. Again I stress the importance that the award needs to be separate, because of the application of the law and other factors. Whatever is awarded to one will be treated separately than the award to the other. So you must deem them separate in all respects and award them separate.

Loss of reputation. You remember Mr. Campbell talking about how his associates and business acquaintances seemed to shun him? Now, whether it was real or not, I don't know;

but he perceived it. And he -- you know, I don't know if any of you have lived in a small community, but when you live in a small community everybody knows everything about everybody, and people [113] talk. And they live in a very small community, Lewiston, Utah. And they had a newspaper article smearing their name all over the valley. When they went into the State Farm claims office that article was right on the bulletin board. And it was being used to sell more insurance coverage.

MR. BELNAP: Your Honor, that is not in evidence and I would move to strike that. It has not been testified to, and it's not in evidence.

MR. HUMPHERYS: My recollection is it was in the deposition testimony, but if it isn't, that's fine.

MR. BELNAP: Your Honor, it is not in evidence.

THE COURT: The jury has heard what is in evidence. I will accept the representation of counsel and strike it.

MR. HUMPHERYS: Okay. Now, they talked about how they became recluse. Now, we often think of emotional disability in certain ways. I'm sorry. We usually associate disability with physical disability. We're unable to do things. When you think about being disabled, I don't think that you can come up with a way that is more disabling than emotional disabilities.

And I'll tell you the reason why. With physical disabilities if you have your mind you are able to enjoy life, you're able to learn and grow, you're able [114] to appreciate, recreate. You have got the facilities in your mind to be successful, to be fulfilled. When you have got an emotional disability you have lost the very inherent part of life which allows you to live life, to experience it. That is a very devastating disability, one which we seldom look at, at least recognize in our society.

Loss of enjoyment in life. It's very closely related. Have you ever tried to sit down and enjoy a good meal when

your mind is in a turmoil? Have you ever tried to enjoy a movie or television program, a sunset, or some of the little pleasures of life? What is a good night's rest worth? I hope I find out soon.

We pay 50 to a hundred dollars to get a good night's rest in a motel rather than sleep in the car or not sleep at all.

They talked about how for many, many, many nights they didn't even sleep. Sleep is rejuvenating. When we wake up we're able to face the day again after the troubles. It helps resolve some of the problems we feel. Sleep is a very important part of life. It's a simple, small enjoyment.

But the mental trauma that goes on inside someone's mind destroys all enjoyment of life. It takes everything out of it.

[115] Embarrassment and humiliation. I don't think there would be anything more humiliating to an older couple who has struggled their entire lives to get where they are -- and they don't have much -- to have to sit down in a lawyer's office and write down everything that they own, realizing that they may not own it very long.

You remember their testimony about simply not going out in public. They were so embarrassed and humiliated, realizing that there had been publications about them, about the excess verdicts, about their finances and about their exposure.

Depression and loss of mental health. Both Inez and Curtis talked about how depressions came and how that affected their ability to do much. Depression affects one's mental health and it's closely associated with the emotional disabilities we talked about before, but it is very real. And if you haven't experienced depression then you have no idea what a black hole human life can be in.

Loss of trust. The Campbells were very trusting people. They were private people. And because they were trusting

people they were taken advantage of. And once you have been violated after you have given yourself and your full confidence and trust, it taints your ability to have faith in life, faith in human [116] beings, faith in the future, or anything else. When you have lost your ability to trust, you have lost an important part of your ability to live, and this came as a result of violation of State Farm's trust.

Now, these are some things. I'm not going to pretend that is an all-inclusive list. There are many others. But even if we were to take these seven and to say that $200,000 for each of those seven items is too much to ask, I don't think it is. What an incredible price to pay in the golden years of their lives when they don't have bodies which can go out and enjoy life as some younger people do, and what they are left with is their mind, essentially, and their ability to experience and enjoy life through their mind. That is taken away through emotional distress.

I don't think it's too much to ask. You may think it's worth more, but I'm going to suggest to you that you award 1.5 million in compensatory damages. And as I said that's only $200,000 for each of those items, or thereabouts. And this would include both of them. I don't think either one of them suffered less than the other.

Now, the punitive damages. There's the range that I gave you, 25 million and a hundred million. I think anything short of that will be a win for State [117] Farm, will have no meaning to them. Anything less in compensatory damages will then call into question whether or not the punitive damages may be awarded, because again I emphasize the compensatory damages are needed to sustain a large punitive damage award. Without it, it is subject to attack in motions here after or on appeal. There is a reason to have a full measure of compensatory damages awarded, and not to say, well, we're awarding enough in punitive, therefore we don't have to award as much in compensatory.

Now, I'm going to have another opportunity to speak since it is our burden of proof. The law allows what's called rebuttal and that will come at the close of Mr. Belnap's and Mr. Schultz's closing statement. That will be brief, but it will be to meet whatever needs to be addressed that has been raised by State Farm and to give some final remarks.

I appreciate your attention. I have appreciated spending the summer with you although we haven't been able to talk, and maybe we will in the future. Thank you.

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EXCERPTS OF TRANSCRIPT OF DEFENDANTS' CLOSING STATEMENTS: PAUL M. BELNAP, ESQ., JULY 31, 1996

[Vol. R. 10324, commencing at p. 119]

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THE COURT: Let the record reflect the jury has returned to the courtroom and the parties are all present and represented.

MR. Belnap, you may begin.

MR. BELNAP: Good afternoon, jury.

THE JURY: Good afternoon.

MR. BELNAP: I stand here somewhat a combination of humbled, awed, and excited all in one, and I hope that in the next while I can convey to you my feelings about this case that we have worked very hard on.

And I don't quite know where to start in doing this, but I am going to tell you that when Mr. Humpherys says what does it take to get State Farm's attention, I want to tell you it doesn't take $25 million, it doesn't take sums that just about floored me to hear. The attention is here in the courtroom. In the courtroom is Mr. Moskalski, Mr. Noxon, Mr. Fairington. They have your attention not in terms of a deathbed repentance, but as was stated at the start of this argument. This is an important case. We agree. It is extremely important to State Farm, it is important for the ramifications that I'm going to be talking to you about.

[120] And so we appreciate your attention during the trial. We appreciate the sacrifice that each of you and your families and friends have made this summer in listening to this testimony.

The reason that people pay for insurance is that they can make a mistake. The conflict in the evidence in this case is that Mr. Campbell has indicated from day one that he did

not make a mistake. He told us that; we believed him. There was other evidence to support that position, which I'm going to be talking to you about.

We understand and we agree that the Logan jury disagreed with Mr. Campbell and the other evidence which I'm going to be speaking about. But for Mr. Humpherys to say that I'm puzzled why State Farm would call witnesses like Mr. Nebeker and Mr. Yancey to come in and talk to you about the accident, when I sat through the first two weeks of this case and the first witness, Mr. Fye, for the plaintiffs talked about the accident. The second witness, Mr. Roberts, for the plaintiff talked about the accident.

Now, why was that? Is that because he was puzzled then? Or was there a reason that the plaintiff talked about this accident? There's a reason we did, and I want to talk about why we talked about this accident in [121] this part of my statement.

Just briefly, the reason we talked about this accident is we don't dispute what happened in the Logan trial. We do dispute that was as a result of reckless, wanton, willful, malicious, conduct which has been alleged by the plaintiffs in this case.

In our view nothing could be farther from the truth. Judgements were made by human beings. We talked about a large, powerful company. This is a question of power. This is a question of might over small. This company is made up of individuals that you have listened to from the stand. People like Jerry Stevenson who was the superintendent from February through the time of the trial and beyond, who looked each of you in the eye and said: I tried to make an honest judgement based upon my experience and my training.

That's what this case is about. That's why we put on evidence, trying to look at this, not from hindsight, but from what took place in Logan so we can show you that these

people tried to make judgments based upon the evidence that they had. And they were wrong, but they were not willful, malicious, or reckless.

The plaintiffs claim that the operation of an insurance business is not like any other business. And we have heard that from their experts who come in and [122] seem to know more about operating an insurance business than an insurance company itself. Whereas neither one of them are in that business but are in the business of being experts making thousands and thousands of dollars across the country each year as they work with the plaintiffs' network of lawyers that choose to handle these kinds of cases against insurance companies because there is big money. You saw on the charts insurance companies have money and it's there for a reason. You heard the evidence. You heard the fact that Andrew was a $5 billion disaster. If it would have gone a few miles to the north it could have been a $14 billion disaster to the City of Miami.

That is why when Mr. Fye sat on this witness stand and admitted that when you take out of unassigned surplus, that is the surplus that is assigned to the other companies that are required to be on the financial statement, there is $12 billion. That is a tremendous amount of money. We acknowledge that. That works out, however, if there is disasters. If there is a need to meet, which there is an ongoing need to the tune of 14 million in claims a year, it's not funny money; it's there for a reason.

The evidence in this case has been undisputed, and it's a fact, there is no dispute to it, that State [123] Farm is a mutual company. Mr. Fye explained to you what that means. A mutual company is owned by the policyholders. Because of that, when it's alleged in a case that it creates a temptation to gamble, there is a gamble being made by the owners of the company, all of the policy holders.

MR. HUMPHERYS: Your Honor, we object on the basis of the pretrial motions in limine and the court's orders. He's going into an area that was not permitted.

MR. BELNAP: Your Honor, that is not correct.

THE COURT: Well, I will allow it at this point, but be mindful of the ruling.

MR. BELNAP: This case, in our view, has been filled with discussions about how important the documents are, which we submit in the 29 to 30,000 documents that were produced in this case, they are important. But the plaintiffs choose to take for the most part documents that are old, that are obsolete, that have been outdated, and they also choose to read out of context. The first document that the plaintiffs put up on the board to you in closing statement is a prime example of that where it was read, the last few sentences from Mr. Jordon's talk where it says, the best thing to do is to make sure the materials are nonexistent ab initio.

If you read in context what he is saying, that [124] is totally taking it out of context and putting the plaintiffs' own version on this document.

Mr. Jordan said from the inception the handling of the claim must be strict adherence to the formalized company procedures and meticulously documented.

The company must not simply deny the claim and walk away. It must detail the reasons for the denial and the factual determinations underlying those reasons.

Does that sound like what was read to you? No.

It must straight forwardly inform the claimant that it is willing to reconsider the claims, should the claimant show that its factual findings are erroneous. If a portion of the property insurance claim is not in dispute, the undisputed portion should be promptly made. In short the claim file should demonstrate on its face that the claim was handled properly, courteously, and professionally.

The reason for such procedural specificity and meticulous adherence to formalize corporate policy becomes evident from the time plaintiff commences discovery. With few narrowly drawn exceptions the entire claim file is discoverable, including interoffice communication, claims, manuals, etcetera. He then goes on to say, after following this meticulously, document [125] the file to make sure that that's the proper way of doing it rather than doing it otherwise. That, among other things that we're going to talk about, is taking what he said out of context.

The court has also instructed you with respect to why Mr. Humpherys spent the first week or two talking about the accident, why put on witnesses about the accident, and instructions such as the Instruction Number 23.

The total problem should be looked at realistically, in the second paragraph, and the standard of conduct dictated by reason and prudence under the circumstances applied as it is in other areas of the law.

Skipping down: It is therefore essential that the company have a reasonable latitude of discretion to decide whether it will accept a proposed settlement. The duties of insurance companies with respect to making and accepting proposals are to act in good faith.

Now, we acknowledge that the jury last October said that State Farm should have settled the case. There has been no finding -- that is your province to make as you return to deliberate this case. There has been no finding that State Farm acted maliciously, that they acted fraudulently, that they acted with malice or any of the other things that have been claimed here which we [126] will be talking about.

As I listened to the argument it was obvious to me at least that Mr. Ovard must have had some fairly significant things to say to you as a jury for his testimony to have been misstated as it was to you.

Mr. Ovard does not have a stake in the action in this case. Mr. Ovard does not have a reason in terms of being on anyone's payroll, or looking to receive damage payments, or anything else to say other than his honest opinions, which certainly a person could disagree with but not belittle when he took it upon himself to ask what had happened in this case with respect to allegedly falsifying claim files when this case had been pending for years and no one from the plaintiffs' side had approached him or his office asking that they look into it. And he himself has told you when this jury finishes with this case, when it is finished with the judicial process, their office will look at it through the market conduct part of their approach in the regulatory system here in Utah.

When it is stated that people like Ina DeLong said that we were taught that we could get away with cheating, I want you to think back on the witnesses that you have heard in this case who have testified and who have told you -- including Mr. Summers, which we're going [127] to talk a bit about here in closing statements -- about how they were trained, both disgruntled and current employees. The witnesses have indicated with respect -- with exception of Davis that they were trained to be fair, trained to handle claims properly, that they did so. Even Mr. Crow who acknowledges that he should have been terminated given his situation, has told you that even two to three years after he left State Farm when he had hooked up with Gary Fye and was receiving referrals from him and was receiving introductions to other attorneys that were listed as potential witnesses in this case that he testified under oath in depositions that he had never been taught at State Farm to cheat anybody and that in his experience in the thousands of claims that crossed his desk he had not cheated people and that the PP&R program had not been used against any particular claim or policyholder.

I find it interesting as we talk about Mr. Summers during this closing statement to now hear that it's acknowledged in this case, which there really isn't much choice to do. That he is dishonest, that he's clearly a liar, that he's a defrauder, and that we, quoting the plaintiffs, do not like him, when for years the evidence has been that he has testified, he has met with, he has provided documents and has cooperated with [128] the plaintiffs to what end? A person who is dissatisfied, who dislikes, probably worse than dislikes, who has a deep grudge for State Farm.

As we talk about this in closing statement, I would ask you to think as I'm talking about you, talking with you, and as Stuart is going to talk about damages. On any particular issue, if we have kept records, they're phoney. If we don't have them, we don't have them because they would hurt us. So if we've got the records, they're not believed. If we don't have them, it's because we're trying to hide them.

There is no way in this case that Mr. Moskalski can win on the plaintiffs' theory. If he does something, if he starts to keep a record that they say they need or a statistic that they say they want, will it be believed? Absolutely will not. There is nothing from the eyes of the plaintiffs' table, as they look at State Farm, that looks like anything but a bad company.

We believe the evidence is to the contrary. The independent objective evidence is to the contrary.

I would hope as you deliberate and think about this, since we're the defendant we didn't get the chance to go first. There was a lot of bad things said about State Farm in the first five weeks of this case, while the plaintiffs' case was on.

[129] And it reminded me, if you can forgive me for kind of a farm story. About a week ago in the middle of the night I woke up out of bed with a horrible smell in our house. My daughter who is home from college had let our dog out, and she got squirted by a skunk. She came in the house and

ran through several of the rooms before we could get her out -- before she could get her out, and for several days -- and this is a Springer Spaniel. She's a great dog, but for several days if I would have closed my eyes I would have sworn I was in the room with a skunk. But she's not a skunk. We got some things from the vet to wash her. She's the same good dog that she's always been. And I would ask you to consider the testimony in its entirety as you look at this case. State Farm is not the skunk that plaintiffs claim it to be.

I want to talk to you -- having responded to just some high points in the plaintiffs' argument, now the first point I want to talk about is the accident. I'm not here to reargue what the Logan jury did, but I want you to understand that we firmly believe that the decisions that were made were not malicious, were not with actual malice, they were not intentional and in knowing disregard for Mr. Campbell.

Now, I think the best place to start with that [130] is as I was preparing for this argument I went back and read the testimony of Mr. Fye, who was the plaintiffs' main witness, on the facts of the accident and whether an insurance company should have settled that case or not. And this is a copy of the diagram that Mr. Fye wrote up there, and I asked him specifically as he was talking about all of these van drivers and he testified under oath that every one of these van drivers said that Mr. Campbell was at fault, and that this was an absolutely clear case that anybody should have seen.

On cross-examination, as I talked to Mr. Fye, he admitted that Officer Parker had no stake in the outcome, that he was told in the hospital that the Campbell car was not the cause and that the discussion with Mr. Slusher took place when Mr. Slusher was lucid or awake and not under the influence of drugs.

He talked about Gerber. Mr. Gerber said the vans were spread out approximately a mile. He admitted that's what

Mr. Gerber said. He admitted that -- Gerber admitted that what he had seen with respect to the passing was in the rearview mirror, and that by the time the accident happened Mr. Campbell's vehicle was up here on the hill and the accident was 10 seconds behind him, five to ten seconds.

We talked about Mr. Zucca's testimony that when [131] the gray car passed there was not a perilous situation. Mr. Zucca told people after the accident that the Pinto caused it. It was wiggling around on the front end. Brenda Barnes, who was in the Bird vehicle, saw the a van behind them pop out, that Zucca told her that he had just made it in time before the accident. And she said she was paying attention and no cars had passed their vehicle.

We talked about the fact that Mr. Campbell was 63, intelligent -- which he still is -- had his wife with him, not in a hurry. He was in an area that was legal to pass, that he had passed the camper only, despite the statements from other people that he passed allegedly six vans, that his statement even before State Farm got into the case was that he was not at fault. And that has been his consistent statement, that he was back in the lane, that there was no contact with his vehicle.

Mrs. Campbell testified that they passed a camper, they were back in their lane. If they passed six vans, she would have noticed it, that her husband was a safe driver.

Mr. Harding testified that Ospital was going at a speed of approximately 70, that Campbell was back in his lane when Ospital had not come over the hill, that Ospital did not have to swerve for Campbell, and Ospital [132] did not slow down.

We talked about the fact that there was an opportunity for the Ospital vehicle to slow, to brake, and that depending on the speed he had as much as 23 seconds -- if it's 55 miles an hour -- from the top of the hill to the scene of the accident, and 17 seconds at 85 miles an hour. Showing the difference of what can happen depending on how the speed is viewed.

We talked about Mr. Knight, the trooper involved, measured -- excuse me, trained to do the measurements, that Parker's speed calculation was correct if the measurements were correct, and he never saw the measurements, and that at a speed of 55 miles an hour there it was 23 to 25 the seconds for the Ospital vehicle from when it topped the hill to the point of the accident, and he could have stopped within that distance.

So as I talked to Mr. Fye, he admitted that from those things that we talked about on cross-examination there was a basis.

Now, that may puzzle Mr. Humpherys, why we would talk about that, but he called a witness. We are talking about it's not to review it in 1983. We're talking about it in 1996 when people are saying we want 25 to a hundred-plus million dollars from this company [133] because it's allegedly reckless, willful, malicious. That's why we have talked about it. That's why we think the evidence that has been put on shows that State Farm was not willful or malicious in making these decisions.

As I have listened to the testimony, I have frankly been amazed at the theory that has been presented to you as a jury from the plaintiffs. And that theory is that State Farm knew this case was a loser. They enlisted Mr. Bennett who knew this case was a loser, that it would be lost. Accordingly they knew if this case was a loser, that they would be going to trial and they would get hit with a judgement for over the limits, which they would then be facing a situation where a former disgruntled employee, Summers, would be testifying against them, claiming that he had been directed to change reports.

It does not make sense that a company would say to themselves we know this is a loser, but we're going to go ahead and just for the fun of it gamble away just to see what

happens, because we're just interested to make sure that's what happens. It does not make sense on the plaintiffs' theory.

The plaintiffs want you to believe that Mr. Summers told the truth on one occasion, and otherwise he's a liar and he is a defrauder.

[134] I want you to think about what is the effect on Mr. Campbell's claim in this case, based upon the plaintiffs' view of Mr. Summers that he's a liar.

In you choose to believe, which we don't believe, that Mr. Summers obviously was told to do any of the things that he claims he was told in this case, but if you choose to believe that Mr. Summers is truthful about what he's saying about this case, he called Mr. Barrett, one of the plaintiffs' attorneys who sat through this whole trial and is sitting in the courtroom today, and allegedly said: Mr. Summers is so upset about the whole matter that he decided to call me. He also has talked to Campbell and advised Campbell of the attitude of the company and has pointed out to Campbell that if there was an excess judgement against him he might have some recourse against the company.

If these plaintiffs really want to ride the Ray Summers horse, then Mr. Campbell not only had the knowledge and the information, which we're going to be talking about in the next few minutes, but he had the actual knowledge that Mr. Summers allegedly had been ordered to change his memorandum from one of liability to one of no liability.

Mr. Summers is not believable and, as the plaintiffs themselves have acknowledged is the person [135] they say he is, that he does not know how to tell the truth.

I want to spend a few minutes talking about information that Mr. Bennett had or that State Farm had and passed on to Mr. Campbell.

First of all, when the case started, State Farm wrote to Mr. Campbell and advised that they would be hiring Wendell Bennett to defend him. They indicated that because the amount claimed against Mr. Campbell was in excess of his policy there may be personal liability on his part and he may choose to get his own attorney.

Now, the plaintiffs have argued one of the misrepresentations to Mr. Campbell in this case is that he had enough insurance and that he was not under insured.

You may recall in the testimony from Mr. Arnold on Friday-- and there is in evidence an exhibit of Mr. Campbell's insurance policy application and history that shows within a few months after this accident Mr. Campbell went in and increased his limits of insurance from 25,000 to $100,000.

And I ask you what does that say about the plaintiffs' allegations that Mr. Campbell was led to believe that he had plenty of insurance?

It has been claimed in this case that [136] Mr. Bennett and Mr. Dahle just cooked up things as they talked. And you heard -- read this transcript and had it read to you several times, that Mr. Dahle was noted down here and said: "I realize there's not much to go on here, but I worked this sucker 9,000 ways."

Mr. Dahle indicated, as one of the things that they were working with and exploring, as they were trying to look at this accident and reconstruct it, that if you put the speed of Mr. Ospital down to 60 miles an hour, and Campbell pulled out at the shortest possible point that he could have been involved in the collision at 60, Ospital would have -- he would have been 800 feet and 11 seconds from the collision, and there just simply couldn't have been one.

So you can find in this multi-page statement lot of things to support an allegation taken out of context. But in the whole it is what Mr. Bennett said it was, reviewing and looking at all of the possibilities.

Mr. Campbell acknowledged correspondence and communication with Mr. Bennett while he was away on his mission and supplied him information about the accident. Mr. Bennett communicated with Mr. Campbell while he was out in the mission field and received information from him so that they could answer court interrogatories and talk about the case.

[137] Mr. Bennett at the same time was communicating with State Farm, talking to them about the depositions that had been taken of the van drivers and sent those depositions on to State Farm and communicated with Mr. Campbell again, indicating what was going on in the case. Which I realize, as an attorney, that in hindsight we could also be more clear. We could always add more detail.

While Mr. Campbell was on his mission, the Ospitals filed their cross-claims for the wrongful -- alleged wrongful death of their son, and that was sent to Mr. Campbell while he was on the mission, indicating that once again he had been sued by someone else claiming that he was at fault.

After getting that letter, State Farm wrote to Mr. Campbell, indicating that once again in the new lawsuit from the Ospitals he was once again being sued for an amount in excess of the protection afforded by the policy and there may be personal liability that he should be aware of.

Now, by the time that November 29th letter -- that I just put up -- was sent to Mr. Campbell, he and his wife had also sat through the deposition of Mr. Slusher and had heard Mr. Slusher tell them that he had passed six vans and that if he had not done so the Ospital boy [138] would not have been a killed.

A trial date was then set and Mr. Bennett communicated with Mr. Campbell about the trial date, and Mr. Campbell wrote back indicating that he was pleased with the court schedule that had been worked out, at this point obviously

knowing that he was the subject of two claims alleging that he was at fault, that people were claiming he passed six vans and had been the cause of the accident.

Mr. Humpherys then wrote to Mr. Bennett indicating that he had retained an expert who exonerated or took the blame away from the Ospital vehicle and placed the entire blame on Campbell. This letter of April 1983 was sent to Mr. Campbell. And this is the letter that Mr. Christensen referred to where it talks about the fact that he's attempting to spook or coerce you.

The letter was also sent to State Farm during the process as they wound down towards trial, Mr. Chipman was located and asked a number of questions by Mr. Dahle among which: How many vehicles did Mr. Campbell's car pass? Just one. And do you have an opinion as to how fast the camper was going at that time? 50 miles an hour, or less among other questions.

Now, the officer's statement had been received [139] by Mr. Bennett at that point and didn't have any additional information to add beyond that in terms of Mr. Chipman feeling that Mr. Campbell had been the cause of the accident.

Mr. Barrett also indicated and offered to settle this case. At the same time that the letter from Mr. Barrett was received, Mr. Humpherys sent another detailed letter to Mr. Bennett talking about the evidence in this case, from their point of view.

Now at this point in time, August 18th, the Campbells were on their way back from Minnesota to the state of Utah. Mr. Bennett sent the letter to Mr. Humpherys and Mr. Barrett and State Farm, and he also got back to Mr. Barrett and Mr. Humpherys and indicated that he had a hard time getting a hold of Mr. Campbell because he was returning and had just returned on the 30th and that he talked to Mr. Campbell about Mr. Humpherys' letter and Mr. Barrett's letter and offer

and was told, according to the letter to Mr. Humpherys and Mr. Barrett, that Mr. Campbell does not desire to pay policy limits on the case.

Now, with this background of the testimony of Mr. Fye and what you have seen, probably more than you want to on the various letters that we have put up on the board over the last two months, I want to talk to you [140] about the plaintiffs' claims of fraud, intentional infliction, and their claim for punitive damages.

Instruction Number 29 talks about the plaintiffs' burden that they have to meet to prove fraud. This burden on the part of the plaintiffs is by clear and convincing evidence, and that term is defined for you in the instructions.

Instruction Number 18 -- if you want to follow with me and hold your finger at Instruction Number 29 which we will be coming back to -- says:

> "Clear and convincing evidence is evidence that produces in your mind a firm belief as to the matter at issue. Clear and convincing involves a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard. However proof beyond a reasonable doubt is not required. For evidence to be clear and convincing it must at least have reached the point where there remains no substantial doubt as to the truth or correctness of the conclusion based upon the evidence."

Now, in looking at Instruction Number 29, certainly in the course of communicating with Mr. Bennett, Mr. Bennett and Mr. Campbell had a number of [141] discussions about the case, but we do not believe the evidence shows that those discussions were false or misleading.

Number four, made with an intention or reckless disregard or indifference to the truth or falsity.

Number five, for the purpose of inducing the other party to act.

Number six, that the other party acting reasonably and in ignorance of its falsity or misleading nature.

Now, this is where Mr. Summers once again enters the picture. If the plaintiffs say that he did what he did in this case, but everything else he has done is a lie, then Mr. Campbell knew that what they allege Mr. Bennett and State Farm were saying was false. We don't admit that it was false, but he would have to be saddled with that knowledge.

Putting Summers aside, because we don't think he can be believed in this case, let's look at paragraph six in terms of what Mr. Campbell, acting reasonably and in ignorance of its falsity or misleading nature, can claim with respect to alleged fraud on the part of State Farm. This is a man who has a master's degree, who was working towards a Ph.D., who has a mathematics bachelor's degree, who is a bright individual who sat through the [142] Slusher deposition, who received two complaints, who had received correspondence from Mr. Bennett indicating that there were people who were claiming him to be at fault, and for him to claim as he did in his testimony in this case that he never heard any adverse evidence against him until the trial is not believable.

Now, I'm not saying Mr. Campbell's a liar. That is not what I'm saying. But I'm asking you to consider what that gentleman may have forgotten in terms of what he was told and in terms of his position in this case now having a stake, a financial stake, in wanting to remember what is alleged here.

We do not believe that the evidence in this case supports a false or misleading statement nor that there was reasonable reliance if you believe that on the false or misleading statement.

I want to talk to you about intentional infliction of emotional distress. Stuart will follow up on that, so I'm not going to spend a lot of time. But that Instruction Number 38 has 3 requirements that have to be met.

These are by preponderance of the evidence. Number one, that the outrageous conduct by State Farm toward the Campbells be proved.

Number two, that State Farm intended to cause [143] emotional distress.

Number three, that the Campbell's suffered severe or extreme emotional distress.

Now, those are fact issues. Those are for you as judges, each of you sitting in this case, as judges, must decide. But when you have heard the testimony from witnesses like Jerry Stevenson and others telling you: I never intended to do anything that was going to harm the Campbells. I used my judgement, and my judgement did not turn out to be right, but I did not intend to harm the Campbells.

I believe -- and I'm an advocate, I understand that, for my client. But I believe the evidence is that the standards of intentional infliction of emotional distress have not been met.

And the answer on the special verdict to that question should be no, along with fraud.

I want to talk about punitive damages for just a moment, instruction number 59.

Once again punitive damages, like fraud, have to be proven by clear and convincing evidence that the conduct was done willfully and maliciously, or done with knowing and reckless indifference towards the Campbells' rights. We don't believe the evidence supports the finding that you would have to make to get to punitive [144] damages.

Even if you have made that kind of finding, the court has gone on to tell you in Instruction Number 60 that punitive damages constitute an extraordinary remedy outside the field

of usual redress. Plaintiffs are not automatically entitled to punitive damages and the law does not require you to award punitive damages to the plaintiffs.

Instruction 61. A defendant's conduct must be malicious or in reckless disregard for the rights of others. That is the defendant must either know or should know that the conduct would, within a high degree of probability, result in substantial harm. The conduct must be highly reasonable or an extreme departure from ordinary care in a situation where a high degree of harm is apparent.

We don't believe that standard has been met.

I want to move to Mr. Summers, because it seems as I listened to the closing statement that the plaintiffs hinge this case, your decision as judges, on Mr. Summers' testimony, and I don't believe that his testimony can be believed.

I want to start by just briefly walking you through the reasons why I don't believe Mr. Summers' testimony can be believed.

[145] First of all this, from the opinion of the United States District Circuit that Mr. Schultz talked to you about a few weeks ago:

> "In July 1980 it was discovered that Summers forged the signature of a representative of Monsanto Chemical to document a loss-of-wages claim. Summers did not dispute the falsification and was warned that another falsification could result in dismissal. In September '81, State Farm discovered evidence regarding a 1977 incident where Summers had falsified various medical and pharmacy bills for services which State Farm's insured supposedly had received, though in fact she had not. Again Summers was advised that he should not falsify company records and was warned that future falsifications would result in

> discharge. As a result of this discovery, State Farm examined and we know from the testimony and also the case that he was put on probation for the conduct."

Now, it's claimed that State Farm attempted to take advantage of this fraud that Mr. Summers had worked actually upon his own employer, State Farm. What he did [146] was pay out bills to someone who had not incurred those bills. He had given Mrs. Gittens money for services she did not receive and he phonied up some bills to try and reflect that and try to recover, himself.

The case goes on to say that in 1986, four years after his discharge -- and he was discharged, given a mandatory early retirement or option of termination, a year and a half before the Campbell case was tried -- State Farm when preparing for trial made an examination of records prepared by Summers and discovered over a hundred and fifty instances where he falsified with 18 of those occurring after his probation.

Counsel for Summers filed a motion seeking a pretrial ruling which would bar State Farm from using at trial the falsifications discovered in '86. And the case goes on to say the reason for that motion was that State Farm did not know anything about it allegedly.

Now, you will recall when Mr. Schultz asked Mr. Summers about this case, he testified that he didn't even know the case had been appealed. He claimed that he wasn't aware that the case had been decided against him.

In the exhibits which you will take into the jury room -- and I believe it's Exhibit 141, but I could be mistaken on that 141-D -- there was a sworn statement that Mr. Summers made under oath to Mr. Bennett in the [147] Gittens case in July -- excuse me -- in September of 1981, just before the Campbell file was received. And in that sworn statement

Mr. Summers said the settlement that he had made with Mrs. Gittens was a bone fide settlement that he had paid her, but yet he had phonied up those bills, but otherwise all that he had done was to overpay for some things that she had not incurred.

In this case, from that witness stand, Mr. Summers testified that he had been ordered to take three releases from this woman and ordered to phoney up those bills by Bill Brown, when he testified exactly to the contrary in September of 1981.

In this case, Mr. Summers testified that his wife did not know why he had been put on probation. The plaintiffs listed her as a witness and chose not to call her. He testified that -- in his deposition he said that the file materials that he got from the police department did not include the statements that plaintiffs' counsel referred to. In the file he said they were included.

He testified that he delivered this file to Wendell Bennett personally. Mr. Bennett received the Campbell file in the mail from Mr. Noxon.

He testified in this case for approximately an hour and a half in exquisite detail about cases where he was told to not mention drinking in the Miller Shoop case [148] and to make sure there was no evidence of that in the file, about drinking and not to offer any benefits, claiming that the insured simply fell asleep. And we went through page by page where that was absolutely false.

He testified that in the Hatfield case State Farm forced him to deny benefits and make her go to Medicare and not pay anything. We went through item by item that that was false.

He testified in the Logan City case, where the person unfortunately hit a garbage truck and was killed, that he was told to use the defense that the person had a sudden illness

or physical problem that had caused the accident and therefore beat Logan City out of their money. We went through document by document that that was not true, that State Farm paid Logan City.

He testified in the Tew case that State Farm did not offer benefits until they were threatened. And we went through document by document where that was paid within just a few days. We go on and on through the Carlson case and the other cases.

Mr. Summers claims in this trial that he had been trained to be honest, by State Farm, but for some reason State Farm was picking on him and he was the only employee that he knew of who was being directed by his [149] supervisors to be dishonest. He then went on to say that Bill Brown, the divisional claims superintendent, had ordered him to change the CLR, when he himself admitted that divisionals don't get CLR's, that he had never been ordered to change one of those before, and that his own fellow employees, two of which had retired, one of which is now serving a mission -- and we read his deposition -- the other one Marilyn Paulson testified that -- that would be Marilyn Paulson, Ellis Christensen, Arch Geddes and Jeppson testified that when Mr. Summers told you and told the jury last October that he had related to each of these employees that he had been ordered to change that CLR, they said absolutely not.

He testified that Mr. Brown called him and told him to change it, that Mr. Noxon called him and told him to take a memo out of a file and return it in a confidential envelope. And he claims that those two individuals came to his office and stole that information out of his desk.

This man unfortunately -- and I'm not a psychiatrist -- has some problems with the truth. You cannot believe that Mr. Summers did what the plaintiffs want to carve out and say was truthful in this one occasion, but everything else he did was a fraud and a lie.

[150] Given all that, as you answer the questions about fraud, I made a note to myself in preparing for this argument that Mr. Campbell said on page 286 of the transcript:

> "I have had and still do have a lot of respect for Wendell. I felt like he did want to do what I needed to have done."

Were mistakes made? Yes. Were errors in judgement made? Yes. Was it fraud? No.

As you answer the questions for Inez, and you consider both fraud, intentional infliction and punitive damages, Inez did not take out the insurance policy contract. The representations that are alleged to be -- to have been made were not made to her. She did not meet with the lawyers. She was not a defendant. The judgement was not entered against her.

MR. BELNAP: Your honor, I'm overheating. Can we take a break and let me get a drink?

THE COURT: Certainly. Take a stretch break.

(Stretch break.)

THE COURT: Back on the record.

Ladies and gentlemen, just so you understand, I don't think there has been any misunderstanding, but I want to be certain you know that we're here for the duration today. And it is the intention of the court to [151] take an afternoon recess. Each side has been allocated the same amount of time, and Mr. Belnap has finished about one hour of his three hours and 15 minutes that has been allotted to each side to argue. And we want to take a break when it's going to be most convenient for the jury.

Would you like to go another half hour or so before we take a recess? Would that work for you? All right.

Why don't you proceed, Mr. Belnap, with that in mind. Somewhere between half an hour or whenever you think it.

MR. BELNAP: By the way, this person who is just sneaking in here is Mr. Burton who retired from the practice of law at a young age. And that's how I got drafted into this case.

Thank you, Mr. Burton.

I want to switch to another subject, and that is to deal more with the pattern and practice and allegations of widespread wrongdoing that has been made against State Farm.

Mr. Fye has testified, as an example, that State Farm should be found liable in this case by virtue of the Excess Liability Handbook, a 1972 document that he admits was obsolete, in his testimony; that Mr. Crow [152] admits was obsolete, in his testimony; that Mark Wells, who we read the deposition on Friday, who has been a fire general claims attorney since 1979, indicated was obsolete; that each of the people in Utah, with the exception of Samantha Bird who changed her testimony, have said: I never saw the document. I never used it.

And Samantha Bird indicated that she remembered seeing it, but indicated she had never used it or been trained in its use -- that Mr. Fye knows that the document is made up of operational guides and material that are fire documents, and that he knew that this document was replaced by another operational guide that is in evidence in this case.

Having chosen to judge State Farm by the standard of an obsolete document authored in 1972, he then chooses to judge State Farm auto based upon that document, which has been time and time again, referred to by the plaintiffs' attorneys as being evidence of State Farm's bad practices, evil motives, and bad acts in allegedly being self-serving, disregarding trial attorney's recommendations, not putting into writing things in the files and not giving evaluations.

As we walked through -- and I'm sorry if we bored you. I'm sorry if I upset you in any way -- but as we walked through those 10 or so Summers' files, I ask [153] you do those files reflect that State Farm chose to take in or take out what would make it look good? No. Did those files reflect only that only what was in there was helpful to State Farm? Absolutely not.

Mr. Fye says that Article 14 from the Claims Superintendent's Manual absolutely dovetails with the Excess Liability Handbook, and it doesn't. Certainly there are similarities, but there are significant differences, and several-page differences dealing with several topics.

I ask you to judge Mr. Fye's testimony based upon his reliance on a document that the plaintiffs' own witnesses and others acknowledge is obsolete, was not used in this case, the people in this case did not use.

This is another example of what these experts want to put State Farm to when they can find a document that makes State Farm allegedly look bad when there are other documents several generations of which have been replaced, updated, and old ones have been obsoleted.

Since the time of that Excess Liability Handbook there have been three changes to the operation guide by the fire company. There has been an entire manual change by the auto company doing away with the Claims Superintendent's Manual and replacing it in 1990 with the claims supervision manual.

[154] I submit as you look, and I would ask you on behalf of my client, seriously when I say this, as you weigh the evidence in this case, I want -- I would want to know if the evidence that you're weighing my client on is an inquisition by ex-employees who are disgruntled, who have an ax to grind, who are currently working against State Farm, like Bruce Davis, who have been found dishonest like Mr. Summers and others that have a stake in the outcome to make their living against State Farm.

If this horrible philosophy exists, if State Farm is this bad company that has been alleged, I ask you if you weigh this evidence and look at the witnesses what did Samantha Bird say? I was trained to be fair. She had some personality conflicts with Mr. Noxon. She didn't like him. She thought he did things that were unfair. But I was trained to be fair and I was fair.

Mr. Jensen, personality conflict with Mr. Noxon, but he indicated he was trained to be fair and was fair.

Ellis Christensen and Arch Geddes from Logan. I was trained to be fair. I would not work for a company who was dishonest or unfair.

Stephanie Stout from Colorado: I was trained to be fair. I was fair.

Lee Norman, Fred Hartwell, Mr. Davis' direct [155] supervisor that he said he liked said: I'm down here. I'm retired, but I'm down here because I'm offended at what Mr. Davis has said and attributed to me.

Rosa Smith -- and the list could go on. Mr. Kingman, Mr. Short, Mr. Moskalski, whose attention I seriously say you do have in this case.

I want to talk about the PP&R program. That is one of the areas that the plaintiffs want to judge State Farm from.

We know that the program came into existence in 1979 and replaced what had been called the development guide program, as Mr. Moskalski explained that to you. And the plaintiffs' view from their experts would be that the minute this program hit the street, State Farm had an evil intent wrapped up in this program. And when they say that this can be used to translate the regional and functional annual gain plans into performance plans so this we're all fostering team work and we're pulling in the same direction, that is an evil statement. And when it's flexible to meet the needs of a changing organization in different styles of management and

the individual differences of employees it's an evil statement of a company that has ulterior motives, allegedly.

When it's said that this program is being [156] instituted so that our collective efforts that each person in their job plays an important role in establishing a strong position of service, growth, and profitability, to create a working environment for management, employees must mutually generate the productivity efficiency, etcetera. That it assists in establishing meaningful goals, evaluating performance, and helping employees know that management is interested in their progression.

In order to read into these programs, what Mr. Fye reads into them, you have to be able to read, as Mr. Fye claims he can, read auras. I can read auras. I can see things that other people can't see.

Well, nevertheless, if you decide that Mr. Fye's correct, which we don't think that he is, this program went into two revisions from the time that Mr. Fye got the 1979 obsoleted book to when he testified on the stand here, one in '87, and one in 1992. And in 1992 it talks about the fact that you have an important role in ensuring that participants in this program receive the most current information on the process. And that current information, among other things, was to say that as a company it has been decided that goals which affect policy costs are inappropriate and not within the broad control of employees and the State Farm philosophy [157] is to pay what's owed and not a penny more. And the example is used in a case study to make that clear.

When it was found that some employees may have been arbitrarily using goals that were not implementing goods claims practicing, which Mr. Fye himself admits that if you combine management of expenses with good investigations, prompt contacts, complete records compiling, good negotiations, good experience and training, those are all proper. If you have

combined those in an attempt to manage expenses, that's fine. But if you arbitrarily approach it, that has never been State Farm's intent, and rather than getting into a situation where it was ever to be misconstrued in 1994, Mr. Hanes sent a memo to people like Mr. Moskalski saying: We do not want to have these goals in PP&R's for claim representatives for claiming management.

And when we talked about this with Mr. Fye, you will recall, he said that's a good step in the right direction. Mr. Prater said: That's a phoney change, don't believe it. And it was put up on the board that our division manager were still talking about managing expenses. And Mr. Moskalski, you will recall, explained to you that a division manager who, as we went through the regional organization, in his region is in Greeley and is responsible for both underwriting -- that's the [158] income aspect of the business -- and is responsible for costs and has to be looking at expenses and costs in talking about profitability.

If you take the plaintiffs's expert's view of an insurance company, you would be out of business.

If you cannot be aware of costs and managing costs, if you could not be aware of trying to make a profit, you will be out of business.

They would want, for the benefit of their clients, to be able to say that every company they testified against is bad because they're trying to manage costs, that they're trying to watch the bottom line.

In the current program, the PP&R's, that are used with employees, it says what Mr. Hanes and Mr. Moskalski in their 1994 memo indicated. Once again Mr. Prater's view of the world is this is just a fraud, this is just a masquerade of an evil company that's trying to just play games.

Of significance in this case, what difference does all of this PP&R business have to do with the Campbell case?

Mr. Crow indicated that trying this case, if Mr. Bennett and State Farm would have been right, would not have reduced average paid costs. It has nothing to do with the Campbell case. Did State Farm reduce average paid costs? Did Mr. Summers have a goal [159] to reduce average paid costs? He did not. This is a red herring as are many other things.

In the president's message that Mr. Christensen and Mr. Humpherys referred to during trial, you will recall Mr. Fye indicated that nobody from the president's office anticipated that I would be sitting here reading this to a jury in 1996, and so using the plaintiffs' favorite buzz words they certainly can't claim that this is one of these allegations of one of the alleged self-serving statements.

Through the combined efforts of everyone in the State Farm organization for more than six and a half decades we have a reached 50 million policies in force mile stone. A truly incredible achievement. It came about because of our sensitivity to people, fair treatment, motivation of agents and employees, and persistence in preparing agents and employees to cope with changes in our business environment.

The 1988 result could be a net gain of 3 million policies. It goes on to talk about that we need our new employees to be trained, we need to make sure that we're offering the kind of service that has gotten State Farm in a continual growth and retaining of policy mode.

As an example, in 1991, again in the [160] President's Forecast, an internal confidential document: Delivering our promise of quality products and service requires State Farm people to consistently perform in a professional way, whether their assignment is directly with customers or indirectly in a support activity.

Many consumers including State Farm policyholders are angered by rising costs. They believe insurance is too costly and they're demanding something be done about it.

The plaintiffs' view is you cannot do anything about costs. You cannot consider it. You cannot reduce it. You cannot control it. You've just got to pay and pay and pay until the product becomes unaffordable or you're out of business.

Throughout the years Mr. Fye has claimed that State Farm last embarked on this program to cheat people and reduce average paid costs. And the statistics that have been supplied indicate those costs have risen over the years. And I asked Mr. Fye if his gripe with State Farm is that they haven't risen fast enough and if he, as an expert paid by the plaintiffs in this case, seems to know more about running this company than State Farm does.

I want to wrap up in the next few minutes, and talk about Mr. Moskalski's testimony because I think it [161] brings into perspective these allegations of the plaintiffs have made against State Farm and brings into perspective that this is a well run, properly motivated and honest company.

Mr. Moskalski explained to you, as the regional vice-president, he has the ultimate authority in this region. He has indicated that if you do not have budgets, if you do not have information about costs, and you're not aware of those things, then you're just kidding yourself and you will be out of business. He talked to you about the evolution of the PP&R program. He talked to you about property damage issues.

Brice Davis has claimed in this case that he cheated people consistently and he did this through goals and other incentives that he was given. If you look at his goals and his testimony he admits that he was writing estimates of approximately $500,000 a month, paying people $6 million a year, he, himself, on his own estimate. His goal for the use of appearance allowances was $1,200 a year; $100 a month.

Mr. Moskalski has indicated to you that State Farm's market share is increasing, that they maintain and retain their policy holders through service and trying to do what is appropriate. He has told you about a program that he has implemented, since he became the regional [162] vice-president in 1989, to manage litigation, to look at and attempt to resolve litigation without going to court, and to make sure when a case is tried that the right decisions are being made with the post-trial report.

He and Mr. Arnold have told you about excess liability cases. And the plaintiffs have said what does it take to get State Farm's attention.

Since the Campbell case was handled, in each of the cases where State Farm has been involved and where there was verdict in excess of the policy limits, there has either been an agreement between the plaintiff's attorney that there would be a stay of execution pending resolution of post-trial motion or appeal, or State Farm has filed a bond; in this Murphy case judgements of $75,000, bond for a hundred thousand dollars.

Does it take a staggering punitive damage award to get a message across to State Farm? It does not. In each of those cases State Farm stepped up, protected their insured, paid the bond, and with no duty to the third party as the court has instructed you in this case, resolved each of those cases.

Plaintiffs belittle Mr. Moskalski's testimony about what has been called the peace-of-mind letter. But from the actions that Mr. Arnold discussed on Friday, combined with Mr. Moskalski's -- have I misspelled that? [163] I saw a school teacher looking at me. I'm embarrassed now. I'm sorry.

Juror: Sorry. That's a common error.

Mr. Belnap: Mr. Moskalski has taken the step of what the practice has been and has made a decision, as a top person in this region, for this region that State Farm does not want

to be in the position of the Campbell case again and does not want to have persons like the Campbells in that position again.

Now, you can belittle that. You can make fun of it as the plaintiffs have in this case, but it was made seriously. It was made with the intention that people are not in this situation again, and that's why we stand here and we say this is an important case to State Farm. Just as the plaintiffs say it's the most important case in the country, we believe it is.

The message is what does it take to get State Farm to change? It doesn't take a huge and horrendous asking for money. It doesn't take an award like the plaintiffs are claiming in this case.

With this peace-of-mind letter, if a decision is made to try a case in the future where there has been an offer within policy limits where that proceeds to trial of the insured -- and State Farm's had a bona fide offer, and has made the decision to take that case to [164] trial based on the evidence, the insured will be given a letter that if their judgement is not correct, if they make an error in judgement, they will do as Mr. Arnold says has happened. And it's undisputed that's occurred, they will step forward, they will protect --

MR. CHRISTENSEN: Your honor, I'm going to object to this. This was excluded because they wouldn't produce the file so we could verify it. And if it was excluded from evidence it's improper argument.

MR. BELNAP: Your Honor, that is absolutely incorrect. We have supplied everything that you have asked us to do and more during this trial.

MR. CHRISTENSEN: There have been none of these so-called called peace-of-mind letters.

MR. BELNAP: No, I'm not talking about the peace-of-mind. I'm saying every one of them in fact have been made.

THE COURT: Proceed. I'm going to deny the objection. The jury has heard the evidence on it.

MR. BELNAP: The question may be asked -- I'm certain that it was asked many times by each one of you as the days drug on and unfortunately it's hot in here sometimes and people lose their tempers and people say things sometimes they wish they didn't and apologies have been made, etcetera. But nevertheless you may ask [165] yourself why are we here?

Mr. Moskalski told you, and there has been other evidence, that State Farm does take seriously these kinds of cases where these allegations are made against it. This is not just a Utah allegation. In terms of the fact that Mr. Moskalski talked about and there was evidence from Mr. Fye that he received-- excuse me -- that a letter was sent out to the Trial Lawyers' Association, plaintiffs bar throughout the United States saying send your documents to Mr. Fye.

Mr. Moskalski talked to you about the fact that there is a network of lawyers who make their living going after insurance companies. We're not disputing the fact that people are entitled to attorneys. That's not what we're here debating. But these are people who share documents, who work on contingent fees where they receive, according to the plaintiffs' own experts, up to 50 percent, and who work with predictable experts that have been developed to go case by case with the same opinions who are motivated financially, who come into this court and criticize State Farm that they don't have records but state that the records that we do keep are not reliable, who criticize State Farm for settling without enough information or criticize State Farm for not settling soon enough, who criticize State Farm saying [166] their training manuals are wrong, that they have the wrong information, or when they do have manuals that are updated that they can't be believed.

State Farm cannot win if you believe that the standard is this two-sided heads you win, tails you lose.

I want to just conclude -- heads I win, tails you lose. Excuse me.

If you decide that the evidence in this case is such that you're concerned about whether or not State Farm has made a change and needs to be punished so that they would make a change, I just want to briefly go through some things that I think absolutely show that State Farm changes before there is any message from you as the jury.

First of all, the PP&R program change was made in 1992 and reiterated in 1994.

Property damage issues that Mr. Davis talked about. State Farm supplies written guarantees for those parts. It's alleged that State Farm destroys evidence and improperly destroys documents.

You heard from Mr. Williams last Thursday that State Farm has a proper document retention program, and under that program there is being kept manuals now, a copy back at home office, for 10 years of the history of the manuals. Under that program there is a schedule that [167] complies with regulation, law and business made for each of the records.

There has been discussion about Article 12, first contact settlements. State Farm has a new manual as of 1990, the Claim Supervision Manual. Article 12 is not in that document.

The Excess, ELH, Excess Liability Handbook has been obsoleted as of 1979 and has been replaced on three subsequent occasions in the fire company with new operation guides that don't have any of the language that is in that book.

Litigation management. Mr. Moskalski talked about a program that the company has to manage files where attorneys are required under the program to give evaluations.

Where they're required to look at ADR, Alternative Dispute Resolution. And that he, in his office, monitors litigation and each case that ends up being tried in the region, and if a mistake has been made he knows about it and he consults with his people to find out what the basis of that mistake was.

I have so much material here, I could go on for hours, but excuse me, let me just check with Stuart.

Thank you. This will be my last opportunity to address you, and after the break Stuart will talk to you. I do appreciate and thank each one of you for your [168] attention.

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EXCERPTS OF TRANSCRIPT OF DEFENDANT'S CLOSING STATEMENTS: STUART SCHULTZ, ESQ., JULY 31, 1996

[R. 10324, commencing at p. 168]

* * *

THE COURT: Back on record. The jury has returned to the courtroom and the parties and counsel are present.

Mr. Schultz, you may proceed.

MR. SCHULTZ: Thank you, Your Honor.

I appreciate the chance to spend a few minutes to talk to you about some other parts of this case today. It's kind of like a long -- finishing a 26 mile marathon. We're almost to the end and kind of pushing to get there. But I appreciate your attention.

During the course of this case, we heard a [169] couple of words used many, many times. I'm just going to write them up here. "Fair value." And there has been a lot of discussion about what fair value is in a particular case.

The plaintiffs have asked some of the witnesses in this case if fair value wasn't, for a general damages claim in a case, whether determined by case multiplying the amount of special damages by three; if that wasn't a measure that was used sometimes to determine what fair value was a way of general damages.

So I did a little multiplication while I was sitting here. It's undisputed in our case here that the total special damages are $911 and I believe it's 25 cents. That's what the special damages are, total out-of-pocket expenses, as a result of all the things that you heard about for two months.

Now, three times that is about $2800, I guess. You multiply it by three; that's what you get. If you multiply it by 3,292 you get the $3 million that plaintiffs have suggested should be

awarded in general damages. And we're going to talk about whether that's fair value based on the evidence in this case.

There has been talk about things that are outrageous, that are claimed to be outrageous. There has been talk about conduct that has to be proved to be [170] outrageous in order to recover certain kinds of damages. I submit to you that this is outrageous.

I want to talk for a minute about some of the jury instructions that the court has given to you today, so that we can be very clear about what you have to decide and what the limits or the boundaries are of some of the things you're looking at.

When we talk about damages and awarding damages, the special verdict goes in a certain form. And on that special verdict, when you get to that, you're going to find that the question about compensatory damages comes before the question about punitive damages, and there is a reason for that. Even though during argument counsel talked about punitive damages first and suggested a number to you for punitive damages and then suggested to you that you need to make sure you give a substantial enough compensatory award so it can justify that punitive award. Well, I submit to you that that's just backwards. And the reason that you have the compensatory damage question on the special verdict first is because you can't award punitive damages until you have decided the compensatory damage question. And there has to be a reasonable and rational relationship between the amount of compensatory damages and the amount, if any, of punitive damages. And the instructions will tell [171] you that you are not required to award punitive damages. Even if the factors for liability are met, that is your discretion to make that decision. And it's because it is a highly unusual kind of damage not to be given lightly, not to be considered lightly. And the burden is on the plaintiffs to prove by clear and

convincing evidence that -- that's more than just the greater weight of the evidence. That's clear and convincing evidence that they are entitled to punitive damages and what the amount, if any, of those punitive damages should be. And because the plaintiffs bear that burden, you are not here to decide that we will start at X number of dollars and then we'll work our way down. No. They have the burden of proving from zero to $1 to $2. And every one of those dollars has to be proven by clear and convincing evidence. So don't be mistaken and think that you start up at some high number and would work your way down, because that is not the way the plaintiffs meet their burden of proof.

Now, let me talk for an minute specifically about Instruction 59, which is the instruction on punitive damages. And I just want to talk about one part of that. It's the second paragraph of that instruction. And it says: Before punitive damages may be awarded against State Farm you must find by clear and convincing [172] evidence that the insurance company's conduct toward the Campbells was willful and malicious, and so forth.

And I underscore the language "toward the Campbells."

Plaintiffs have the burden of proving that there was conduct, malicious, willful or with knowing and reckless disregard towards the Campbells. That means in handling the Campbells; a third-party, bodily-injury claim, the plaintiffs have the burden of proving that standard. It does not mean that they have met that standard because somebody in Colorado thought they shouldn't have had to take an appearance allowance. No appearance allowances were involved in the handling of the Curtis Campbell third-party, bodily-injury case. No after-market parts were used on his car. No depreciation was taken. The Campbell case was not attempted to be settled to a first-party contact. No settlement offer of the low fair value was attempted, because State Farm

didn't offer anything in the Campbell case. And that's because, as Mr. Belnap has gone over, they made a judgement and decided that the case could be defended.

The Campbells not were earthquake victims or home-owners, loss victims. They were not members of a class action in Illinois or California.

All of those things are not part of the conduct [173] towards the Campbells that must be proved in order to meet that standard.

Now, I want to talk for a minute about Instruction Number 38. That's the Instruction regarding intentional infliction of emotional distress. And I just want to say again that as you look at paragraph number one: The outrageous conduct in this case must be toward the Campbells.

Not someone in Colorado, not someone in California or Illinois.

If you look at Instruction 39, it speaks in terms of what conduct can be considered outrageous or intolerable. It's got to be conduct that is so extreme to exceed all bounds of what is usually tolerated in a civilized community. Conduct which is merely unreasonable or offensive is not considered sufficiently outrageous.

But the jury in October and November of last year found it was unreasonable conduct by State Farm. And that isn't standing alone. Finding sufficient to say that there was intentional infliction of emotional distress. And one of the things that was mentioned with respect to intentional infliction of emotional distress was the comment that Mr. Campbell claims Wendell Bennett made right after the trial, words to the effect: Put a [174] for-sale sign on the farm.

Let me just suggest to you that that statement is totally inconsistent with everything else that was in the correspondence following that trial between Mr. Bennett and Mr. Hoggan or Mr. Jensen where he told them to work out an arrangement

with Mr. Slusher and the Ospitals that would protect the Campbells from losing any of their property. And I think you will recall some of those letters that Mrs. Bennett wrote. And I believe Mr. Campbell testified that it was his understanding that Mr. Bennett had a conflict of interest after that excess verdict came in and that was one of the reasons Mr. Campbell went to the Hoggan & Jensen firm, so that he could have independent counsel. And Mr. Bennett communicated with Mr. Hoggan and Mr. Jensen and there is nothing in those letters to suggest that he was telling Mr. Campbell he ought to sell his home, rather he wanted them to work out an arrangement, an arrangement to, in effect, make an agreement with Slusher and the Ospitals that would allow a lawsuit to be filed against State Farm.

And yet the plaintiffs' position is that Mr. Bennett did everything he could to avoid any problems or any liability for State Farm, that he was telling Mr. Campbell through Mr. Campbell's own lawyer to make an [175] agreement so they could sue State Farm. And I'm going to get into the supersedeas bond a little bit later, but I do want to talk about that one comment.

Mr. Jensen, Miles Jensen one of the lawyers up in Logan, when he testified here in court, testified that Mr. Bennett never said anything like that to him, selling the property, telling them to put up a for-sale sign on his home. And Mr. Jensen testified contrary to his deposition when he came in here in court he said that Mr. Campbell had told about him that statement, but in his deposition he said he hadn't, or he couldn't remember, I should say.

So we have got a very definite dispute there of facts, and of course Mr. Bennett absolutely denies that he made that kind of a comment in the context that is being claimed.

You are going to be asked, with respect to the fraud issue -- other counsel, Mr. Christensen and Mr. Belnap have

gone over this in some detail, but I want to just talk about one part of this. If you look at Instruction 47 -- I'm sorry. That's not the right one. Instruction 39, that talks about fraud. No, that's wrong, too.

Okay. Twenty-nine. One of the nine requirements -- and in fact the last one is that the [176] alleged misrepresentation or nondisclosure caused economic or pecuniary injury or damage.

Now, what I think is important to remember here is that the main issue that the plaintiffs have presented here, they have talked about this, that Mr. Campbell, none of this would have ever happened if State Farm would have settled, and that they misrepresented to Mr. Campbell what the facts were or they should have told him to get a lawyer, and so forth. But when you talk about causation you need to keep in mind at this point -- and I'm not trying to be obscure, but I think it's an important point to keep in mind, and that is the person claiming fraud has to be able to show that if it hadn't been for that fraud, he could have taken some action or done something that would have changed the outcome.

For example, if you were buying a house and you thought you were getting some water rights with it, and you were told that you were, and it turned out that they weren't there, you could always claim that if I had known they weren't there I wouldn't have signed the contract. But in the third-party bodily-injury context this is a little bit different because, as plaintiffs have pointed out, there is a fiduciary duty owed by the insurance company, and that fiduciary duty arises because the insured Mr. Campbell gives up his right to control [177] settlement. And the insurance company controls that.

And so the implication here is that if Mr. Campbell had made a demand for settlement or if he had a lawyer who made a demand, that State Farm would have had an obligation or a legal duty to have settled. And I just point that out to you that

they do not have that obligation. If they did, then there wouldn't be, probably wouldn't be a fiduciary duty. So you can't have it both ways.

And I would ask that you keep that in mind with respect to the fraud causation question.

Now, you're going to be asked some questions in the special verdict, and I want to go over some questions first here that I think the evidence is undisputed on, some of the damage questions.

How much property did Curtis and Inez Campbell lose because of the excess judgement? The answer to that is none.

The next question: How much of their own money did Curtis and Inez Campbell pay to Slusher and Ospitals to satisfy the excess judgments? The answer again is zero.

The next question: How much of its money did State Farm pay to satisfy the excess judgments? We have that here on that board that you have seen before. To [178] Mr. Slusher a total of $226,000, -- $226,168. To the Ospitals, $88,119.

And as you know that's everything the jury awarded plus interest plus costs.

Under jury Instruction number 57 the court has instructed you that Utah law does not allow a cause of action for breach of the duty of good faith and fair dealing and there is no fiduciary duty of any kind imposed upon an insurance company such as State Farm to a third-party claimant such as Mr. Slusher and the Ospitals, and that any damages awarded here to the Campbells cannot be based on damages that Mr. Slusher or the Ospitals claimed to have suffered in the Cache County case because they have been totally and fully compensated for those damages.

But there an interesting additional point to that, and that is -- and it's a little bit different, in my view, than what Mr. Humpherys told when he said this is the Campbells' case. He started out -- well, you will recall that Mr. Campbell made an agreement with Mr. Slusher and the Ospitals back in

December of 1984, is when it was signed. And under this agreement, any bad-faith damages that are awarded to Mr. Campbell, not just his under this agreement; he gets 10 percent under this agreement. Mr. Slusher gets 45 percent, and the [179] Ospitals get 45 percent. They have a real interest in this even though they have no right of action against State Farm, and are paid in full for all the damages awarded. And they control or they have a voice in any resolution in this case under the terms of that agreement. Mr. Campbell cannot resolve it without their consent.

Let's go to the next question, and I have already talked about this a little bit. How much money has Curtis Campbell paid in out-of-pocket expenses because of the excess judgements? I already wrote that up, I put it the -- $911.25.

Did Curtis and Inez Campbell declare bankruptcy because of the excess judgments? No. In fact, nobody even ever tried to take any of their property away from them.

You will recall I asked Mr. Hoggan, who was an early witness in this case -- I think he was about the third witness in this case. And I thought he was a very -- well, you remember he had white hair and he was the lawyer from up in Logan who represented Mr. Campbell along with Mr. Jensen. And he talked about the fact that the entry of a verdict by a jury against someone does not automatically trigger the taking of any property. And he told you a little bit about that. First you have got to [180] have a judgement entered. After a judgement is entered, the creditor has to go through the procedure to get a writ of execution or a writ of garnishment, a sheriff's sale. All those things have to happen before anybody's property is taken. And he made it very clear that none of those things ever happened to Mr. Campbell or Mrs. Campbell; none of those procedures even started, were ever even started.

Let me ask the next question here, and this goes more to the claim of the damages, the compensatory damages that the Campbells have been making, and I'm going to talk a little more about that as we go along. But first off were Curtis Campbell and Inez Campbell diagnosed with any medical problems due to the excess judgments? Well, there's no evidence of that in this case at all. In fact the plaintiffs haven't submitted any medical evidence whatsoever. No doctors have come in to testify, no medical records were put into evidence, although we heard today about mental instability or emotional instability and depression. There is absolutely no medical diagnosis in evidence at all.

Along that same line, how much medical expenses did Curtis and Inez Campbell incur because of the excess judgments? Zero.

Sometimes when people are claiming to have [181] physical or emotional or mental problems of a severe nature you expect some kind of medical care to be involved. But not here.

Now, the next question I have here is how much money would Ospitals and Slusher have received if State Farm had settled before trial? And the answer is, as you well know, $25,000 each. Now, they said they were willing to take that right up pretty much to the last day of the trial.

How much money did Ospitals and Slusher receive because State Farm did not settle before trial? And I won't write that again, but it's right here. And because of their interest in that agreement, the question is how much more money are Ospitals and Slusher now asking for? And finally, the question is why?

There has been a lot of talk in this closing argument about trust, about violating trust. There has been talk about how you ought to award damages for intentional infliction of emotional distress and for fraud and for punitive damages because this

Campbell case was a no-brainer. Remember hearing that? This is one that everybody, anybody who knows anything, could see Campbell was going to lose and Ospital was going to win. I would like to read to you from Defendant's Exhibit 118-D, a September 27, 1982 letter from Mr. Humpherys to [182] Mr. Ospital where he is talking about the fact that a wrongful death claim is going to be filed. And the second paragraph says:

> "This will also confirm our conversations wherein you indicated a desire to file a wrongful death action primarily for the purpose of assisting the defense of a Slusher claim. Nevertheless, we will attempt to recover other damages that you are entitled to under the law. As I explained this is not a clear case, and we may not be successful in the wrongful death claim. Nevertheless, there is a fair chance we may succeed, which together with the strategical benefits in the defense makes the wrongful death claim worth bringing."

Does that sounds like a no-brainer? Was State Farm acting outrageously when it felt that case was defensible?

Mr. Hoggan was an interesting witness because he came to this somewhat after the fact, after the verdict came in, but it was just two days after. And there was a suggestion in the plaintiffs' closing argument that we were playing word games, that is I guess that I was playing word games with Mr. Hoggan's testimony [183] regarding the September 29th, 1987 letter that he sent.

And you will remember that was the letter that talked about State Farm -- let me put it up here. This is the letter from Mr. Hoggan to Mr. Bennett. If you look down at the bottom paragraph of that letter on the first page he says:

> "This letter is to advise that State Farm insurance company through you of the foregoing and also that our client looks to State Farm for payment of these judgments in full, that Mr. Campbell considers it the duty of State Farm to take all steps which can be taken to set aside the judgement to attempt to have the matter retried if there are facts and the basis upon which to do so."

Now, Mr. Hoggan testified that that was a true statement, that Mr. Campbell wanted State Farm to try to get the judge in Logan overturn that jury verdict so the case could be retried. That was what he wanted, and that's what he told State Farm to do, and yet now the argument that is being presented to you is that Mr. Campbell absolutely, positively never wanted that case tried if there was any risk, if there was any adverse evidence.

Well, by this point in time he had heard all [184] the adverse evidence, he had gone through a trial, and he had lost; and yet he was telling his attorney, his own attorney, to demand that State Farm try to get that reversed and have a new trial.

Now, if we go on and read this further he says:

> "And further that it remains the responsibility now that Mr. Campbells' defense has been undertaken by State Farm to pursue any avenues of appeal which may reasonably be made under the circumstances. This duty is not the duty so far as we can see of our clients, but is the duty of State Farm Insurance Company, particularly with their refusal and failure to settle the case within liability limits, when such can easily have been done."

Now, we go down to the second-to-the-last paragraph where he says:

> "We submit that State Farm did not exercise good faith and did not take due care so far as their policy holders' interests are concerned. If for any reason State Farm fails to fully follow through on the matter to its conclusion, and if an ultimate decision is adverse to pay the same in full we would look [185] to State Farm not only for payment in full of the judgement, but for substantial punitive damages."

Now, I want to show you what Mr. Hoggan said about that letter, what that meant. This is his testimony in this courtroom, starting on line 15. And he even thought I was mischaracterizing it, I guess.

> "Well, maybe it's a distinction without substance. What the letter says, and it speaks for itself, and you haven't characterized it there exactly the way it is in the letter. What the letter says is 'try and get the judgements set aside, the verdict. If you're not successful, appeal it. If you're not successful, pay the judgement. If you do that, that's the end of the case.
>
> I say, "Okay."
>
> "Answer: According to that letter.
>
> And then I say: "Now let me ask you this. Did State Farm try to get the verdict set aside and get a new trial for Mr. Campbell?
>
> "Answer: I believe they did, yes.
>
> "Question: So that one got done, is [186] that right? Did State Farm appeal the judgments?
>
> "Answer: Yes.

"Question: And the appeal was not successful for Mr. Campbell, correct?

"Answer: That's correct.

"Question: And after that had been done, did State Farm pay the judgements in full, Mr. Hoggan?

"Answer: I'm informed that they did, yes.

"Question: So State Farm did all three things that you asked them to do, is that correct?

"Answer: Eventually they apparently did that, yes.

"Question: Okay. And they did it in the order that you told them to do also, correct?

"Answer: Yes. There's no other order you could do it in.

"Question: That's right. Did that end the matter?

"Answer: No.

"Question: So State Farm did all [187] three things that you demanded they do on behalf of Mr. Campbell, but Mr. Campbell still looked to State Farm for substantial punitive damages; isn't that true?

"Answer: That's correct.

"Question: Did you ever retract the things that you said in this letter to Mr. Bennett, tell him that you didn't want State Farm to do these three things?

"Answer: No."

So we had a letter from Mr. Hoggan, the lawyer who represented Mr. Campbell, his personal attorney, who told State Farm through Mr. Bennett: This is what you have to do, if you do these three things, that's the end of the case.

State Farm did those three things, but that didn't end the case. What happened was we ended up getting sued for substantial punitive damages again, even though everything was done that was required.

Now, whose trust was violated?

I want to talk for a minute about the supersedeas bond issue. During the course of the trial, I think fairly late along in the trial, some questions were asked by plaintiffs' counsel to the effect that if a supersedeas bond had been put up on the entire judgement, this case never would have happened. And I found that to [188] be a very interesting comment, because I asked Mr. Jensen if he was testifying that -- was he saying that if there had been a supersedeas bond, did that mean there never would have been a December '84 agreement, and he said no.

He thought State Farm should have done a lot of other things, I will acknowledge that, and sooner. But he didn't say that with a supersedeas bond there never would have been an agreement. And what's been represented here is that what a supersedeas bond does is that it commits the defendant or State Farm, the insurer, to pay the judgments if they are affirmed on appeal.

Now, State Farm didn't put up a supersedeas bond for the full amount, and Mr. Belnap has explained to you that that situation has evolved and in these later cases that either happened or payment has been made and an agreement has been made and State Farm has changed the approach.

But Mr. Stevenson testified he didn't have any experience with supersedeas bonds. He hadn't ever had this issue come up before. And I guess you could criticize for not knowing the exact perfect thing to do. But it is somewhat inconsistent for the plaintiffs to say if State Farm had put up a supersedeas bond we would never have this lawsuit or never have this agreement when [189] the point of a supersedeas bond is to commit to pay

the judgement in full if affirmed on appeal. And State Farm did that. They made that unequivocal commitment in August of 1986, almost 3 years before the appeal decision came down, and yet plaintiffs still pursued their action a month later.

Now, there has been such criticism that it took five and a half years before the judgement was paid. Well, the reason for that was because the appeal wasn't decided for five and a half years, and Mr. Hoggan had demanded that State Farm appeal the case. And in fact, as I read to you, he said it was their duty, their obligation to appeal and to see that appeal through.

You can't see an appeal through if you pay the judgement before it gets to a decision. And I don't think even the plaintiffs would blame State Farm for the backlog of the Supreme Court back in that time frame.

Now, with respect to the supersedeas bound there is an important letter that was sent by Mr. Hoggan to Mr. Bennett, Exhibit 105-D, and it's dated December 6, 1983. I think that's the day after the amended judgement was entered in favor of the Ospitals and about a week after the judgement was entered in favor of Mr. Slusher.

Mr. Hoggan says this -- I'm sorry. This is a different letter. It's a December 23rd letter that I [190] ways referring to and in this letter, Exhibit 98-D, in this letter Mr. Hoggan tells Mr. Bennett that the Ospitals' counsel and Mr. Slusher's counsel and Mr. Hoggan and Mr. Campbell and Mr. Jensen are going to have a meeting the first part of 1984 to discuss whether or not they can get, for Mr. Campbell, assurance that no execution will be taken on his property. And then Mr. Hoggan says this:

> "Under these circumstances, I believe that we could only make a final determination as to the need of the supersedeas bond after that meeting,

> or as soon as we are able to obtain some type of a commitment from them as to their willingness to withhold execution pending appeal."

So Mr. Hoggan is telling Mr. Bennett right there: We don't know if we're going to need a supersedeas bond. We have got to wait and see what happens at this meeting.

And as the evidence unfolded we know that the parties in substance agreed that there would not be any execution. There were written assurances given in December of 1983 that prior to this meeting being held neither of the plaintiffs would attempt to execute on Mr. Campbell's property. Those came from Mr. Barrett's [191] partner, Mr. Brady. And Mr. Jensen said he had those assurances, he notified Mr. Campbell of that, that there was no -- that he had assurances that no execution would be attempted. Mr. and Mrs. Ospital and Mr. Slusher, all three of them, testified in this court in this case that they had all reached the decision that they would make an agreement and not execute on Mr. Campbells property, and that they had reached that agreement in principle as of January 1984.

Now, the actual agreement wasn't reduced to writing and signed until December, but in principle that agreement was reached. That was affirmed again in a letter from Mr. Barrett, in March of 1984, to Mr. Hoggan or Mr. Jensen where again they said: Rest assured so long as we're working out this agreement no attempt will be made to execute on Mr. Campbell's property.

And a copy of that was sent by Mr. Jensen to Mr. Campbell.

So he was aware, and Mr. Campbell himself testified -- and this was read into the record here. The question was:

> "Now, after the trial and between say September 20, '83, when the jury verdict came down and the end of that year, were you aware of the fact that there was any [192] discussion going

> on between your lawyers Hoggan and Jensen and Mr. Humpherys and Mr. Barrett about your assigning any kind of a claim you might have for bad faith refusal to settle against State Farm, the Ospitals and Slusher? You were aware of that, any discussions like that?
>
> "Answer: Yes.
>
> "Question: And if you did assign any claim for bad faith that you had, what did you expect to get in return?
>
> "I expected to get relief from those judgements posted against me.
>
> "You expected that if you were to assign you claim for bad faith against State Farm to Slusher and Ospital, that they in turn would agree not to try to enforce collection of the judgement against you from your personal assets?
>
> "Right. That's correct."

And then he goes on to make clear that by the time he was leaving that meeting, or as of late 1983 or early 1984, he had the feeling that Slusher and the Ospitals were going to leave him personally alone until they had had an opportunity to see if they could get an [193] agreement finalized.

And his answer is: "Right. That's how I felt."

Now, I ask you to consider the proposition that is put forth here by the plaintiffs that Mr. and Mrs. Campbell had severe fear or emotional distress because of the fear that their property was going to be taken in light of this evidence. We have letters telling them nothing will be done until an agreement can be reached or it's concluded that it cannot be reached. We have Mr. Campbell attending a meeting and testifying under oath that his understanding was that nothing

would be done to his property so long as they were working towards an agreement. That same letter again comes a couple of months later in March of 1984. We have counsel meeting with Mr. Campbell and explaining the situation to him. And we have one other very important bit of information, and that is what led up to the ultimate agreement.

Mr. Belnap showed you a copy of this letter, from Mr. Barrett to Mr. Humpherys in December of 1982, the one where he says Summers came and told him about their disagreement, and so forth. And after that letter we have a series of letters between Mr. Barrett and Mr. Humpherys where the possibility of bad faith is [194] discussed.

Mr. Barrett writes back to Mr. Humpherys in January 1983 saying: I haven't heard from you about my proposition to depose the State Farm adjustor. And then February 8th of 1983 Mr. Humpherys writes back to Mr. Barrett and says: Before this action, in other words before a bad-faith action could be filed against State Farm we would have to obtain a judgement against the Campbells which judgement would exceed his policy limits, we then obtain an assignment of all claims for Mr. Campbell in turn for agreement not to execute against him personally. And we then bring a bad-faith action against State Farm.

Now, that was what they were discussing about seven months before this case went to trial. And in light of the court's jury instruction you understand that as matter of law Mr. Slusher and the Ospitals could not bring a bad-faith action directly against State Farm. They can't do it. So how are they going to do this? We go a little further and we come to Mr. Barrett's letter, of May 16th, 1983 to Mr. Humpherys confirming the settlement between Slusher and the Ospitals of $65,000. And then he says in the second paragraph:

> "You will prepare the necessary documents setting forth the arrangements for [195] how the claim against Mr. Campbell should be pursued, particularly if the case is not settled and it is necessary to bring a bad-faith action against Campbell's insurer."

So they confirm that again and then in June of 1983, couple of weeks later, the agreement is signed on June 3rd, 1983, where Slusher, the Ospitals, their counsel and Allstate agree down here in paragraph three that they're going to assist in prosecuting a claim for bad faith against any insurer of the responsible party. And then you get down to paragraph four and they set out how this is going to happen, how this is going to work. And when you go over to paragraph four on page two they talk about splitting up the excess recovery half and half with respect to any general and punitive damages recovered in a bad-faith claim.

Now, this is an agreement, ladies and gentlemen of the jury, a contract, I guess you could call it, whereby Ospital and the Slushers agreed to pursue a bad-faith action against State Farm, which they couldn't pursue without Mr. Campbell giving them some kind of cooperation because by law they can't pursue it.

And Mr. Nebeker testified that in his opinion it was highly unlikely that any such claim could be pursued or the cooperation of Mr. Campbell could be [196] obtained if Mr. Slusher and the Ospitals executed and took Mr. Campbell's property to try and satisfy their judgment.

And so what we have is a situation where the evidence shows that even before trial there was an agreement to pursue a bad-faith action by parties who can't pursue it without Campbell helping them. And I submit to you that for that agreement to be carried out, no execution could be pursued and there was no intent to ever do that.

And as you look at what happened within just a few weeks after the judgments were entered in late November and early -- the amended judgement in early December, no attempts were made to execute. And the entire time was spent trying to work out a way to make an agreement that would allow that to happen.

So I submit to you that with respect to the damages being claimed by the Campbells, or fear that their property was going to be lost, that their entire, everything they worked for was going to be lost is simply not borne out by the actual evidence in this case.

And if Mr. Campbell or Mrs. Campbell really thought that might happen, then there was a definite miscommunication of what was going on. They had their own independent counsel. Mr. Campbell had gone to [197] Mr. Hoggan and Mr. Jensen to get legal advice. Hoggan was in contact, Jensen was in contact with the lawyers for Ospitals and Slusher. If there was any misunderstanding about what the intent was, it was not State Farm's doing.

Now, there was some discussion in that regard about the desire by the Ospitals for closure in this matter. They felt strongly that they wanted to vindicate their son to prove he was not at fault for this accident. And they both testified here and made that point, that that was important to them.

But it's also been said that they wanted closure in this matter. And although they did not view the settlement by Allstate and Farmers of $65,000 to Mr. Slusher as any kind of an admission of fault on the part of their son, Mrs. Ospital testified that she thought if State Farm had paid the policy limits that would have been an indication or admission in her mind of fault by Mr. Campbell.

But in any event they said they wanted closure. And closure for them and for Mr. Slusher could have been settlement before trial; that's one option. They were willing to accept $25,000 right up until the last day of trial, apparently up until the time

the jury came in; but after the jury came in closure did not mean taking [198] $25,000. And it didn't mean -- apparently closure didn't mean getting paid 88,000 and $226,000 either. Closure was in their control once these judgments were paid in full, if they wanted it.

I want to talk for a minute about the claims, the other claims of general damages.

THE COURT: Mr. Schultz, would this be a good time to stand up and take a stretch break?

MR. SCHULTZ: Sure. That's fine.

(Stretch break.)

THE COURT: We'll resume our seats.

MR. SCHULTZ: One of the jury instructions that the court gave you -- and I hope I can find this one. Okay. It's number 54 -- says:

> "You should not award damages for the disappointment, frustration or anxiety the plaintiffs experienced as a result of the fact that the jury in the Cache County lawsuit choose not to accept plaintiffs' version of the accident."

And as you think about part of the concern that the Campbells have expressed from the witness stand, it was that the jury didn't believe the truth. I think that's the way Mrs. Campbell -- I'm paraphrasing, but when she talked about having heard Mr. Slusher's deposition [199] testimony about him claiming Curtis Campbell passed six cars at the time, six vans at a time, she said: It was just a lie so I didn't worry about it.

Mr. Campbell adamantly to this day still says he did nothing wrong.

Mr. Campbell's brother Don testified that one of the things that really upset Mr. Campbell was that the jury didn't accept his version; the jury found him at fault when he thought he wasn't. And that is not something you can award

damages for; the fact that they were disappointed and frustrated and had anxiety because the jury don't believe their version of the facts.

Another thing, Instruction Number 55: Plaintiffs do not claim that Mr. Campbell's Parkinson's disease was caused by or permanently aggravated by emotional stress, if any, resulting from State Farm's conduct. And they are not claiming any damages from that.

But I suspect that having to live with that disease does create some emotional stress for Mr. Campbell, and I suspect that taking care of Mr. Campbell because he has that disease creates a little stress for Mrs. Campbell. I suspect there are other things in their lives separate and apart from this lawsuit that occurred in 1983 that has caused them some [200] stress in their life.

There has been discussions suggesting that, well, how could anyone ever question -- how could anyone question that there was severe emotional distress. Well, that's an easy thing to say, but you're the ones that have to judge that. And you have to judge it on the basis of the facts and not on the basis of passion or prejudice. And we have to look at these facts and we have to evaluate them and analyze them, without passion, to decide if that standard has been met.

Plaintiffs have made the point of saying that Mr. Campbell has been through a lot of stressful experiences in his life, and that's true and there's no question about it. And I don't question that in the least. He has had the unfortunate circumstance of losing two of his wives, of having one wife leave him. Those are very stressful circumstances, no doubt about it. He had a stroke. He has Parkinson's disease. Those things could create stress. But they're not related to this accident.

They are suggesting to you, I guess, that Mr. Campbell made it through all of those very stressful events in his life and he went on, but the fact that this case wasn't settled is

somehow totally different and apart in measure from those other events, and that [201] constitutes severe distress. And I submit to you that you have to look at this very critically.

Now, one other important jury instruction that I don't want to forget mentioning is Number 58, because there may be some confusion about this and I want to start out with the second part of this because it's a little easier to understand, I think.

The court in this case has already ruled as a matter of law that the plaintiffs are not entitled to any damages for emotional distress or anxiety associated with or resulting from the prosecution of this lawsuit that we're here dealing with.

So it would be improper for you to think that Mr. or Mrs. Campbell was entitled to any kind of damages for emotional distress or anxiety simply because this lawsuit has been prosecuted and it has taken a number of years to get to this point. As a matter of law they are not entitled to any damages for that.

The first paragraph says -- and again that is a rule by the court -- that plaintiffs cannot recover any damages for emotional distress or anxiety that arose after December 6, 1984 when the plaintiffs finalized the agreement with Slusher and Ospitals and the Ospitals and Slusher promised not to execute to collect the excess judgements. Now there is a proviso on that and that is [202] if the plaintiffs have proven that there was a condition that developed or preexisting condition that was aggravated after the date of the verdicts but before December 6th due to emotional distress or anxiety, to the extent that the condition or aggravation continued after December 6th they could, that wouldn't be precluded. But that's a matter of proof for you to determine, and we would submit to you that given the assurances that Mr. Campbell received as early as December of '83 and January of '94 it was not realistic, and certainly by December 6th of

1984 it was not realistic or appropriate for any damages to be awarded for any kind of emotional distress associated with concerns for one's property because that was taken care of, and that concern was alleviated by that agreement. And the fact Mr. Campbell has pursued this action is not a compensable item of damage either.

Now, as we talk about punitive damages, one of the things that plaintiffs have brought out is the seven factors that were listed here on the board. And one of the things that was suggested was the lower the range of punitive damages the more the jury is telling State Farm is okay to keep doing this; quote, unquote, or words to that effect.

Now, what is it that State Farm -- I want to [203] talk about some things State Farm did, and I want you to ask yourself is this something that the plaintiffs want you to send a message on that State Farm shouldn't do any more? Do the plaintiffs not want State Farm to make a motion for a new trial as demanded by Mr. Cambell's counsel after the verdict? Do they want them to not follow his demands to appeal the case? Do they want them not to see that through as it was demanded it was their duty to do? And do they want them not to pay the judgement in full with interest and expenses as was demanded by Mr. Campbells counsel within a month after the judgments were affirmed?

I submit to you that those are good things. Those are things that State Farm did. They protected Mr. Campbell by pursuing that the way he wanted. And although the promise, the unequivocal promise probably could have been made earlier, the fact of the matter is Mr. Campbell and Mrs. Campbell never lost any property.

Do they want State Farm not to send out the peace-of-mind letters that Mr. Moskalski has determined will be done?

You know we're kind of in a bit of a catch-22 here because on one hand plaintiffs are saying State Farm has to change. So when we come in here and Mr. Moskalski says, well, here's a change we have made. He gets [204] criticized for that: Well, that's not a sincere change.

It's hard to know what to do, I guess.

That change with that peace-of-mind letter is a significant, substantial commitment made by this insurance company to all its insureds in bodily injury claims in this region. That means that they will protect, no matter what happens in a trial, their insureds and they will tell them that before the trial so long as the insureds agree to cooperate and there is a bona fide offer to settle.

And as Mr. Moskalski said, because of that peace-of-mind letter there will never be another Campbell case.

But even before that decision was made, the practice in these other excess cases was to work for an agreement to protect the insureds to post a bond or pay the judgement by a negotiated settlement.

Now, Mr. Humpherys used the worth "chiseling" a couple of times. And I guess in the plaintiffs' world it's chiseling if you try to negotiate settlement when you have a good-faith basis to defend yourself. But that's not what the law says. Even insurance companies, ladies and gentlemen, have a right to defend themselves in court, despite what the plaintiffs would have you believe.

[205] Is it chiseling, as Mr. Humpherys suggested, if you don't pay the full amount you think a claim is worth? Do you recall what Mr. Brinkman said about the settlement with Mr. Slusher on behalf of the Ospitals'? He said he thought the fair value in general damages was a hundred thousand dollars. He knew that there was a risk, and that's why he said they settled. Did they settle for a hundred thousand dollars? No. They settled for $65,000. Did Mr. Brinkman think that

was chiseling? Remember I asked him: When Mr. Barrett told you he would accept $65,000, did you call back and say, Mr. Barrett, you're not taking enough? And it took him two or three times to understand my question, and finally he said: of course not. We were adversaries.

One of the exhibits in this case -- and I forget the number of it. I believe it's 31, but I'm not positive. Yeah. This is the file that was produced from Mr. Humpherys with respect to the handling of the Ospital case. And in this file there is a note handwritten note from April 27th, 1983, conference with Bob and Celia. Celia was, I believe, an All State adjustor -- talks about concern about $50,000 authorization. Wants to explore tendering up to 80,000, 50,000 from Allstate and 30,00 from Farmers, plaintiff will give part of the excess back to us.

[206] Is that chiseling? Did Allstate ever offer 80,000 dollars? No. Just as Allstate made their decision and felt that they had paid fair value -- and I'm not criticizing them for what they did -- it's not fair to stand up here and claim that State Farm doesn't pay fair value just because somebody else thinks a case is worth more than State Farm decides it was worth.

Two more things I want to talk about, basically. That brings me to the question about statistics. And you realize statistics, these statistics don't help plaintiffs' case, obviously, so they must be all fraudulent, even though these numbers of B.I. lawsuits come from documents that were prepared beginning even before this accident happened and were prepared in the normal course of business every year for 15 years, from 1980 through 1994. And yet these documents, it is suggested to you, are prepared for some kind of self-serving fraudulent purpose. And I guess it's understandable why plaintiffs don't like these statistics because they belie some of their arguments.

But I want to talk for a minute about a set of statistics that I don't think plaintiffs dispute. They come from the Excess Liability Handbook and they put that up here -- I don't know how many times. From 1966 to 1972 State Farm kept track of how many excess bodily injury [207] verdicts had come in. And you recall there were some questions asked of Mr. Prader about that, and we used this number here, the nationwide bodily injury claims from 1980 through 1994 as sort of a guideline. And that works out to about 400,000 a year. And we said let's divide it in half. Let's say from '66 to '72 there were only half. Or we could divide it in half again, and let's say there was only a hundred thousand bodily-injury third-party claims during that time frame.

Now, we worked out those numbers and it turned out that there was about .0 -- I believe it was .018 of 1 percent of those claims that resulted in excess verdicts during that time frame.

And if you only used a hundred thousand cases a year it would be .037 of 1 percent resulted in excess claims.

Now, let me give you a hypothetical. Let's say you were a professional basketball player, and your foul shooting percentage was that you missed .037 of 1 percent of your shots, I doubt that the coach could kick you off for having a pattern and practice of missing foul shots. And if you had a son or daughter who you wanted to make sure they -- I don't know -- brush their teeth every day and over a 10-year period they missed .037 or 1 percent of those days, I doubt that you would take them out and [208] punish them severely. I doubt if you would tell them that they had to change their ways. And that's why these statistics have been criticized so much by the plaintiffs, because they don't support their theory. And Dr. Tolley told you, who has a lot of experience in analyzing statistics that what these statistics show is that State Farm is actually offering more than fair value 90 percent of the time if you judge it by what the jury verdict is.

And I won't review all of what he said. But I think it was pretty clear what the point was.

Now, the last thing I want to talk about is the items that Mr. Humpherys talked about with respect to general damages.

One of the things he talked about was loss of reputation in the community. Now, I don't think we have had a whole lot of testimony about that, frankly. As I recall Mr. Campbell's deposition that was read in, he talked about one man who he had some contact with, and then he didn't have a lot of contact about him while he was on his mission.

Don Campbell, Mr. Campbell's brother, said that Curtis Campbell's reputation wasn't worse today than it had been -- or hadn't been affected negatively because of this. In fact he said he has always had a good [209] reputation and it's still just as good now as it was before this.

In fact Mr. Don Campbell seemed kind of surprised when I asked him if Mr. Jensen ever told him that he thought Curtis' reputation was worse off now. He said Mr. Jensen never told him that.

One of the other things was emotional disability, and I already talked to you about the fact that there is no medical -- there has been no medical expense, there has been no doctor visits to establish that there was some kind of medical problem. What I want to mention in addition to that is Mr. and Mrs. Campbell went on two missions, went on a mission in 1981 -- excuse me they left in 1982, but they obtained physical examinations in 1981, November. And there is some questions on those.

This is Exhibit 163-D. This is Curtis Campbell's from November of 1981. There are some questions on here that were answered. He was asked if he has ever had treatment for emotional or mental stress, and the answer is no. And then the question is does he have any difficulty getting along with others? Rarely. A feeling that people are not fair? Rarely.

Loss of temper? Rarely. Overwhelming stresses and tensions at home? Never. Thoughts about suicide? Never. A feeling [210] of people don't under you? Rarely. Hopeless discouragement about school or work? Never. Hurt feelings? Rarely.

Now, that was in 1981, November. That's after the accident but before the trial.

Mrs. Campbell in November of 1981. No treatment for emotional or mental stress. Difficulty getting along with others? Rarely. Feeling that people are not fair? Rarely. Loss of temper. Rarely. Overwhelming stresses at home? Rarely. Thoughts of suicide? Never. And in addition to that, medication for high blood pressure. Almost two years before the verdicts and judgments came in in this case, Mrs. Campbell was receiving medication for high blood pressure.

They also went on missions in 1986. And I won't take the time, but those are exhibits here and essentially those questions were answered the same way in 1986 as they were in 1981.

Don Campbell testified they fulfilled that mission, Mr. Campbell wasn't in a wheelchair at that time. They filled it honorably. Yet today we were being told they were afraid to go out of the house because of depression and emotional disability, embarrassment and humiliation. I submit to you that simply the evidence [211] does not support this kind of wholesale demand for huge, huge damages in light of this evidence.

The special verdict form -- well, let me mention just one other thing. During the course of this trial, the defendant submitted evidence from some regulators from different parts of the states, and these regulators have been given the assignment, as you heard, to evaluate and to watch over the insurance industry and to look for patterns and practices. Now they don't get involved in everything in litigation, but they

were very specific in saying if there was a widespread nationwide pattern or practice of cheating and defrauding that that is something they would know about, somebody would know about that.

And the plaintiffs did not bring in a regulator of their own to dispute that.

The special verdict has several questions. Do you find from a preponderance of the evidence that the breach of the duty of good faith and fair dealing and the breach of the duty of fiduciary duty was a proximate cause of damages? And you probably will answer that yes, because there are some damages. But that does not mean that there is a basis for the kind of damages being requested here or for the punitive damages being asked for.

[212] The standards for those are not met, we submit. The standard for severe emotional distress or intentional inflection is not met. The standard for fraud is not met. And you can simply go through those first two questions to question seven and decide what general damages, if any, should be awarded. And as indicated, as we talked about at the beginning, it should be fair value, not unfair.

And I thank you very much.

THE COURT: Thank you, Mr. Schultz.

* * * *

EXCERPTS OF TRANSCRIPT OF PLAINTIFFS' CLOSING REBUTTAL: ROGER P. CHRISTENSEN, ESQ., JULY 31, 1996

[R. 10324, commencing at p. 213]

* * *

THE COURT: Back on the record. The jury is in the courtroom, the parties and counsel are present.

Mr. Christensen?

MR. CHRISTENSEN: I understand we have 20 minutes, which you will be grateful for. I think I have about three hours of notes.

[214] I'm sure after that long, this many trips through the evidence you can probably anticipate, without my having to rehash it, the responses to the issues that have been raised. I certainly had my notes to take you back through some of the eye-witnesses to the accident, Mr. Dahle's statements in private, Mr. Bennett's dictating a memo to himself that he had to get Mr. Dahle to quit saying Campbell was at fault, and I put those in my notes because of some of the things Mr. Belnap said about Mr. Dahle's testimony. I found places in Mr. Chipman's testimony where he said the guy driving the gray car caused the accident, even though Mr. Belnap refers to Chipman as someone giving favorable testimony to Mr. Campbell.

The bottom line, and I think you got the picture. If you don't after this many weeks -- it's probably not going to happen.

Anyway, there was a lot of evidence putting Campbell at risk. The issue was not was there a chance to win. I suppose in a lawsuit there is always that chance. The issue was they misrepresented the risks to Campbells, and there is no question that they did.

Now, there were some parts of jury instructions read, the fraud instruction, which is instruction 29, the words "malicious, willful" were used. Let me make sure [215] we don't have confusion on that.

Number four talks about a representation or nondisclosure made intentionally or with reckless disregard or indifference of the truth or falsity.

It's important to know that either one of those meets that standard. And the punitive damage instruction, 59, which is really the one I intended to cover, does use "willful and malicious" in part of it. And Mr. Humpherys explained malicious doesn't mean that literally in law, doesn't mean you hate somebody. It goes to say: "Or such conduct was done with a knowing and reckless indifference toward and disregard of the Campbells' right and well-being."

I don't know how else to put it. I call that the you just-don't-give-a-damn standard, didn't care about Campbells' rights and well-being. And I submit that's exactly what you've got here. The evidence is rampant.

Now, there was again an effort by State Farm to distance themselves from Mr. Summers, their own employee assigned to this file. I mentioned the Gitten case this morning, and I looked at this case out of the Cache County court, the Bear case. They claim some discovering Mr. Summers' falsifications of documents in September of '81. And we have here in the Bear versus Christofferson [216] file, Mr. Bennett on behalf of State Farm filing a motion to try to enforce a release Summers got, and the motion is March of '82. The next year.

With an affidavit in the file, a sworn statement, by Mrs. Bear saying that I was decided by Summers into signing this release. And yet both Wendell Bennett and State Farm were enforcing it months after they discovered the dishonesty.

We presented a great deal of evidence to you that State Farm was happy to take advantage of Summers' dishonesty whenever it fit their purposes.

Let me move quickly. They claim that Mr. Bennett's comment "sell your home" is inconsistent. I read you this morning part of a letter from Bennett where he said that's exactly what you're going to have to do, is put up your home as a bond on appeal if you can't cut a deal.

Let me, as far as the causation argument, there is no question if State Farm had been honest with Campbell, the case would have been settled. Of if any one of their following people, Summers, Noxon, Brown, or Bennett, if any one of them had been honest with Campbell the case would have settled. And I think it's that simple.

I want to talk about -- I guess it's gone. [217] Mr. Schultz pointed out that the Campbells hadn't lost their home, hadn't taken out bankruptcy. Guess why?

It's because they were forced to sign this agreement as an alternative. They can't have it both ways. They can't criticize the agreement and the reasons we're here today in one breath and suggest that it's improper and inappropriate in the other breath to reap the full benefits of the agreement. If Campbell hadn't signed this he would have lost his home. He would have taken out bankruptcy.

You're entitled to consider the harm that would have been caused if this matter had stayed on the course State Farm put it on. The reason that Campbells didn't lose their home is in part because Mr. Humpherys played a key role in bringing the parties together.

There have been a number of snide remarks and comments made about plaintiffs' lawyers, Mr. Humpherys in particular, and that should not be overlooked. That the terrible injustice was avoided in this case in part because of the role he played.

And guess why Slushers and Ospital got paid in full with interest and costs. Because they had, by that point, some people willing to stand behind them so that they didn't have to take less.

Mr. Schultz went through the Hoggan letter and [218] completely ignored Hoggan's testimony that he did not have in mind when he wrote that letter that they would take care of it years later. He totally ignored Jensen and Hoggan's testimony about their frustration that State Farm wouldn't protect Campbell, they wouldn't put up the bonds. He ignored letters and notes of phone conversations where they requested Campbells put up the bonds. He tried to use as proof a physical exam filled out in '86 that the Campbells didn't experience emotional distress in '83 and '84 while their property was at risk.

Now, they made a big deal of the fact that Campbell had to assign his rights. As you will recall, Mr. Roberts, one of the prominent attorneys in town, said he believed that you could probably take those as part of seizing the other assets.

Mr. Schultz said the Ospitals could have closure if they wanted it. State Farm wants people to want closure. Once they're worn down is when the good deals come along.

Mr. Moskalski, and they said we question his sincerity. You're darn right we do. I took his deposition just a few weeks before this trial, April 26th. He said -- State Farm had done nothing wrong in handling the Campbell case, nobody involved had done anything wrong, nothing was against policy. He also, in [219] that deposition and in this trial, has denied knowing anything about Janet Kamak coming to Utah, an in-house attorney who works directly under him. She and him both came from Texas. When she came and instructed the destruction of the documents in evidence. And you have seen that memo enough times; you've probably got it memorized. Samantha Bird said Janet Kamak said

Mr. Moskalski had sent her over, and this was the instruction they had to produce documents in a bad-faith case in Texas and he wanted them to get rid of them. Mr. Moskalski denied knowing anything about that, in fact claimed he hadn't even heard anything about that until years later. And he hadn't seen the documents until we showed them to him.

You're darn right we question his sincerity.

Mr. Humpherys needed me to cover a technicality that may be significant. Mr. Belnap indicated Mrs. Campbell was not insured on the policy. And on page four of the policy, which is part of Exhibit four, it defines insured to include a spouse. So that should put that to bed.

MR. BELNAP: That wasn't what I said. I said --

MR. HUMPHREYS: Can we not have speeches in the middle argument?

MR. BELNAP: That misrepresents what I said, [220] your honor. The policy was taken out by Mr. Campbell.

THE COURT: The jury heard him.

MR. CHRISTENSEN: Mr. Belnap said Mrs. Campbell wasn't at the meetings. That's not true. She testified about what she heard at the meetings. It's possible she wasn't to every one of them, but she certainly heard the representations.

Mr. Fye is criticized for saving State Farm documents. I would simply say this: They're certainly a lot safer in his hands than Mr. Cochran's. And the truth wouldn't come out if somebody didn't have these documents. Over and over again we have seen the truth come out through the documents when the witness was giving self-serving testimony.

And I would like to conclude with saying one of the most impressive things to me in this case, and I don't mean that in a positive way, I mean it in a negative way. Is the wide variety of people State Farm was able to get to come to this court and say things that obviously weren't true.

Early in the case you heard our witnesses talk about the dishonesty. I would submit to you that the most powerful evidence you have of dishonesty may have come through their case when you got to see it firsthand from their witnesses. Over and over again witnesses came [221] in and said things that weren't true, and said things that they had obviously been programmed to say. I don't think you can have more powerful evidence than that.

You have heard evidence through Ina DeLong State Farm knows that only one in thousands of people that are mistreated will ever get to where we are today. They count on that. They take it to the bank.

Even when they're found to owe them money, the evidence is they don't pay it or they don't pay at all. If you look what it has taken for the Campbells, and more importantly for this message to make it this far to you after all those years, and I have to say that -- I don't want to sound self-serving after I criticized that, and I hope this won't -- but the criticism about plaintiff's lawyers failed to mention all the years of no pay and the burdens that that puts on a firm and the people involved, the enormous expenses. It's not surprising very, very few people make it this far in this kind of a case. This is a chance for the Campbells to make a difference in how people are treated, not only by State Farm, but by other insurance companies.

It's the one opportunity you have to have a voice in this. Within a few days you will be ordinary citizens again. Whether you like it or not, your verdict is going to send a message. It will either send a [222] message to what State Farm has been doing and the way it has been treating people like the Cambells is okay and State Farm and others are free to pursue that course and continue to reap the profits from it, or you're going to send a message it needs to stop. But the

message is going out one way or the other, and that message has to be sent in dollars. That's the only language they understand.

We appreciate -- although it hasn't been completely voluntarily we still appreciate your great service your attentiveness. I'm not sure I've had a jury -- I have never had a trial nearly of this length. Even in my shorter trials I've had much less attentive juries. I think you have sensed the importance of this case.

I'm sorry. When I get very tired, I embarrass myself.

Anyway, let me simply conclude by saying we felt a tremendous burden to carry this are message in this case to have it heard, to have the story told, and we now feel like we're passing responsibility to you, and we're comfortable with that. We have every confidence you will do the right thing. And again we thank you for letting us steal your summer, and on behalf of ourselves and our clients we look forward to your verdict. Thank [223] you.

* * * *

EXCERPTS OF TRANSCRIPT OF PLAINTIFFS' CLOSING REBUTTAL: L. RICH HUMPHERYS, ESQ., JULY 31, 1996

[R. 10324, commencing at p. 223]

* * *

MR. HUMPHERYS: Your Honor, there are five minutes left and I was going to take five minutes and answer a couple of questions.

There was a representation made by Mr. Belnap that average paid claims continued to rise. I would like to show you from Exhibit 58, I believe, the Auto Administrative Report, and this is something you have not seen. Bate stamp 08717 under the heading of severity. This is a company-wide document. I would like you to see here the two categories, severity and frequency. Frequency is how they compute the number of claims company wide. Here they being compute the average pay. I want you to look at some of these. Under B.I., which is the coverage we have been talking about, they went down from '92 to '93 the average paid claims reduced.

Medical, you look at the same years and they went down. In U.M., look at the same years and they went down. Look in the coverage of D&D, they went down. Look in the coverage of P.P.P., they went down. Look in the comp coverage, they went down. It is simply not true.

And when you factor in inflation and when you factor in the fact that policy limits are going up by law, they have to go up. The average paid has to go up, but they are still not paying fair value as their own [224] documents show.

MR. BELNAP: That's a misrepresentation of this document. Mr. Humpherys knows it.

MR. HUMPHERYS: That is not true.

MR. BELNAP: It is a compilation. The pages from this have to be compiled in all the coverages to come to that.

MR. HUMPHERYS: Your Honor, this is inappropriate. It's their document and a company-wide summary of severity.

MR. BELNAP: We have sat down with him, Your Honor, and we have gone over that. And those pages have to be compiled together. They take the auto company, the standard, and the other companies together and that's --

MR. HUMPHERYS: Maybe we can resolve this. I will represent to the court and to the jury that these figures represent State Farm Mutual Automobile Insurance Company and not the other companies that do auto insurance. That should correct that, the concern he has. And that's what Exhibit 58 is.

All right. Now, with that out of the way I would like to cover a couple more points on Summers' testimony -- well, I won't write it down.

What did Summers say he put on his report? Report? That Campbell was at fault. What did State [225] Farm put on their report? That Campbell was definitely not at fault. They're saying that Summers lied.

Let me ask you this one question. Which opinion, Summers' or State Farm's is consistent with the verdict in Logan? Which opinion is consistent with the jury last October? Summers'. Summers knew there was fault on Campbell.

I want there to be no question that Curtis Campbell, Inez Campbell, John Ospital, Winifred Ospital, and Bob Slusher stand united in this case against State Farm. There is no doubt. Inez's claim is separate from Curtis'. Hers is not subject to that agreement. She could dismiss it any time she desired.

All of them feel that an injustice has been done and that this must be opened, exposed, and presented, that there is no disunity in, despite how they think personally, feel about one another.

Now, counsel put up three times specials as an indication of what general damages should be. Just quickly when someone dies, a child, there may be only $2,000 in burial expenses. Does that mean there should be only awarded $6,000 for the death? No.

What about a rape? What about defamation? What about other kinds of horrible mental trauma that can be used in today's society? That three times is not [226] applicable in any way, shape, or form on the severe mental injuries that can occur. And that is one of them.

Now, the Ospitals have had their son killed. Bob Slusher has his life and physical body materially altered. The Campbells have had their lives materially altered. They have all been victims in one form or another, all of which could have been resolved by State Farm at one time or another.

We ask that you not make them a victim again by sending the message to State Farm that we don't care if you're not going to compensate someone for the suffering you caused. We don't care if you engage in improper conduct. We will trust you and your figures and your regulators.

MR. BELNAP: Your Honor, I'm going to object to this. Mr. Christensen went into this in his closing and you gave Mr. Humpherys more time and they're beyond that now.

MR. HUMPHERYS: Your Honor, part of the reason why is he has been objecting and making and speeches.

THE COURT: I have taken that into consideration I think you should bring it to a conclusion.

MR. HUMPHERYS: I am. This is my remarks. I didn't interrupt their closing remarks at the end.

[227] The message can be sent not only to State Farm but to the insurance industry as a whole by saying what is done here is unacceptable. That's what punitive damages are for. Don't let these 15 years that these parties have been

involved in litigation in one form or another be in vain. It is time to let this message be known. Sunshine is the best disinfectant, and if there isn't a significant award, there will be no scrutiny by the public. It will not be known. It will not be publicized. It will die a natural death. There needs to be a strong pronouncement or there will be no sunshine, no exposure, and no change in behavior. Thank you.

* * * *

EXCERPTS OF TRANSCRIPT OF POST-TRIAL HEARINGS, JULY 31, 1996

[R. 10324, commencing at p. 227]

* * *

THE COURT: Ladies and gentlemen of the jury, it is now the time to submit this to you for your deliberations. I'll ask my clerk to swear the bailiff who has the responsibility to see to it that you're allowed to do so in a quiet and secure place.

(The clerk affirms the bailiff to take charge of the jury.)

THE COURT: All rise.

(The jury left the courtroom to begin their deliberations at 5:05 p.m.)

THE COURT: Let the record show the jury left the courtroom. Please be seated.

We're going to recess. I wanted to just make [228] some closing comments to counsel.

This has been an extremely long and hard fought case and there has been emotion and I have been aware of that from time to time, and it is certainly something that a case is best without, but under the circumstances of this case I believe it has been kept to a minimum. I have had the very strong impression that there has been a professionalism that has been exhibited in this case that is exceptional. I have a high regard for counsel who presented the case. Despite the disputes that have arisen between them from time to time, to me they have been minimal in relation to the significance of this case with both parties, all the parties. And in view of the fact that it has gone on for two months now, I think you should be commended for that.

* * *

[237] * * *

THE COURT: Back on the record in the case of Campbell versus State Farm Mutual Automobile Insurance Company.

May the record show the jury has returned from its deliberations at the hour of 8:37 and the jury of eight is present and seated. The parties and counsel for the parties are present.

* * * *

EXCERPTS OF TRANSCRIPT OF POST-TRIAL HEARING, DECEMBER 18, 1997

[R. 10292, commencing at p. 114]

* * *

THE COURT: The Court is familiar with the record and I don't think any argument is necessary.

The Court now having had an opportunity to hear argument of counsel and review memoranda is going to grant State Farm's motion for a remittitur or in the alternative for a new trial, should plaintiffs desire a new trial. The amount of compensatory damages the Court finds appropriate under the record of this case is $600,000 for Curtis Campbell and $400,000 for Inez Campbell. The Court believes it's appropriate to explain the basis for its decision.

The Court has granted the remittitur based on two aspects of the evidence in the case. First, what the Court views as a relatively limited period of time in which the primary stresser -- that is, the threat of financial ruin -- was a real threat to the Campbells; and secondly, that the absence in the record of any objective evidence of emotional or mental distress.

* * * *

EXCERPTS FROM TRANSCRIPT,
OCTOBER 26, 1995

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH

NO. 890905231
(VOLUME 3 OF)

CURTIS B. CAMPBELL AND
INEZ PREECE CAMPBELL,

PLAINTIFFS,

V.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

DEFENDANT.

BEFORE THE HONORABLE
WILLIAM B. BOHLING, JUDGE

OCTOBER 26, 1995

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * *

[413] * * *

MR. HUMPHERYS: . . . The Plaintiffs would offer into evidence the Exhibit number 1, which is the Slusher judgement against Campbell; Exhibit number 2, which is the Ospital judgement against Campbell; Exhibit 3, which is the jury verdict in the Logan trial; Exhibit 4, which is the State Farm policy issued to Mr. Campbell.

And at this time we understand there is no objection to those and we'll offer them into evidence.

THE COURT: Is there any objection?

MR. HANNI: No objection.

THE COURT: They will all be admitted.

(Exhibits 1-P, 2-P, 3-P, and 4-P received into evidence.)

* * * *

EXCERPTS FROM TRANSCRIPT,
NOVEMBER 1, 1995

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH

NO. 890905231
(VOLUME 6 OF)

CURTIS B. CAMPBELL AND
INEZ PREECE CAMPBELL,
PLAINTIFFS,

V.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
DEFENDANT.

BEFORE THE HONORABLE
WILLIAM B. BOHLING, JUDGE

NOVEMBER 1, 1995

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * *

[1115] * * *

Q I'm going to refer to a document, and I'm not sure that document is in evidence. It's the report that he did that was apparently typed on July 9th of '81.

MR. HANNI: I not sure --

MR. CHRISTENSEN: Is there any problem with my referring to that?

MR. HANNI: Let's mark it as an exhibit and put it on.

MR. CHRISTENSEN: Let me suggest that we'll mark it at noon and put it in and I will just refer to it in the meantime. Or do you want to take the time to do it now?

MR. SCHULTZ: Your Honor, we would like to mark this if we're going to use it. It won't take that long.

THE COURT: Fine.

(Exhibit 32-P, 33-P, and 34-P introduced for identification.)

[1116] * * *

THE CLERK: Okay. This is 32-P.

* * *

MR. HUMPHREYS: Thirty-Two. Thank you.

We would go ahead and offer it. I think counsel would stipulate on its admission.

MR. SCHULTZ: No objection.

THE COURT: It's admitted.

MR. CHRISTENSEN: We have also had marked as Exhibits 33 and 34, other documents that this witness prepared. And we would move their admission as well.

THE COURT: Mr. Schultz?

MR. SCHULTZ: No objection.

THE COURT: They're admitted.

(Exhibit 33-P, and 34-P received into evidence.)

* * * *

ORDER DENYING VARIOUS MOTIONS OF STATE FARM TO EXCLUDE PLAINTIFFS' EVIDENCE, R. 6626-32

FILED May 28, 1996

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IN THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY
STATE OF UTAH

CURTIS B. CAMPBELL and
INEZ PREECE CAMPBELL,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

ORDER DENYING VARIOUS MOTIONS OF STATE FARM TO EXCLUDE PLAINTIFFS' EVIDENCE

Civil No. 890905231
Judge William B. Bohling

On the 17th day of May, 1996, the following motions came regularly before the court:

1. State Farm's Motion for Consolidated Pretrial Hearing To Determine the Admissibility of "Other Acts" Evidence (Utah Rules of Civil Procedure 16(b); Utah Rules of Evidence 104);

2. State Farm's Motion in Limine For an Order Excluding Evidence of Other Alleged Improper Claims, Policies, Procedures and Practices;

3. State Farm's Motion in Limine for an Order Excluding Pattern and Practice Evidence;

4. State Farm's Motion in Limine to Exclude Evidence of Non Third Party BI Claims Handling Practice and/or Procedures;

5. State Farm's Motion in Limine to Exclude Evidence of Non-Utah PP&Rs; and

6. State Farm's Motion in Limine to Exclude All Evidence from Plaintiffs' Witnesses Delong, Prater and Fye Regarding State Farm's Pattern and Practices.

Plaintiffs were represented by their counsel L. Rich Humpherys and Roger P. Christensen; Defendant was represented by its counsel Glenn C. Hanni, Paul M. Belnap and Stuart H. Schultz.

In ruling upon the above motions, the court finds as follows:

1. The court has already held numerous hearings to consider evidentiary issues including spending most of four days in the past week. It is not feasible or necessary to hold more evidentiary hearing before the start of trial, which is scheduled for June 4.

2. The court generally finds that in cases of fraud, intentional infliction of emotional distress and punitive damages, there needs to be considerable latitude to prove intent, reckless disregard, absence of mistake, plan, outrageous conduct, and

other elements of these claims. The court finds generally that wrongful and illegal practices, procedures, policies and other improper claims handling procedures (hereinafter referred to as "Wrongful Pattern and Practice" evidence) are relevant to the issues in the second trial.

3. The court finds that the wrongful pattern and practice evidence is directly relevant and necessary for plaintiffs to address the issues of punitive damages i.e. whether State Farm acted willfully and maliciously, or with conduct manifesting a knowing and reckless indifference toward and disregard of the rights of the Campbells. Regarding the evidentiary considerations in awarding punitive damages, the fact finder and the trial court must consider evidence such as the effect State Farm's wrongful conduct has had on the Campbells and others, and how reprehensible or egregious is the State Farm conduct, including how extensive and repetitive it has been and its duration. Under the policy behind punitive damages, the award must punish and deter similar conduct. The court finds that Wrongful Pattern and Practice evidence is relevant to plaintiffs' claims.

4. In establishing the alleged fraud, plaintiffs must prove each element of fraud including intent or reckless indifference toward the truth of misrepresentations. Plaintiffs must also rebut defendant's assertion that State Farm's actions toward the Campbells were inadvertent errors or mistakes in judgment. The court finds that the Wrongful Pattern and Practice evidence is relevant and probative to these and related issues regarding fraud.

5. Regarding plaintiffs' claim of intentional infliction of emotional distress, plaintiffs must prove that State Farm's actions were "outrageous conduct" and the intent to cause emotional distress or reckless disregard of the emotional distress. Evidence of plans, patterns, motives, lack of mistake

and related evidence should properly be considered. The court finds that the wrongful pattern and practice evidence is relevant.

6. State Farm has raised various defenses such as the fact that Campbell consented to the trial of the underlying case, that State Farm relied in good faith on Wendell Bennett's opinions. The court finds that the Wrongful Pattern and Practice evidence directly bears on plaintiffs' rebuttal to these defenses.

7. Through various pleadings and hearings, State Farm has established that it has a practice to destroy all copies of outdated documents, including manuals and other claims handling policies and therefore cannot produce some of the relevant documentation during the time period in question. Given the amount of time which has expired since the handling of the Campbell file and the destruction of these documents, plaintiff[s] have been hindered in their ability to discover needed evidence to establish their claims. Plaintiffs have been required to rely to a significant degree upon the oral testimony and memories of various witnesses. The court finds therefore that the Wrongful Pattern and Practice Evidence is helpful to overcome the disadvantage of destroyed evidence and plaintiff[s] would be prejudiced to exclude such evidence.

8. Acting upon State Farm's motion, this case was bifurcated, and plaintiffs' evidence in the first trial was substantially limited. Though the Wrongful Pattern and Practice Evidence was relevant to plaintiffs' claims of bad faith under Rule 402, Utah Rules of Evidence, at State Farm's request the court excluded the evidence with the expectation that it would be considered in the second trial. This was the primary reason for bifurcating this case for trial. Even with this restriction of evidence (which primarily benefitted State Farm), the jury in the first trial found against State Farm on

all questions on the verdict. In light of this verdict, the court finds that the pattern and practice evidence is of high probative value and importance to plaintiffs' claims, and that serious prejudice to plaintiffs would result if such evidence were excluded. The court further finds that the probative value is not outweighed by the danger of unfair prejudice or confusion.

9. The court acknowledges that on any specific item of evidence that may fall into the general category of Wrongful Pattern and Practice, there may be an issue under Rule 403 to exclude the specific evidence. The court finds that it is improper, however, to exclude specific items by addressing the general issues of wrongful pattern and practice evidence. Therefore, the court will consider a motion under Rule 403 of a specific item of evidence, consistent with the above findings.

10. The court finds that there may be some issues of claims handling by the State Farm Insurance companies that may be so distant in its relationship to the issues in this case, that it should be excluded. The court therefore (except as otherwise specifically ordered) limits the scope of the Wrongful Pattern and Practice Evidence to claims, policies, procedures and practices of State Farm Mutual Automobile Insurance Company except for medical insurance claims, that pertain to automobile insurance policies. Evidence of claims, policies, procedures and practices that pertain to State Farm Fire & Casualty Company, may also be relevant as long as they have sufficient relationship to automobile insurance claims or the claims handling policies and procedures of State Farm Mutual Automobile Insurance Company. The court finds that this limitation on the scope of this evidence (while it is narrower than plaintiffs' claim is justified by the record before the court) limits the pattern and practice evidence to that evidence which is sufficiently similar and linked to the conduct at issue in this case that it properly should be considered as part of the alleged common overall schemes.

10. The court is further persuaded and bases this order upon the points and authorities set forth in plaintiffs' General Memorandum in Opposition to Defendant's Pending Motions in Limine.

11. This order is part of a large number of orders which the court has entered dealing with evidentiary issues in this case. It is part of a careful effort by the court to exercise its discretion in balancing the interests of the parties and to provide an overall approach to the trial of the matter which is fair and equitable. Consequently it must be considered in light of all the other evidentiary and discretionary rulings in this case.

Based upon the above findings and the very extensive record in this case, the court denies said motions.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the following motions are denied:

1. State Farm's Motion for Consolidated Pretrial Hearing To Determine the Admissibility of "Other Acts" Evidence (Utah Rules of Civil Procedure 16(b); Utah Rules of Evidence 104);

2. State Farm's Motion in Limine For an Order Excluding Evidence of Other Alleged Improper Claims, Policies, Procedures and Practices;

3. State Farm's Motion in Limine for an Order Excluding Pattern and Practice Evidence;

4. State Farm's Motion in Limine to Exclude Evidence of Non Third Party BI Claims Handling Practice and/or Procedures;

5. State Farm's Motion in Limine to Exclude Evidence of Non-Utah PP&Rs; and

6. State Farm's Motion in Limine to Exclude All Evidence from Plaintiffs' Witnesses Delong, Prater and Fye Regarding State Farm's Pattern and Practices.

The court (except as otherwise specifically ordered) limits the scope of the Wrongful Pattern and Practice Evidence to claims, policies, procedures and practices of State Farm Mutual Automobile Insurance Company except

for medical insurance claims, that pertain to automobile insurance policies. Evidence of claims, policies, procedures and practices that pertain to State Farm Fire & Casualty Company, may also be relevant as long as they have sufficient relationship to automobile insurance claims or the claims handling policies and procedures of State Farm Mutual Automobile Insurance Company.

The court will consider appropriate motions by defendant to exclude a specific item of evidence under Rule 403, Utah Rules of Evidence.

DATED this 28 day of May, 1996.

BY THE COURT:

/s/
William B. Bohling
District Judge

ORDER REGARDING EVIDENCE OF OTHER CASES, R. 6593-96

FILED May 28, 1996

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IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE, STATE OF UTAH

CURTIS B. CAMPBELL and
INEZ PREECE CAMPBELL,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

ORDER REGARDING EVIDENCE OF OTHER CASES

Civil No. 890905231

Honorable William B. Bohling

Defendant filed a Motion in Limine to Exclude Evidence of other cases, along with a supporting memorandum. A hearing was conducted with respect to such Motion on

May 17, 1996. Roger P. Christensen and L. Rich Humpherys appeared on behalf of plaintiffs and Glenn C. Hanni, Paul M. Belnap and Stuart H. Schultz appeared on behalf of Defendant. The court having heard the arguments of counsel, there having been some discussion between counsel and the court, the court having considered the issues raised by this motion in light of and in conjunction with numerous other evidentiary motions, and based on the extensive record in this case including numerous hearings, the trial of the first phase of this case, the numerous depositions and pleadings in this case and the other matters before the court, hereby issues its ruling as follows:

1. Plaintiffs will be limited in presenting evidence in their case in chief of other lawsuits to lawsuits involving automobile claims, (either third party or first party). These can include lawsuits relating to automobile claims either handled by State Farm Auto or lawsuits relating to automobile claims where State Farm Fire wrote the automobile policy. The court will also allow evidence of cases where plaintiffs have shown adequate linkage to the auto company.

2. The foregoing restriction does not apply to rebuttal and impeachment evidence. The court finds that because State Farm contends that it does not keep records of bad faith verdicts, punitive damage verdicts, excess verdicts against its insureds and other similar information, that plaintiffs have been limited in their efforts to obtain such information. Plaintiffs have obtained limited information from the Westlaw data bank concerning approximately 75 trial court decisions which plaintiffs contend represent judicial rulings of misconduct on the part of State Farm, which cases have been disclosed to defendant. Plaintiffs have also disclosed approximately 30 appellate decisions which plaintiffs contend show judicial determinations of misconduct on the part of State Farm. Plaintiffs have indicated that they also have evidence of class actions and RICO actions against State Farm.

3. At the hearing, counsel for plaintiffs advised the court that with the very extensive discovery which has been done in this case, some of the cases specifically listed may have been the subject of testimony in depositions taken in this case. To the extent that is true, the plaintiffs stated that they may raise such cases in their case in chief. However, unless the listed cases have been the subject of deposition testimony, plaintiffs do not plan to discuss them in their case in chief, but inten[d] to use them for impeachment and rebuttal. Accordingly, it is the Order of this Court that the use of the listed cases will be limited to impeachment and rebuttal, except where such cases have been the subject of deposition testimony. In the event the court will consider the admissibility of such evidence as it comes up during the trial.

4. State Farm has access to much more information concerning the cases listed by plaintiffs than do plaintiffs.

5. State Farm has designated a number of fact witnesses who deny that State Farm engages in unfair conduct towards its insureds and who largely disclaim knowledge or awareness of bad faith verdicts, punitive damage verdicts, or excess verdicts against State Farm.

6. State Farm has also designated five present and former insurance regulators as witnesses. Three have been designated as expert witnesses. Such insurance regulator expert witnesses will give opinions that State Farm does not engage in unfair conduct towards its insureds with such opinions being based in large part on the regulators[’] alleged lack of awareness of claims by persons insured by State Farm that they have been treated unfairly. Plaintiffs contend that for the most part such regulators have denied knowledge of bad faith verdicts, punitive damage verdicts, excess verdicts, class actions against State Farm, RICO actions or the similar information.

7. In light of such evidence, the court deems it appropriate to allow evidence of the other cases designated by plaintiff[s] by way of impeachment and rebuttal.

8. State Farm has indicated that with its superior access [to] information concerning such cases, it has determined that some of those listed by plaintiffs have been reversed on appeal while others were not in fact rulings of misconduct by State Farm. The court desires to avoid wasting time by having plaintiffs, acting on erroneous information, raise cases indicating misconduct by State Farm, which in fact, do not. Accordingly, defendant is required, to the extent it has information indicating that plaintiffs[’] information regarding such cases is erroneous, to provide it to plaintiffs.

Dated this 28 day of May, 1996.

BY THE COURT:

/s/

Honorable William B. Bohling
District Judge

ORDER REGARDING EXCLUSION OF TESTIMONY IN INA DeLONG, R. 6591-92

FILED May 28, 1996

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IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE,
STATE OF UTAH

CURTIS B. CAMPBELL and
INEZ PREECE CAMPBELL,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

ORDER REGARDING EXCLUSION OF TESTIMONY OF INA DeLONG

Civil No. 890905231

Honorable William B. Bohling

Defendant's Motion in Limine to Exclude Ina DeLong's Testimony came on for hearing before the court on May 17,

1996. Defendant was represented by Glenn C. Hanni, Paul M. Belnap and Stuart H. Schultz, and plaintiffs were represented by L. Rich Humpherys and Roger P. Christensen.

At the hearing, defendant's request for the court to sign a commission allowing defendant to obtain a California document subpoena to subpoena documents in the possession of Ina DeLong was also considered.

After considering the written memorandum submitted by defendant, after hearing the arguments of counsel and discussion between counsel and the court, the court hereby rules as follows:

1. Inasmuch as it is anticipated that Ina DeLong will be asked to give opinions and inasmuch as defendant requested production of Ms. DeLong's documents well before the discovery cut off, the court will sign a commission to enable defendant to subpoena documents from Ms. DeLong.

2. Defendant's motion in limine is granted in part and denied in part. Ms. DeLong will be allowed to testify, but will not be allowed to give testimony which has no relationship to the auto company. In order for her to give testimony concerning defendant's policies, practices and related matters, proper foundation will need to be laid such as that she knows what the practices and policies are of the auto company or that the practices and policies that she is familiar with at the fire company are the same as the subject practices and policies of the auto company.

For the reasons set forth in the court's Order Denying the Various Motions of State Farm to Exclude Plaintiffs' Evidence, the court does not deem it appropriate to issue an order in limine completely excluding Ms. DeLong from testifying. However, as noted above, proper foundation will need to be laid and her testimony will also be subject to the limitations and guidelines the court has set forth the aforesaid order.

DATED this 28 day of May, 1996.

BY THE COURT:

/s/
Honorable William B. Bohling
District Judge

ORDER FILED MAY 28, 1996, R. 6571-79

FILED May 28, 1996

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IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE,
STATE OF UTAH

CURTIS B. CAMPBELL and
INEZ PREECE CAMPBELL,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

ORDER

Civil No. 890905231

Honorable William B. Bohling

Defendant's Motion in Limine (dated May 9, 1996) to Exclude Evidence Regarding the Excess Liability Handbook came on for hearing before the Court on May 20, 1996.

The motion, at defendant's request, was also reheard on May 21, 1996. Paul Belnap, Glenn Hanni and Stuart Schultz were present at both hearings on behalf of defendant, and Roger P. Christensen and L. Rich Humpherys appeared on behalf of plaintiffs at both hearings.

In State Farm's written and oral arguments it contended that the Excess Liability Handbook ("The Handbook") should be excluded, "because the Campbells cannot show relevance or proper foundation." (Defendant's Memorandum in support of its motion, p. 2.) Defendant also argued that the Handbook should be excluded under Rule 403 Utah Rules of Evidence.

The Court having considered the written memoranda filed by the parties in this case, the oral arguments of counsel, the evidence presented at the Rule 104(a) hearing heretofore held in this case on October 27, 1995 ("The 104(a) hearing"), the depositions, exhibits, the record from the bifurcated trial, and the extensive additional record in this case, and being fully advised, hereby finds and rules as follows:

Because of the mass of evidence and information in the record in this case, it is not feasible to set forth in this order all of the evidence supporting the Court's ruling. However, while not intending to provide an exhaustive recitation of findings supporting the Court's ruling, the following are provided by way of explanation and illustration:

1. During the trial last October defendant produced three identical copies of the Excess Liability Handbook. One copy was provided to the Court for its use, one copy was provided to plaintiffs' counsel for their use, and the third copy was marked as Exhibit 21 at the Rule 104(a) hearing in this case. Defendant has admitted the authenticity of Exhibit 21, but contends that it was used exclusively by State Farm Fire and Casualty Company ("State Farm Fire"), defendant's wholly owned subsidiary.

2. There is substantial evidence offered by both sides indicating that defendant has destroyed, discarded or otherwise eliminated manuals, handbooks, claim school records, records of claims conferences, training materials, claims handling memos and guidelines, and other documents which would otherwise be subject to discovery in this case. The lack of such information is a factor which the court determines may properly be considered in deciding the admissibility of handbooks, manuals and other materials which still remain in existence.

3. There is a substantial amount of evidence in the record in this case indicating an overlap in the claims handling functions of State Farm Fire and State Farm Auto. For example, it is undisputed that during the entire period in question State Farm Auto has handled the automobile claims generated by auto policies written by State Farm Fire, which handles no auto claims. There are numerous references to auto claims in the Handbook. Also, claims handling at State Farm Fire and State Farm Auto share common management at various levels in the two companies. In some instances the Division Claims Superintendent of State Farm Auto also has management responsibility over claims for State Farm Fire within the same division. The Handbook states as its purpose: "to provide education, training and assistance to Divisional Claims Superintendents . . . with regard to the handling of excess liability claims." (Part III, page 1.) The Campbell case is an excess liability case.

4. There is evidence in the language of the Handbook suggesting that the Handbook applied to handling of excess liability auto claims for both State Farm Fire and Auto.

5. The evidence in the record in this case indicates that until 1970, State Farm Fire did not have its own claims department, but its claims were handled by a combination of the use of State Farm Auto claims department and

independent adjusters. In 1970, State Farm Fire began developing its own claims department. Management for the State Farm Fire claims department mainly came from claims personnel from State Farm Auto. R. E. Aaberg was made the head of the new claims department at State Farm Fire. At the time of that appointment he was in upper management with the claims department of State Farm Auto, where he had many years of experience. Mr. Aaberg's name appears on the face sheet of the Excess Liability Handbook.

6. In the Excess Liability Handbook itself are many references to auto claims and auto claims handling. At least part of the materials appear to have been prepared by Ross G. Hume, who is identified in the manual as senior claim counsel for State Farm Auto.

7. Part V of the Excess Liability Handbook is strikingly similar to the June 1983 version of Article 14 of the State Farm Auto Claims Superintendent's Manual. There is ample evidence from which a jury could reasonably conclude that Part V of the Excess Liability Handbook was patterned after earlier versions of Article 14 of the Auto Manual, which are no longer available. The earliest version of Article 14 produced by defendant in this case is a 1983 version. A version of Article 14 dated in October of 1981 is contained in documents in the possession of plaintiffs' expert, Gary Fye. Accordingly, the version of Article 14 which was in force on the date of the accident in question in May of 1981 is not available.

8. The court deems this significant for a number of reasons. For example, a number of witnesses proffered by plaintiffs in this case claim that State Farm instructed defense counsel in excess exposure cases not to put certain types of information in writing, such as the attorney's opinion as to case value or his estimate as to the amount of the potential verdict. While State Farm denies such instructions were

given, they are set forth on pages 9 and 12 of Part V of the Excess Liability Handbook, but are not found in the available version of Article 14.

9. The Excess Liability Handbook contains other information corroborative of plaintiffs' evidence and contradicting defendant's evidence. For example, page 4 of Part III has a section entitled, "Self-Serving Correspondence." Several of plaintiffs' witnesses have testified that it is common practice to distort claims files at State Farm by the use of untrue, self-serving documents. The State Farm adjuster assigned to the Campbell case has testified that this was done in the Campbell case file. Defendant's witnesses have denied both the practice of preparing self-serving documents and that self-serving documents were placed in the Campbell claims file.

10. Part IV, page 7, includes an analysis of the financial impact on State Farm of 222 "excess claims" and boasts of how well the company has fared on such claims. Defendant denies that it does such analysis or keeps records of such claims.

11. Defendant contends that the Excess Liability Handbook was made obsolete by a memorandum dated February 8, 1979. Plaintiffs challenge the authenticity of this memorandum in light of defendant's failure to produce this document until very recently, and repeated denials that it has kept documents of this nature from this time frame. It is an eight-page document addressed to regional vice-presidents with the subject "Educational Material." Regional vice presidents are over both State Farm Auto and State Farm Fire. The language on which defendant relies is found on the second to the last page and there is nothing about the way the document is written or structured which would call any particular attention to that language.

12. Defendant also produced a one-page memo with the subject "Educational Materials" dated May 20, 1986 which is addressed to regional vice-presidents, repeating the instruction that a number of materials were obsolete, including the Excess Liability Handbook. Plaintiffs also challenge the authenticity of this memo for the same reasons.

13. Even if a jury concludes that the '79 and '86 memos proffered by defendant are authentic, a jury could also reasonably conclude that the 1979 memo was not effective in communicating the discontinuance of the Handbook and that the 1986 memo is evidence that there was continued use of the Excess Liability Handbook at least up to May 20, 1986. The accident in question occurred in May of 1981 and State Farm's investigation, handling and defense of the matter occurred between May of 1981 and September of 1983 when the case was tried. There was an appeal thereafter.

14. At the 104(a) hearing held in this matter on October 27, 1995, the Excess Liability Handbook was treated at some length by several witnesses. Mr. John Crowe testified that he was employed from 1965 to 1990 at either State Farm Auto, State Farm Fire or both. He became a claims superintendent for State Farm Fire in 1979. Mr. Crowe, as an employee of State Farm Auto, served as the Divisional Claim Superintendent for both State Farm Auto and State Farm Fire for the Northern Utah Division in 1987. (Crowe Deposition, p. 5.) He testified that he received a copy of the Excess Liability Handbook in the ordinary course of his duties as a claims superintendent in 1979 or 1980. He further testified that it accurately reflected the instructions that both State Farm Auto and State Farm Fire gave their claims handling personnel in 1981 to 1983 time frame for dealing with excess liability claims. Crowe, as divisional claims superintendent for both State Farm Auto and Fire in Northern Utah, also at one point had some responsibilities relating to the Campbell case.

15. Mr. Ray Summers (the State Farm Auto adjuster assigned to the Campbell case), was employed by State Farm Auto for 19 years, up until the later part of 1982. He had extensive experience in both fire and auto claims, and testified that the instructions, guidelines and recommendations contained in the Excess Liability Handbook accurately reflected what he was told as far as how he should conduct himself in handling cases with excess exposure. He further testified that the instructions and policies expressed in the Excess Liability Handbook were followed in the handling of the Campbell file.

16. The Handbook also contains information which is relevant to the issues of knowing misconduct, intent, motive, concealment of misconduct, absence of mistake, plan, preparation and pattern and practice.

17. For the foregoing reasons, along with others contained in the very extensive record in this case, the Court exercises its discretion and determines that plaintiffs have met their burden both with respect to relevance and foundation for the admission of Exhibit 21, the Excess Liability Handbook. The points raised by defendant go to weight, rather than admissibility, and to the extent the points raised by defendant have validity, they may be raised in challenging the weight which the trier of fact should give to this evidence.

18. The Court further exercises its discretion pursuant to Rule 403 of the Utah Rules of Evidence, and determines that the relevance and probative value of the Excess Liability Handbook are not substantially outweighed by the danger of unfair prejudice, confusion, misleading the jury, considerations of undue delay, waste of time or needless presentation of cumulative evidence.

Defendant's Motion in Limine is denied.

DATED this 28 day of May, 1996.

BY THE COURT:

/s/
Honorable William B. Bohling
District Judge

ORDER REGARDING EVIDENCE OF SPOLIATION OF EVIDENCE, R. 6608-15

FILED May 28, 1996

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IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE,
STATE OF UTAH

CURTIS B. CAMPBELL and
INEZ PREECE CAMPBELL,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

ORDER REGARDING EVIDENCE OF SPOLIATION OF EVIDENCE

Civil No. 890905231

Honorable William B. Bohling

By way of preface, the Court notes that the record in this case is extensive with the court having conducted many

days of hearings both with respect to discovery matters, motions to compel, motions for protective orders, evidentiary hearings with respect to the existence and non-existence of evidence and has reviewed extensive written and oral arguments relating to the subjects of this order.

In the court's order excluding the testimonies of witnesses Ivie, Glauser and Thornley, the court has attempted to explain that its rulings with respect to evidentiary and trial related matters cannot be fairly and accurately viewed in isolation. That is true of this order.

1. On March 29, 1996, defendant, State Farm, filed a motion in limine for an order excluding evidence of spoliation of evidence. On May 9th State Farm filed a motion in limine for an order excluding evidence of document destruction in general and specifically the Samantha Bird 1990 memorandum, Elaine Rigler April 1990 minutes, "Buried Alive" video and 1995 letter from Dan Cochran.

2. Plaintiffs oppose each of defendant's motions.

3. The present action involves claims for bad faith, fraud and other intentional misconduct. It arises from an underlying case, Slusher v. Ospital and Campbell which resulted [in] a verdict against plaintiff, Campbell, in excess of his policy limits with defendant, State Farm, in a trial conducted in Logan in 1983. An appeal was taken of the Logan judgment which was affirmed by the Utah Supreme Court in 1989.

4. Campbell originally filed this action in 1986. However, at defendant, State Farm's request, it was dismissed by the court as premature, as the appeal of the underlying judgment was still pending.

5. After the underlying judgment was sustained on appeal, this action was refiled in 1989. Discovery requests were served on State Farm in August 1989. Included in those requests were very broad requests for claims manuals, claims procedures, booklets, memorandum, audio and video tapes and a wide variety of other information.

6. In spite of this outstanding request, there is evidence in the record in this case that on April 5, 1990, in-house counsel at the regional office of State Farm, Janet Cammack, participated in a meeting with the claims management personnel for State Farm for the State of Utah. The minutes of the meeting ("Elaine Rigler minutes"), the personal notes taken by someone who attended it, and a memorandum written as a follow up to the meeting contain evidence indicating that instructions were given to destroy the very types of evidence which had been requested. (These documents were not produced by State Farm, but were obtained by plaintiffs from a former employee, Samantha Bird, who attended the meeting and who prepared some of the documents.) Samantha Bird has given both deposition testimony and testimony at a Rule 104(a) hearing in this matter.

7. The follow up memo, prepared by Samantha Bird, written April 6, 1990, reads in part as follows:

> Yesterday in the staff meeting we talked about the need to purge our desks of all old memos, notes and procedural guides. With the increase of bad faith suits being filed against State Farm, it is important that you get rid of all your old stuff [sic] know that you have lurking around in your drawers and filing cabinets.
>
> Please get rid of all old memos, claim school notes, old seminar or claim conference notes and any old procedure guides you may have. They are trying to avoid having to come up with old records when the 'request for production of documents' comes in and they request 'all training manuals, memos, procedural guides, etc. that are in the possession of your claims reps and management' . . . that way if

> they subpoena our claim manual for U claims for 1987, for example, we will say we don't have it. This should be easier than trying to produce it or having to defend it.

8. State Farm has admitted that the Campbell case was the only bad faith case pending against State Farm in Utah as of April, 1990.

9. Janet Cammack, during this time frame, met with the other State Farm offices within the Mountain States Region as well.

10. There is evidence in the record in this case that in 1995 State Farm sent letters to the law firms it retains in various parts of the country instructing outside counsel that upon the conclusion of a case to immediately return original documents to State Farm and to destroy all others. ("1995 letter from Dan Cochran.")

11. By its own evidence, State Farm has confirmed in open court in hearings conducted in this case how successful their evidence destruction efforts have been. A State Farm employee, Paul Short (who was State Farm's designated representative for the first trial in this case), spent many hours going to the claims offices in the state confirming that the requested documents had been destroyed.

12. State Farm, through representations of counsel, through responses to discovery requests, and through numerous witnesses both by way of deposition and hearing conducted before this court, has consistently represented that much of the potential documentary evidence that plaintiffs have sought to discover in this case has been destroyed through State Farm's own efforts.

13. A designated spokesperson for State Farm at evidentiary discovery hearings conducted in this case, Karen Ortiz, admitted that claims manuals and claims materials are routinely requested

in every bad faith case filed against State Farm. She also admitted that there are always bad faith cases pending against State Farm.

14. Accordingly, there is evidence in the record suggesting that while State Farm was instructing that documents be destroyed, not only was this case pending, but there were cases pending against State Farm around the country where such documents had been requested or were at issue. There is also evidence that State Farm knew or reasonably should have known that the evidence which was being destroyed at its instance would be relevant to and would be requested in discovery in future cases.

15. There is evidence before this court that State Farm had a practice of maintaining a historical file showing various versions and changes in its claims manuals. Plaintiffs have attempted to discover the claims manuals which were applicable prior to and at the time of the accident which is the subject of this case, defendant has represented that such prior versions of the manuals have been destroyed.

16. There is evidence before this court that the decision and approach to destroy and conceal evidence to prevent the use of such evidence in court proceedings against State Farm comes from the upper levels of management in the company. Associate general counsel for State Farm Insurance Companies, Leo Jordan, in a presentation given on August 14, 1979, stated in part:

> It cannot be overstressed, however, that the proper manner of avoiding damaging materials from reaching plaintiffs' counsel is not by attempting to log-jam the discovery process, but rather making certain such materials are non-existent ab initio. If the files and procedures are to be subject to judicial scrutiny, there must be absolutely no hint of disregard for the insuring public's interest.

17. There was evidence presented at an evidentiary hearing in this matter that State Farm's July 27, 1992 Operations Guide states in part:

> State Farm must strive to maintain a thorough and consistently applied inactive records destruction program. It is our best defense against costly judgments in court resulting from improper storage and destruction.

18. Several former State Farm employees have testified that destroying, altering and concealing evidence is common practice at State Farm.

19. At a[n] evidentiary discovery hearing conducted before this court over a three-day period in March of 1996, evidence was presented of destruction of documents, efforts by State Farm to conceal evidence and misrepresentation by State Farm of the existence of evidence.

20. While plaintiffs are not able to identify specifically every document which has been destroyed, they have been able to identify some specific documents which have been destroyed and are able to identify categories of documents which have been destroyed.

21. As part of plaintiffs' efforts to obtain discovery of documentary evidence, plaintiffs attempted to take the deposition of John Kodani, a resident of the State of California. Mr. Kodani's affidavit has been filed in this case indicating that he has over three million pages of State Farm documents. Mr. Kodani is an attorney that does legal work and document processing for State Farm.

22. The court has reviewed the deposition transcript of the Kodani deposition. In spite of what appeared to the court to be good faith efforts by plaintiffs' counsel to pursue legitimate discovery, Mr. Kodani failed to produce a single document or to make a good faith effort to authenticate any of the documents which plaintiffs had obtained through other sources.

23. The court has heretofore determined discovery abuse on the part of State Farm in connection with the Kodani deposition and has sanctioned State Farm accordingly.

24. Under Rule 403, Utah Rules of Civil Procedure the court finds that evidence of destruction and concealment is highly probative and does not find undue prejudice to State Farm if it is admitted. However, plaintiffs would be seriously prejudiced if the evidence were excluded.

25. It is not feasible in this order to outline with specificity all the reasons and basis for the court's order given the very extensive nature of the record in this case. Accordingly, the foregoing is not intended as an exhaustive recitation of the basis for the court's ruling, but is given by way of example.

For the foregoing reasons, among others, it is hereby ORDERED as follows:

A. Under the facts and circumstances of this case and in light of plaintiffs' claims and defendant's defenses, the court has determined that it is appropriate for plaintiffs to present evidence of State Farm's destruction and concealment of evidence.

B. The court does not make a decision at this point whether a jury instruction relating to spoliation of evidence will be given as requested by plaintiffs. The court reserves such decisions to be made later in these proceedings after hearing the evidence at trial.

DATED this 28 day of May, 1996.

BY THE COURT:

/s/

Honorable William B. Bohling
District Judge

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL BASED ON THE COURT'S FAILURE TO TRIFURCATE THE TRIAL, R. 10105-07

FILED Aug. 3, 1998

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IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
STATE OF UTAH

CURTIS B. CAMPBELL and
INEZ PREECE CAMPBELL,

Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL BASED ON THE COURT'S FAILURE TO TRIFURCATE THE TRIAL

Civil No. 890905231

Judge William B. Bohling

State Farm's motion for new trial based on the Court's failure to trifurcate the trial came regularly before the Court on the 18th day of December, 1997. Plaintiffs were represented by their counsel L. Rich Humpherys, Roger P. Christensen, Karra J. Porter, Laurence H. Tribe, and Kenneth J. Chesebro; defendant was represented by its attorneys Paul M. Belnap, Stuart H. Schultz, and Glenn C. Hanni. The Court has now heard argument of counsel, has considered the extensive memoranda filed by the parties, and has reviewed all the evidence submitted at the time of trial. The Court makes the following findings and conclusions:

This Court finds that State Farm's motion for new trial based on the Court's failure to trifurcate the trial is without merit. Although the Court was not required to order a bifurcated trial, it did so at State Farm's request. This was done, over the Campbell's strenuous objection. Such bifurcation was an additional burden on the resources not only of the parties, but of the Court.

In effect, State Farm designed the bifurcation. It was State Farm that insisted on covering in the first trial only the threshold bad-faith issue, and to reserve all other issues for the second trial. At the time that State Farm made its motion for bifurcation and successfully persuaded the Court to grant it, it did not indicate that what it was really seeking was trifurcation. State Farm initially raised its trifurcation request after the first trial (more than two years after its original motion seeking bifurcation), and only a short time before the scheduled date for the second trial. When that motion was considered, the Court believed that trifurcation was unnecessary and impractical, and that it would not create prejudice to deny that motion, but would result in severe prejudice to the Campbells if the case were trifurcated.

The Court is convinced that State Farm was in no way prejudiced by this Court's denial of its motion for trifurcation.

Furthermore, trifurcation would have required a continuance of the trial, which would have worked a hardship and been a great injustice to the Campbells in this case. By the time the motion for trifurcation was made, it had been approximately 13 years since the excess verdicts had been rendered against Mr. Campbell, this case had been pending for more than seven years, and one plaintiff, Mr. Campbell, was elderly and in poor health. Even proceeding with the trial as scheduled, Mr. Campbell's health only allowed him to participate on a very limited basis. A continuance and trifurcation would have also substantially increased the Campbells' litigation expenses, which were already huge.

At the time of State Farm's trifurcation motion, this case had already consumed a disproportionate share of the Court's time and resources. Nearly all of the evidence in the three-week Phase I of the trial was presented again in Phase II, which lasted nine weeks. If the Court granted trifurcation, most of the evidence from Phase I and II would have also been a necessary part of the proposed Phase III, resulting in excessive duplication. A Phase III would have imposed an even greater hardship on the parties, their attorneys, the Court, the Court's staff, and another jury.

The Court is fully satisfied that it did not abuse its discretion in denying State Farm's motion for trifurcation. Accordingly, the Court hereby denies State Farm's motion for new trial based on the Court's failure to trifurcate.

DATED this 3 day of August, 1998.

BY THE COURT:

/s/

Honorable William B. Bohling
District Court Judge

ORDER DENYING STATE FARM'S MOTION FOR JUDGMENT NOV AND NEW TRIAL REGARDING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, R. 10117-21

FILED Aug. 3, 1998

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IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
STATE OF UTAH

CURTIS B. CAMPBELL and
INEZ PREECE CAMPBELL,

Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

ORDER DENYING STATE FARM'S MOTIONS FOR JUDGMENT NOV AND NEW TRIAL REGARDING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Civil No. 890905231

Judge William B. Bohling

Defendant's Motion for Judgment Notwithstanding the Verdict Regarding Intentional Infliction of Emotional Distress came regularly before the Court on the 18th day of December, 1997. Plaintiffs were represented by their counsel L. Rich Humpherys, Roger P. Christensen, Karra J. Porter, Laurence H. Tribe, and Kenneth J. Chesebro; defendant was represented by its counsel Paul M. Belnap, Stuart H. Schultz, and Glenn C. Hanni. The Court has now heard argument of counsel, has considered the extensive memoranda filed by the parties and has reviewed the evidence submitted at the time of trial. The Court makes the following findings and conclusions:

1. After reviewing the jury instructions nos. 38, 39, 40 and 42, and the legal standard that applies to this motion and the Campbells' cause of action for intentional infliction of emotional distress, the Court concludes that there was competent evidence to support each element of the cause of action and concludes that there is no basis to grant State Farm's motion.

2. The Court heard competent evidence to sustain the jury's finding that the actions and omissions of State Farm constituted outrageous conduct under the circumstances of this case.

3. There was ample evidence for the jury properly to conclude that each element of this cause of action was properly proven. Some of the relevant evidence is set forth below:

a. At the time of State Farm's wrongful conduct, the Campbells were elderly and Mr. Campbell had residuary effects from a stroke and Parkinson's disease.

b. The Campbells were economically vulnerable, having suffered previous financial setbacks and having meager financial resources.

c. The Campbells were emotionally vulnerable and fragile. Mr. Campbell had previously experienced severe emotional trauma, including the murder of his first wife, the desertion of his second wife after his stroke, and the death of his third wife from cancer less than two years after their marriage. Mrs. Campbell had gone through a bitter divorce. The Campbells' home had previously gone into foreclosure and one of their cars had been repossessed due to the wrongful actions of Mrs. Campbell's ex-husband.

d. State Farm was aware of the Campbell's vulnerability and fragility, and of the complete trust the Campbells had placed in State Farm and its agents. State Farm intentionally and fraudulently betrayed this trust and took advantage of the Campbells' vulnerability.

e. The Campbells suffered severe shock and emotional distress resulting from the outrageous conduct of agents of State Farm who had presented themselves as "good neighbors" who would provide "peace of mind," and who held themselves out as trustworthy individuals focused on protecting the Campbells.

f. State Farm lulled the Campbells into a false sense of security by representing that they had nothing to worry about when, in reality, the Campbells had serious excess exposure. While still under the effects of the shock of the excess verdict, State Farm instructed the Campbells to put a "For Sale" sign on their home. State Farm offered the Campbells no financial protection from the potential financial ruin caused by the excess judgment.

g. After defrauding and deceiving the Campbells and callously leaving them at the mercy of the judgment creditors, State Farm engaged in aggressive contemporaneous efforts to hide their misconduct and to make it extremely difficult for the Campbells to seek redress.

h. State Farm's callous and outrageous treatment of the Campbells was done pursuant to widespread corporate policies and practices and was not merely the result of misconduct by low-level corporate employees.

4. The above findings represent only a small part of the totality of the evidence and the reasonable inferences drawn therefrom, which support the jury's finding of intentional infliction of emotional distress. A detailed description of the evidence and the reasonable inferences that may be drawn from the evidence is contained in Campbell's memoranda on this issue.

The above summary of facts, together with the detailed summary of facts set forth in the Campbells' memoranda and oral argument, clearly demonstrate that there was competent evidence for a jury to find intentional infliction of emotional distress on the part of State Farm as it relates to both Mr. and Mrs. Campbell. The Court is satisfied that substantial evidence was submitted to the jury that could support the jury's verdict, and that the verdict is not manifestly against the weight of the evidence.

Based upon the foregoing findings and conclusions, the Court denies defendant's motions for Judgment NOV and for New Trial on the plaintiffs' intentional infliction of emotional distress claims.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant's Motion for Judgment Notwithstanding the Verdict and for New Trial relating to plaintiffs' intentional infliction of emotional distress claims are hereby denied.

DATED this 3 day of August, 1998.

BY THE COURT:

/s/

Honorable William B. Bohling
District Court Judge

ORDER REGARDING STATE FARM'S MOTION FOR A NEW TRIAL OR REMITTUR REGARDING THE COMPENSATORY DAMAGE AWARDS, R. 10093-99

FILED Aug. 3, 1998

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IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
STATE OF UTAH

CURTIS B. CAMPBELL and
INEZ PREECE CAMPBELL,

Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

ORDER REGARDING STATE FARM'S MOTION FOR A NEW TRIAL OR REMITTUR REGARDING THE COMPENSATORY DAMAGE AWARDS

Civil No. 890905231

Judge William B. Bohling

State Farm's motion for a new trial or remittitur regarding the compensatory damage awards came regularly before the Court on the 18th day of December, 1997. Plaintiffs were represented by their counsel L. Rich Humpherys, Roger P. Christensen, Karra J. Porter, Laurence H. Tribe, and Kenneth J. Chesebro; defendant was represented by its counsel Paul M. Belnap, Stuart H. Schultz, and Glenn C. Hanni. The Court has now considered the extensive memoranda filed by the parties, has heard argument of counsel, has reviewed the evidence submitted at the time of trial, and has considered all other information contained in the file. The Court makes its findings and conclusions as follows:

1. The Court finds that the jury verdict award of general compensatory damages in the amounts of $1,400,000 for Curtis Campbell, and $1,200,000 for Inez Campbell, is not fully supported by the evidence. This finding is based upon two factors:

a. There was a relatively limited period of time in which the primary stressor, i.e., the threat of financial ruin, was a real threat to the Campbells;

b. There was a lack of objective evidence of emotional or mental distress.

2. The Court finds, however, that there was ample competent evidence that the Campbells did suffer substantial general emotional damages as a proximate result of State Farm's wrongful conduct. The Court accordingly finds that, based on the evidence, the general damages suffered by the Campbells should be: for Mr. Campbell, $600,000; and for Mrs. Campbell, $400,000. The Court finds that these amounts are reasonable, appropriate and just based upon the evidence and the following considerations:

a. General damages are unique to an injured party and arise from the individually specific circumstances surrounding the wrongful conduct and damages, as well

as the unique emotional makeup, personal history, and susceptibility of each individual. Pain, suffering, and other general damages are more difficult to quantify than numerically more precise economic damages, but are no less real, and should be fully compensated to the extent they are proven by the evidence. It may be reasonably assumed that not every victim of emotional injuries receives medical treatment from medical professionals. The absence of evidence of medical treatment, though a factor to consider, is therefore not dispositive of whether the injured party suffered severe emotional injuries. The determination of damages should be made from a review of all the evidence, which the Court has conducted.

b. The circumstances leading up to and surrounding the Campbells' general damages are a necessary part of the evaluation of their damages.

c. During all relevant times, the Campbells were economically vulnerable, having previously suffered financial setbacks and having modest financial resources. State Farm's wrongful conduct clearly placed the Campbells in the jaws of financial ruin. The reality of this situation was a stressor, which must be looked upon as having reasonably triggered severe general damages.

d. During the applicable time, the Campbells were elderly, and Mr. Campbell was suffering from the effects of a stroke, as well as the early stages of Parkinson's disease. The Campbells did not have financial reserves and they lacked the ability to recover from the financial ruin with which they were threatened. Without that ability, the anticipation of the loss of their home and other assets was a highly traumatic experience to them.

e. The Campbells were emotionally fragile and vulnerable. Mr. Campbell had previously suffered a

stroke. Both Mr. and Mrs. Campbell had suffered a considerable measure of tragedy and loss in their lives, more than what the Court would consider to be the normal experience of persons their age.

f. Mr. Campbell had previously experienced severe emotional trauma, including the murder of his first wife, his second wife's desertion following his stroke, and the death of his third wife from cancer less than two years after their marriage.

g. Mrs. Campbell had gone through a bitter divorce. Due to the actions of Mrs. Campbell's ex-husband (who had failed to live up to his post-divorce financial agreements), the Campbells' home had gone into foreclosure and one of their cars had been repossessed.

h. The Campbells were quiet, unassuming, and trusting individuals. By nature, they held their problems and emotions within themselves. Because of her husband's fragile health, Mrs. Campbell faced the financial and emotional burden of supporting her aging husband who had few financial resources outside of Social Security benefits. These and other experiences made the Campbells particularly susceptible and vulnerable to mental and emotional suffering.

i. It was clear from the evidence, and particularly the live testimony of the Campbells, that the Campbells suffered serious emotional and mental suffering as a result of State Farm's wrongful conduct.

j. The Campbells, who were trusting by nature, readily entrusted their financial and emotional wellbeing to State Farm. After a tragic automobile accident in which one young man was killed and another was seriously injured, the Campbells relied completely on State Farm to protect them. The betrayal of this trust was traumatic and resulted in considerable general damages.

The evidence supports a finding that the Campbells suffered a severe shock as they realized that the company in whom they had placed their full trust, which had assured them on more than one occasion that there was nothing to be concerned about, was deserting them as they faced imminent financial ruin from the excess verdict. Instead of mitigating the emotional trauma that was being caused by the result of State Farm's previous fraud and bad faith claim handling, State Farm greatly exacerbated the Campbells' emotional and mental injuries by instructing the Campbells to put a "For Sale" sign on their home and later suggesting they use their home as collateral for a supersedeas bond. The suffering from the betrayal was exacerbated by State Farm's well-understood and well-publicized policy of holding itself out as a "good neighbor," offering insurance products premised upon assuring consumers "peace of mind." The clear evidence of the Campbells' suffering due to State Farm's betrayal further justifies substantial general damages.

k. The outrageousness of State Farm's wrongful conduct is further evidence of the extreme stress to which the Campbells were exposed and further substantiates a significant general damage award. It would be unreasonable to assume that a person could be exposed to State Farm's outrageous conduct as were the Campbells, and not suffer severe mental anguish.

l. Many witnesses, including high-ranking State Farm officials, acknowledged at trial that an excess verdict alone (even if never executed on, in the end) would likely cause mental distress and would traumatically affect the insured.

3. There was extensive testimony and other competent evidence presented during the trial, only a part of which has been summarized above. This evidence is sufficient and

adequate to support the remitted amounts. It is not feasible for the Court to discuss here all of the evidence regarding damages, and the absence of discussion concerning a particular point does not mean that the Court has not made a careful review. On the contrary, the Court has thoroughly considered and carefully weighed all the evidence, including that which has been set out in the parties' memoranda and at oral argument.

4. The Court does not find that the jury acted under the influence of passion and prejudice in making its award of compensatory damages. However, the court finds that there was insufficient evidence to justify the total amount awarded in compensatory damages and therefore the Court grants State Farm's motion for a remittitur, in the amounts set forth above. In the event that the Campbells chose not to accept the remittitur, the Court would alternatively grant State Farm's motion for a new trial.

5. On the 5th day of January, 1998, the Campbells filed an acceptance of the Court's remittitur. The Court will accordingly deny State Farm's motion for a new trial.

6. The original judgment on the verdict filed August 8, 1996, will be amended to reduce the amount of general damages in favor of Curtis Campbell to $600,000 and the general damages in favor of Inez Campbell to $400,000. The judgment of compensatory damages should otherwise be unaffected by this order (e.g., with respect to the running of post-judgment interest).

Based upon the above findings and conclusions, the Court issues the following order.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant's motion for a remittitur regarding the compensatory damages is granted. The judgment of the Court entered on August 8, 1996, shall be amended as follows:

1. The principal amount of the judgment based on the general damages awarded to Curtis Campbell shall be amended and reduced to $600,000, with post-judgment interest continuing to run from August 8, 1996.

2. The principal amount of the judgment based on the general damages awarded to Inez Campbell shall be amended and reduced to $400,000, with post-judgment interest continuing to run from August 8, 1996.

3. The principal amount of the judgment with respect to the special damages awarded to the Campbells shall be unaffected by this Order.

State Farm's motion for a new trial based on excessive compensatory damages is hereby denied.

DATED this 3 day of August, 1998.

BY THE COURT:

/s/

Honorable William B. Bohling
District Judge

MOTIONS FOR JUDGMENT NOV, FOR NEW TRIAL OR REMITTITUR FILED AUGUST 19, 1996, R. 7758-62

FILED Aug. 19, 1996

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

CURTIS B. CAMPBELL and
INEZ PREECE CAMPBELL,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR NEW TRIAL OR REMITTITUR

Civil No. 890905231

Judge William B. Bohling

Pursuant to the Utah Rules of Civil Procedure, as more specifically set forth below, defendant, State Farm Mutual Automobile Insurance Company ("State Farm"), moves the court as follows:

Pursuant to Rule 50(b), U.R.C.P., State Farm moves for judgment notwithstanding the verdict, and specifically moves the court to set aside the jury verdict and judgment in favor of plaintiffs and to enter judgment in favor of State Farm in the following particulars and on the following grounds:

1. There was insufficient evidence to support a jury verdict and judgment for fraud in favor of either Curtis B. Campbell or Inez Preece Campbell and against State Farm;

2. There was insufficient evidence to support a jury verdict and judgment for intentional infliction of emotional distress in favor of either Curtis B. Campbell or Inez Preece Campbell and against State Farm;

3. Imposition of punitive damages against State Farm in this case violates the due process clauses of the United States Constitution and the Utah Constitution because State Farm had no fair notice, based on the state of existing law, that its conduct was subject to punishment under Utah law;

4. There was insufficient evidence to support a jury verdict and judgment against State Farm for punitive damages;

5. Inez Preece Campbell has no cause of action, as a matter of law, against State Farm arising out of the May, 1981 automobile accident, subsequent lawsuit, trial, and judgments entered against Curtis B. Campbell;

6. There was insufficient evidence to support a jury verdict and judgment against State Farm and in favor of plaintiffs with respect to the issues of substantial likelihood of excess judgments and reasonableness of State Farm's decision not to settle the underlying case.

Pursuant to Rules 50 and 59, U.R.C.P., State Farm moves for a new trial on one or more of the following grounds:

1. Abuse of discretion by the court with respect to evidence admitted, evidence not admitted, and/or instructions given or not given, pursuant to which State Farm was prevented from having a fair trial;

2. Excessive general compensatory and punitive damages, appearing to have been given under the influence of passion or prejudice or other improper considerations;

3. General compensatory damages and punitive damages are grossly excessive and therefore in violation of the due process clauses of the United States Constitution and the Utah Constitution;

4. Punitive damages are grossly excessive and therefore violate the ban on excessive fines under the Utah Constitution;

5. The punitive damages award is unsustainable because it is based on conduct occurring in other states in violation of the due process and commerce clauses and comity principles of the United States Constitution;

6. Insufficiency of the evidence to justify the jury's verdict or that the verdict is against law in the following particulars and on the following grounds:

a. Insufficiency of the evidence to support the jury's verdict of fraud in favor of either Curtis B. Campbell or Inez Preece Campbell and/or that said verdict of fraud is against the law;

b. Insufficiency of the evidence to support the jury's verdict of intentional infliction of emotional distress in favor of either Curtis B. Campbell or Inez Preece Campbell and/or said verdict of intentional infliction of emotional distress is against the law;

c. Insufficiency of the evidence to support the jury's verdict of general compensatory damages in the amount

of $1,400,000 in favor of Curtis B. Campbell and in the amount of $1,200,000 in favor of Inez Preece Campbell and/or that said verdict of general compensatory damages is against the law;

d. Insufficiency of the evidence to support the jury's verdict of liability against State Farm for punitive damages and/or that said verdict for punitive damages is against the law;

e. Insufficiency of the evidence to support the jury's verdict of punitive damages in the amount of $145 million and/or that said verdict for the amount of punitive damages is against the law;

f. Insufficiency of the evidence to support the jury's verdict on any cause of action in favor of Inez Preece Campbell and that such verdict is against the law;

g. Insufficiency of the evidence to support the jury's verdict against State Farm with respect to the issues of substantial likelihood of excess judgments and reasonableness of State Farm's decision not to settle the underlying case and that such verdict is against the law;

h. Insufficiency of properly admissible evidence to support the jury's verdict with respect to fraud, intentional infliction of emotional distress, liability for punitive damages, general compensatory damages, and amount of punitive damages, and that the verdict is against the law due to the court's incorrect decisions regarding evidence which was wrongfully admitted, wrongfully excluded, jury instructions which were wrongfully given or not given, and special verdict forms which were wrongfully given or not given; and

7. Error in law in the particulars and on the grounds as previously set forth above.

In the alternative, State Farm moves for a remittitur of the general compensatory damages and punitive damages, which are excessive as a matter of Utah law and as a matter of the due process clauses of the Utah and United States Constitutions and the excessive fines clause of the Utah Constitution.

Pursuant to prior stipulation of the parties and order of the court, the above-referenced motions will be further supported and documented in particularity by affidavit, memorandum and documentation to be filed within the timeframe set forth in the court's order of August 8, 1996.

DATED this 19th day of August, 1996.

STRONG & HANNI

By /s/
Glenn C. Hanni
Paul M. Belnap
Stuart H. Schultz
Attorneys for Defendant