

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF WESTCHESTER: CIVIL TERM PART

3 -----X

4 PROGRESSIVE NORTHEASTERN INSURANCE
5 COMPANY,

5

Plaintiff,

6

Index No.

-against-

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8750/05

8 NORTH STATE AUTOBAHN, INC. D/B/A NORTH
9 STATE CUSTOM AUTO, AND GREGORY T.
COCCARO,

10

Defendants.

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111 Dr. M.L.K., Jr. Blvd.

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White Plains, New York 10601

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August 1, 2008

14

JURY TRIAL

15

BEFORE:

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HON. MARY H. SMITH, JSC, and a jury of
six plus 2 alternates.

17

18

APPEARANCES:

19

FOR THE PLAINTIFFS:

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NELSON LEVINE DE LUCA & HORST, LLC

518 Township Line Road

Suite 300

21

Blue Bell, PA 19422

BY: MICHAEL R. NELSON, ESQ.

22

-and-

ROBERT S. STICKLEY, ESQ.

23

FOR THE DEFENDANTS:

24

MEDINA TORREY MAMO & CAMACHO, ESQS.

95 Beekman Avenue

886

1 Sleepy Hollow, New York 10591
BY: ANTHONY J.MAMO, JR., ESQ.
2 - and-
ERICA L. EVERSMAN, ESQ.
3 846 N. Cleveland
Massillon Road
4 Bath, Oh 44333
5
6
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8
9
CYNTHIA D. LENAHAN, CSR, RPR
10 Senior Court Reporter
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1 (Whereupon, the following takes place
2 on the record in open court in the
3 presence of the Court, the attorneys, the
4 parties and outside the presence of the
5 jury.)
6 THE COURT OFFICER: All rise, please.
7 THE COURT: Please be seated.
8 THE COURT OFFICER: The Honorable
9 Mary H. Smith presiding.
10 Good morning, your Honor.
11 THE COURT: Good morning. Please be
12 seated. We are still on trial.
13 Yes?
14 MR. MAMO: Judge, two things: One,
15 Mr. Nelson and I spoke yesterday and he
16 asked if it would be all right to take a
17 witness out of turn. We were doing the
18 cross examination of Jason Ceasar and
19 Mr. Nelson wanted to put his expert on
20 today. I agreed, but of course it's up to
21 the Court. I said I would consent with
22 that.
23 THE COURT: I have no problem with
24 that.

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1 MR. MAMO: We are going to start with
2 Mr. Nelson's expert today.
3 The second part is yesterday we were
4 at the facility where the car was located
5 and they had a photographer there who took
6 I don't know how many hundreds of
7 pictures. I wanted to just make sure that
8 we were not going to be introducing
9 several hundred pictures.
10 THE COURT: Why do we need to
11 introduce any pictures of the car?
12 MR. MAMO: I don't know.
13 MR. NELSON: Your Honor, you said --
14 we asked the Court to allow an inspection
15 of the jury --
16 THE COURT: I said you could take a
17 picture if you want, but we never
18 addressed whether you actually had to --
19 it had any relevance to the case.
20 MR. NELSON: Your Honor, my expert
21 worked with the photographer yesterday to
22 take pictures of the items that he wants
23 to show the jury.
24 THE COURT: That's fine. How many do

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1 we need?
2 MR. NELSON: Sixteen. I may not even
3 get into all 16. It's probably 13.
4 THE COURT: Okay. Well, let me see
5 what we have here. So 16.
6 Have they been marked already?
7 MR. NELSON: They are marked.
8 THE COURT: What numbers are they?
9 MR. NELSON: 66-C. You don't have
10 them, your Honor, because we just produced
11 them -- we just created them yesterday.
12 THE COURT: I have 66 marked as Mike
13 West's curriculum vitae. Now you are
14 going to mark it 66-C?
15 MR. NELSON: Yes, and then 1 through
16 16.
17 THE COURT: Mark them now.
18 MR. NELSON: Defendants have been
19 given a copy, your Honor.
20 (Whereupon, the photographs referred
21 to are received and marked Plaintiff's
22 Exhibits 66-C1 through 16 in evidence.)
23 THE COURT OFFICER: Plaintiff's
24 Exhibits 66-C1 through 16 so marked into

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1 evidence, your Honor.
2 MR. MAMO: Yes, your Honor.
3 And lastly, Judge, Miss Eversman will
4 be doing the cross examination of
5 Mr. West.
6 THE COURT: Okay. Fine.
7 MR. MAMO: Thank you.
8 THE COURT: Bring in the jury.
9 THE COURT OFFICER: Yes.
10 (Whereupon, the jury enters the
11 courtroom.)
12 THE COURT OFFICER: The jury is
13 entering.
14 THE COURT: Hi everybody. Welcome
15 back. Be seated. We are still on
16 plaintiff's case.
17 We are going to be taking a witness
18 out of order. I mentioned that at the
19 beginning, sometimes the schedules of
20 witnesses become very difficult and in
21 civil cases we do take witnesses out of
22 order.
23 It is a plaintiff's witness, Jason
24 Ceasar, who was on the stand. He was not

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1 cross-examined. We will go back to the
2 cross-examination. All right. And he was
3 the employee who testified he went to the
4 shop looking for various things including
5 parts. All right.
6 So let's bring in a new witness for
7 the plaintiff.
8 MR. NELSON: Thank you, your Honor.
9 I would like to call Mr. West to the
10 stand.
11 THE COURT: Please raise your right
12 hand.
13 MICHAEL WEST, a witness
14 called on behalf of the Plaintiff, after
15 having been first duly sworn, took the
16 witness stand and testified as follows:
17 THE COURT: State your name and
18 address for the record.
19 THE WITNESS: Michael J. West, 14864
20 Tukwila-International Boulevard, Tukwila,
21 Washington 98168.
22 THE COURT: Your witness, please.
23 MR. NELSON: Thank you, your Honor.
24 DIRECT EXAMINATION

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1 BY MR. NELSON:
2 MR. NELSON: Your Honor, Mr. West
3 uses hearing aids to assist with his
4 hearing, so there may be times where he
5 has to hear a question again.
6 THE COURT: Okay.
7 Q. Mr. West, can you please tell us how many
8 years you've been employed in the body repair
9 business.
10 A. Forty-five years.
11 Q. It's been 45 continuous years?
12 A. Yes.
13 Q. How are you employed?
14 A. As a collision repairman.
15 Q. And what's the name of the company you are
16 associated with?
17 A. South Town Auto Rebuild. I have been the
18 owner and operator of South Town for 36 of those
19 years.
20 Q. And what certifications do you hold, sir?
21 A. I'm a master certified collision repair
22 refinish technician certified by the Institute of
23 Automotive Service Excellence and I also am
24 certified as a collision repair refinish estimator

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1 by the Institute of Automotive Service Excellence.
2 Q. Approximately how many auto body repair
3 mechanics in the United States have a masters
4 certification?
5 A. About 8500 out of the total of 45,000 who
6 hold some kind of a certification. Total number
7 of collision repairmen is around 200,000.
8 Q. How long have you held that master
9 certification?
10 A. About 15 years. I have recertified three
11 times. You recertify every five years.
12 Q. Have you received any awards or
13 recognition for your association with ASE?
14 A. Yes, I have. In 1992 I was recognized as
15 the collision technician of the year for the
16 United States having scored the highest score on
17 master recertification tests, and then again in
18 1997 I had the highest score in the nonstructural
19 certification examination.
20 Q. Do you have any other accreditations by
21 any other organizations?
22 A. I am an accredited automotive manager.
23 This is a title that you get by going through a
24 course of activities through the Automotive

1 Institute of Bedford, Texas. It involves -- it's
2 kind of like a certification between an accountant
3 and a CPA.

4 The owner of a mechanic or repair shop or
5 a manager gets this accredited automotive manager,
6 AAM title, after taking a series of courses and
7 tests. It took me about 15 years, so it wasn't
8 really speedy at it.

9 Q. Do you do any teaching in the auto body
10 repair and management field?

11 A. Yes, I do. Through the Inter-industry
12 Conference on Automotive Collision Repair. We
13 call it ICAR. They are the imminent training body
14 throughout the United States, New Zealand,
15 Australia. They teach 72 different disciplines in
16 the auto collision repair field. Of those, I
17 teach 19.

18 Q. Do you have any responsibility to do
19 examinations regarding any welding?

20 A. Yes, I do. I am the welding examiner in
21 Washington State for the weld quality test that
22 the Inter-industry Conference on Auto Collision
23 Repair has.

24 My duties involve examining the weld test

1 previously, I served on her Washington Anti-Fraud
2 Task Force.

3 Q. Do either of those boards that you serve
4 on have anything to do with titling issues?

5 A. Yeah. Yes, they do. The Washington Auto
6 Theft Prevention Authority looks into all kinds of
7 counterfeit branding issues, cloning of vehicles,
8 rebuilding totals the wrong way, this type of
9 thing.

10 So we get -- and Washington State
11 unfortunately is one of the higher states in auto
12 theft, so we had to institute an Auto Theft Task
13 Force.

14 Q. Mr. West, I retained you on behalf of
15 Progressive to evaluate an automobile. I'm not
16 going to ask you to talk about it just yet, but
17 did you do an evaluation on an automobile?

18 A. Yes, I did.

19 Q. Did you evaluate the other documents
20 involved in the estimating of the repairs of that
21 vehicle?

22 A. I certainly did.

23 Q. Okay.

24 MR. NELSON: Your Honor, I would like

1 plates themselves. There's eight different welds
2 that are involved on the steel and the aluminum
3 test, and I examine them visually. Actually they
4 have to pass visually first.

5 The ones that pass visually, I
6 destructively test and destroy for tear-out and
7 penetration.

8 Q. Why is welding such an important issue for
9 the body shop industry?

10 A. Well, the advent of high strength steels
11 and advanced high strength steels the unibody
12 vehicles are assembled with, when we weld them
13 together, in a subsequent collision, they may tear
14 apart if the welds aren't good.

15 So that would endanger the safety of the
16 occupants and the structural integrity of the
17 automobile.

18 Q. Do you serve on any boards, sir?

19 A. Yes, I serve on many boards. I've been on
20 many boards, but the most recent one I was
21 appointed to by the Governor of the State of
22 Washington is the Washington Auto Theft Prevention
23 Authority, and the reason she appointed me was
24 that, when she was the Attorney General

1 to ask the Court to accept Mr. West as an
2 expert in the field of auto body repair,
3 auto body estimating, and auto body shop
4 management.

5 MS. EVERSMAN: I have no objection,
6 your Honor.

7 THE COURT: Ladies and gentlemen,
8 Mr. West will be recognized as an expert
9 in the fields mentioned by Mr. Nelson.

10 Now, when someone is qualified as an
11 expert, that person, by virtue of his
12 experience, his education, his background
13 and in a skill or profession of which most
14 of us know very little about, is allowed
15 to give opinions which most witnesses
16 cannot. All right. But I will give you a
17 full charge on this at the end of the
18 case.

19 I do want to tell you that an expert
20 does not -- testimony is not something
21 that you have to accept of whole cloth.
22 You are still the judges of the facts.

23 So, if your opinion differs or if you
24 feel the facts and evidence that he relies

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1 on for his opinions are not correctly
2 stated, you may reject in whole or in part
3 the expert's opinion.
4 MR. NELSON: Thank you, your Honor.
5 BY MR. NELSON:
6 Q. Mr. West, I believe you have some
7 photographs in front of you there on the bench.
8 A. 66-C.
9 Q. Yes. Could you please go through those
10 photographs.
11 A. Sure.
12 MR. NELSON: Your Honor, I have
13 enlarged some of these photos for Mr. West
14 to review with the jury. If it's okay if
15 you can step down and show them.
16 THE COURT: Yes.
17 MR. NELSON: Mr. West, can you please
18 step down.
19 Your Honor, this photograph that's
20 also on the easel is Plaintiff's 13-A. It
21 is already admitted into evidence.
22 MS. EVERSMAN: Your Honor, may I move
23 my position so I can see?
24 THE COURT: Certainly. You may go

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1 over here if that's helpful.
2 MS. EVERSMAN: Thank you.
3 Q. Mr. West, directing your attention to
4 photograph 66-C 9, can you please describe what
5 that photograph depicts.
6 A. That's the photograph of the car in
7 question, the Dr. Bilik's Mercedes Benz 2004 E320
8 wagon.
9 THE COURT: When were these
10 photographs taken, counsel?
11 MR. NELSON: They were taken
12 yesterday, your Honor.
13 THE COURT: So this is the car as it
14 is today, August 1, 2008, and I do want to
15 give an instruction that I instructed
16 counsel of both sides to take pictures if
17 they wished of the car yesterday to be
18 used today. I think this is what we are
19 looking at.
20 MR. NELSON: That's correct, your
21 Honor.
22 BY MR. NELSON:
23 Q. Mr. West, as best you can, I know there's
24 not a lot of space up here, can you please

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1 describe what is in photograph 66-C 2.
2 A. This is the bottom of the Mercedes Benz
3 right here, so we are underneath it. You can see
4 the lift right there and there's one of these on
5 each of the four corners of the automobile.
6 We are looking forward underneath the car
7 here. So these are what we call the floor pans.
8 This is the bottom of the car on each side and
9 these have covers on them that I'm going to show
10 you in a moment.
11 Outside here is where the rocker panels
12 are and these are some of the parts of the vehicle
13 that I inspected that I have in question in my
14 testimony here.
15 Q. Directing your attention to Plaintiff's
16 66-C 1, can you please describe what that photo
17 depicts.
18 A. These are the underbody covers that go in
19 that area that I just showed you. So instead of
20 having an undercoating on a Mercedes, they have
21 these screwed on and bolted panels that are made
22 out of plastic and they go longitudinally. The
23 rocker panel would be right along here and this is
24 where the exhaust comes through.

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1 Q. Mr. West, do the cars come manufactured
2 with this green tape?
3 A. No. We put that green tape on there for
4 identification purposes.
5 So this would run underneath of this area
6 right here.
7 Q. Mr. West, directing your attention to
8 Plaintiff's Exhibit 66-C 4, can you please tell us
9 what that depicts.
10 A. That is damage that exists currently on
11 the Mercedes Benz in that area right there. This
12 is the rocker panel, this is the rocker panel.
13 That's your door right there.
14 This is the pinch weld. It's part of the
15 rocker panel and very small part of the rocker or
16 the floor pan. So you can see the close proximity
17 of this to this in this area, and the covers go
18 over the top of this.
19 Q. What do the little circles in this
20 photograph depict?
21 A. Those little circles are spot welds that
22 the manufacturer spot welds and joins this section
23 to this section, and one way I determined that it
24 had never been repaired previously is all those

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1 little spot welds are intact. None of them were
2 filled in, none of them were disturbed. The paint
3 is all the same paint as the manufacturer put on
4 it.
5 So it's very obvious that this part had
6 never been repaired to me.
7 Q. Is this part normally straight or is it
8 curved like that?
9 A. This part is normally straight. This is
10 all jagged from running over those rocks.
11 Q. Directing your attention to 66-C 5,
12 Mr. West, can you tell me what that photo depicts.
13 A. This depicts the same damaged area that we
14 saw except we're not looking at it in the proper
15 manner.
16 The car would be tipped up on its side
17 here.
18 This shows the floor pan area or the
19 underbody of the car. If you were underneath, you
20 would be looking at it in this picture. You are
21 looking at it this way really, not the way it is.
22 You can see right in this area is where
23 that small dent was and right there is where the
24 pinch weld has been damaged.

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1 I inspected this area very, very
2 carefully. I saw no sign of any damage anywhere.
3 So I know that it was never repaired in
4 this area because of all these marks. This is
5 wax-based corrosion protection. These are seam
6 sealers along there. That's all from the factory.
7 Q. Directing your attention to Plaintiff's
8 Exhibit 66-C 7.
9 A. This is a little more of a close-up of it
10 and this is that pinch weld that we were looking
11 at, the same side, right side.
12 This is the dent. It's actually looking
13 at it upside down.
14 THE COURT: Yes, it is upside down.
15 MR. NELSON: Let me flip it around,
16 your Honor.
17 A. That's a jagged area we have been looking
18 at here, right along this area here in the car,
19 and there's the dent that's been a lot of focus in
20 the picture.
21 Now, this photograph --
22 THE COURT: What number is that,
23 please?
24 MR. NELSON: Your Honor, this is 66-C

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1 6.
2 A. Now, this photograph is one of those two
3 panelings I showed you in the very beginning that
4 goes on the bottom side of the car where you saw
5 the exhaust. These were replaced. These are new.
6 I saw no damage in the area that the
7 damage now exists under there.
8 So my reasoning tells me that these were
9 not on there at the time that got damaged and it
10 hasn't been damaged after these were put on
11 because there's nothing wrong with these. These
12 go on top of that damage. So it covers it.
13 MR. NELSON: Your Honor 66-C 8.
14 A. This is a good picture. It shows you the
15 perspective we were really looking at.
16 You would be standing looking at the side
17 of the car if it was up in the air and this is one
18 of those panels, those black panels, installed,
19 and you can see how it goes along the undamaged
20 part of the rocker here and here and how there's a
21 gap in there, and you'd be able to see this damage
22 if the outer rocker cover wasn't on like it is
23 here.
24 This tape that's right here we put on to

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1 move the zone of damage up to the door so we could
2 relate to it after we put the outer cover on,
3 which we are going to do in the next photograph.
4 Q. What is this outer cover made of, sir?
5 A. It is plastic. It's plastic. It's a
6 little stiff. It's stiff, but you can take a
7 knife and scratch it.
8 So, if anything got under it to put a dent
9 like that in it, you'd see a mark on the outer
10 rocker cover.
11 And this, too, this is completely
12 undamaged in this area. As you can see, if that
13 would have been on there when that happened, it
14 would have some kind of deformation, tear or mark
15 in it.
16 MR. NELSON: Your Honor, 66-C 10.
17 A. This is with the rocker panel cover
18 molding on and the floor pan cover molding or
19 covering, I call it a paneling, on and you can see
20 how it completely covers the damage that's
21 underneath there.
22 You can't see the damage at all. So but,
23 in the area, if you look down here, you can't see
24 any dent, that's underneath, and you can't see any

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1 of that jaggedness that was on the pinch weld in
2 this area because they are covered by these
3 undamaged coverings.
4 Q. You said these were undamaged coverings.
5 Were they put on after the accident?
6 A. Yes. These are new. We have invoices for
7 these.
8 THE COURT: What number is this?
9 MR. NELSON: This is 66-C 10, your
10 Honor. You can see the perspective.
11 THE COURT: Okay.
12 MR. NELSON: Your Honor, 66-C 11.
13 Q. Mr. West, what does that photo depict?
14 A. That photo is the left side or driver's
15 side cover that goes under the floor pan.
16 Q. This is the opposite side of the side we
17 are looking at?
18 A. Yes, and we had put these marks on here
19 because there's a small indentation that is in the
20 pinch weld on the other side of the car where I
21 showed you all that jagged metal. There's a small
22 indentation that was probably caused by a jack,
23 and there's no damage here, a jack or some kind of
24 mechanical device.

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1 MR. NELSON: This is the opposite
2 side of the car now.
3 THE COURT: Twelve?
4 MR. NELSON: This number is 66-C 3,
5 your Honor.
6 A. This photograph is a little bit difficult
7 to make out because you're looking at the inside
8 of the left side rocker cover molding on the
9 floor.
10 Q. You said left side. Is that driver's
11 side?
12 A. Driver's side, yeah. This is the original
13 factory sticker. There's no damage to this, there
14 was noncharged for, but the point we're showing
15 here is in this area, there's no damage right
16 there so, and there's no damage on the opposite
17 side of this either.
18 So that little indentation that we're
19 going to take a look at, it wasn't caused after
20 that was put on. That was something that
21 happened.
22 THE COURT: Let's make this clear.
23 This is a rocker panel that had been
24 removed from the vehicle.

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1 THE WITNESS: It's that covering
2 right there, your Honor.
3 THE COURT: It's something that is
4 not on the car anymore.
5 THE WITNESS: We took it off.
6 THE COURT: You took it off?
7 THE WITNESS: Yes.
8 MR. NELSON: Your Honor, I'm not sure
9 he understood your question.
10 This is the part that is still on the
11 car.
12 MR. MAMO: Objection.
13 MS. EVERSMAN: Objection.
14 THE COURT: Now, look, witness,
15 explain what this is.
16 THE WITNESS: That is the rocker
17 panel cover that's on the opposite side of
18 the car, the left side.
19 THE COURT: Why is it on the ground?
20 THE WITNESS: Because it was taken
21 off at another time.
22 THE COURT: Previous to your seeing
23 it?
24 THE WITNESS: When I inspected it in

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1 April 6th of 2008, I removed it.
2 THE COURT: So this photograph was
3 not taken yesterday?
4 THE WITNESS: This photograph was
5 taken yesterday.
6 THE COURT: And why is this piece on
7 the ground?
8 THE WITNESS: Because those parts
9 were not on the car yesterday. None of
10 the parts I've shown you were on the car
11 yesterday.
12 We re-installed them all back on to
13 the car.
14 THE COURT: Okay.
15 MR. NELSON: They were taken off so
16 he could look at the underside of the car.
17 THE COURT: No, no. He has to
18 explain the photographs.
19 THE WITNESS: Sure.
20 MR. NELSON: Okay.
21 BY MR. NELSON:
22 Q. 66-C 12. Mr. West, can you please tell us
23 about this photograph.
24 A. This is the left side rocker panel looking

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1 straight up when you are underneath the car with
2 the paneling replaced on it, and the rocker panel
3 cover molding. These little things you see here
4 are clips that hold it on, and you can see
5 absolutely no distortion in this area where there
6 was anything that hit it after those had been
7 placed on by the shop.
8 Q. So this is the driver's side again?
9 A. Yes.
10 Q. What were the damages on the passenger's
11 side?
12 A. Right.
13 Q. Before we proceed, how many hours did
14 North State charge to fix the driver's side -- the
15 passenger's side where that damage was?
16 A. Where the damage was, North State charged
17 three hours to repair the rocker panel and three
18 hours to repair the floor panel where I could see
19 that no repair had ever taken place.
20 Q. I direct your attention again to 66-C 8.
21 This area here, they received how much time to
22 repair?
23 A. Three hours.
24 Q. And then on the floor on the bottom, you

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1 see --
2 A. On the floor where I could see absolutely
3 no damage whatsoever, an additional three hours.
4 Q. Did they charge to paint as well?
5 A. Yes, yes, they did.
6 Q. And, on the side of the driver's side
7 where you didn't find any damage, how much did
8 North State charge to fix the rocker panel on the
9 driver's side?
10 A. Three hours to repair the driver's side
11 rocker panel and three hours to repair the
12 driver's side floor pan.
13 I could see no damage whatsoever that ever
14 occurred there.
15 Q. Now, go back to January 11th, that
16 estimate that North State wrote that Dr. Bilik
17 signed, on the side that was damaged, the
18 passenger's side, how many hours were written on
19 that estimate for the rocker panel that had three
20 hours in March?
21 A. The preliminary estimate North State
22 issued had eight hours of repair to the
23 passenger's side rocker panel, this area right
24 here.

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1 Q. In addition to looking at the rocker and
2 floor pans, did you look at other aspects of this
3 car while you reviewed it?
4 A. Yes, I did. I inspected the entire
5 superstructure, the frame, the sub frame, the
6 suspension of the area, of the entire car.
7 MR. NELSON: Your Honor, picture 66-C
8 13.
9 Q. Now, how much did North State charge to
10 repair the unibody frame overall?
11 A. Overall, the whole unibody, including the
12 setup and measure, they had 23 hours on it.
13 THE COURT: What is the unibody?
14 Q. What is a unibody?
15 A. The unibody, your Honor, is the entire
16 structure underneath all these skins. It's one
17 unit piece that's welded together, unit
18 construction compared to a frame body over frame
19 that the body is actually bolted on like a Chevy
20 pickup.
21 Q. Mr. West, when you're looking at a car
22 like this and you're trying to evaluate whether or
23 not there was any frame damage and unibody damage,
24 what kind of things are you looking for?

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1 A. I'm looking for telltale marks like
2 disturbances where the seams come together, you
3 know, if the seam sealer has been cracked or if
4 the seam sealer has been replaced in a different
5 pattern than what the rest of the vehicle has,
6 like over here.
7 I look for spot welds that may have been
8 disturbed or any kind of bunching around the spot
9 welds.
10 By the way, this area is the right front
11 frame rail area and this is the bumper extension
12 right here.
13 THE COURT: I don't think your
14 pointer is working.
15 THE WITNESS: No, it's starting to
16 die out.
17 BY MR. NELSON:
18 Q. Well, what is this area right here?
19 A. That's the front bumper absorber. It's
20 made out of aluminum.
21 Q. And that connects to the unibody?
22 A. Yes.
23 Q. This material here in the photograph that
24 almost looks like toothpaste or some kind of

1 caulking, what is that?

2 A. That's a heavy seam sealer that is put on
3 there by a factory, by the factory. In some
4 places you can see it sprayed; some places like
5 this, it's brushed out.

6 That covers the seams to keep the moisture
7 out of in between the seams where it might start
8 corroding from the spot weld because the
9 protective cover is burned away right there on the
10 inside, so they try to keep moisture out in
11 between.

12 Q. This stuff we see right here, was this
13 installed by Mercedes Benz when the car was built?

14 A. Yes.

15 Q. Or was it done at the factory?

16 A. It's all built at the factory, and the
17 reason it looks a little different color is
18 because, when they sprayed the car, they just put
19 a few coats of paint over it. They don't get
20 complete coverage on it.

21 So it's pretty easy to tell if it's been
22 disturbed or repainted just by the way the color
23 looks in comparison to the rest of the vehicle.

24 Q. Can you go through the process and explain

1 there's telltale signs from that.

2 Q. How many frames have you repaired in your
3 lifetime?

4 A. Thousands.

5 Q. How many people have you taught how to
6 repair frames?

7 A. Thousands.

8 Q. Did you look at this area alone on the
9 car, sir?

10 A. No. I looked at the entire area of the
11 whole car, every inch of it.

12 Q. Except what you couldn't see under the
13 upholstery and stuff?

14 A. Yes.

15 Q. But, as far as the engine components and
16 rear components of the car, you looked at all the
17 unibody structure seams?

18 A. All the areas that were charged for repair
19 I paid specific attention to. So I was going down
20 the entire structure looking for any signs of
21 where they might have worked.

22 Q. Did you see any signs on the front of the
23 car that the frame had been realigned and tools
24 had been applied?

1 to your Honor and the jury how these cars are
2 generally straightened and we're talking about the
3 frame of the unibody.

4 A. Generally they are set up on a frame
5 machine, a frame bench, and they're fastened in
6 this area underneath the car at the four corners
7 of what we call the torque box structure and then
8 they are measured to determine if they are out of
9 height. We call that datum from an invisible
10 plane that runs under the car, and then we
11 compared the length, the height and the width from
12 center.

13 So, if there is some damage, then we need
14 to hook up to it with hydraulic power and chains
15 and put a stress on it if they are short or pull
16 them if they need to be swayed one side or
17 another.

18 At the same time we're doing that, we
19 stress relief it. So you would be --

20 Q. Is that like a happy-hour stress relief?

21 A. That's what the jury is going to need
22 after this. Anyway, we apply hammers, different
23 kinds of tools in these areas to shock the
24 molecules back into their original position, so

1 A. No, I couldn't see any evidence of it.

2 Q. How many hours did North State get for
3 that repair to align the front end rails?

4 A. Six hours on that.

5 Q. Did you see any signs on the rear of the
6 car --

7 A. No.

8 Q. Let me finish. Did you see any signs on
9 the rear of the car that showed any signs of
10 realignment of the rear rails?

11 A. None at all. If I might add, I agree with
12 the defense's witness, Phillip Moseley, from
13 Mercedes Benz. I agree with him completely.

14 I found the underbody and structure of the
15 car indistinguishable from a car that had never
16 been in an accident.

17 Q. Mr. West, did you prepare a report of your
18 findings as to what you thought North State
19 charged for and shouldn't?

20 A. Yes, I did.

21 Q. Could you please take your seat.

22 A. Okay.

23 MR. NELSON: May I approach the
24 witness, your Honor?

918

1 THE COURT: Yes.

2 MR. NELSON: I am showing the witness

3 what's marked as Plaintiff's 66.

4 Q. Mr. West, what is Plaintiff's 66?

5 A. This is a summary of known overcharges and

6 unrepaired but charged for items that I found on

7 the car.

8 Q. How much does that amount to?

9 A. \$2,808.65.

10 Q. Now, are you trying to take the position

11 that that's all the defendants overcharged Dr.

12 Bilik?

13 A. No, I don't take that position, but I'm

14 very conservative. These are the known

15 overcharges of unrepaired but charged-for items.

16 I didn't put things that I assumed they

17 hadn't repaired on there, only the things that I

18 know they didn't.

19 Q. Or that they overcharged for?

20 A. Yes.

21 Q. So we have already covered the passenger's

22 side rocker and floor and the driver's side rocker

23 and floor.

24 Could you just please identify in your

919

1 report which of those charges pertain to those

2 parts.

3 THE COURT: Do you want to put this

4 in evidence?

5 MR. NELSON: Yes, your Honor. I'm

6 sorry.

7 MS. EVERSMAN: I have no objection,

8 your Honor.

9 THE COURT: 66 in evidence, report

10 from Mr. West.

11 (Whereupon, the report referred to is

12 received and marked Plaintiff's Exhibit 66

13 in evidence.)

14 THE COURT OFFICER: Plaintiff's 66 so

15 marked into evidence, your Honor.

16 Show it to the witness again?

17 MR. NELSON: Please.

18 A. Thank you.

19 Q. Mr. West, I would like you to, as you're

20 going through this report, also draw the

21 comparison to Plaintiff's Exhibit 2, which is

22 North State's estimate of March 22nd.

23 A. Okay.

24 Q. That was your frame of reference for

920

1 evaluating these charges, right?

2 A. Yes, it was. I believe the previous

3 question was what parts of this report line up

4 with what we have just seen here.

5 Q. Let's start off with the right rocker and

6 right floor panel. Okay?

7 A. Okay. Right side rocker, which I have

8 here on line 20, refers to line 206 on North State

9 Custom's Exhibit 2, three hours, right side floor

10 pan, the underbody part that we were looking at,

11 that lines up with Exhibit 2 209, 3 hours.

12 Q. When you say Exhibit 2 209, you are

13 talking about Plaintiff's Exhibit 2, line 209?

14 A. Two, line 209 on the North State estimate.

15 Line 18, which is the left side floor pan

16 --

17 Q. That's the driver's side?

18 A. Yes -- driver's side floor pan where I

19 found no damage, no sign that there had ever been

20 any damage. It corresponds to Plaintiff's Exhibit

21 2, number 205.

22 And then line 16, left side rocker panel,

23 that's the driver's side rocker panel, corresponds

24 to Plaintiff's Exhibit 2, line 219, for another

921

1 three hours.

2 Q. Does your report reflect North State's

3 charges for paint labor?

4 A. Yes, it does.

5 Q. What line?

6 A. Line 24. This corresponds to North

7 State's lines 219, 206, 205, and 209, refinish

8 left side rocker panel, right side rocker panel,

9 left side floor, right side floor.

10 I could see no evidence that they had ever

11 painted anything under there at all for 1.6 hours.

12 Q. Okay. Please refer to line one in your

13 estimate.

14 A. Okay.

15 Q. Just, if you could, tell us why you've

16 written that on your report.

17 A. This says remove, replace right front seat

18 belt. That corresponds to North State's line 163

19 on their estimate for one hour and \$258. This is

20 the right front seat belt.

21 According to the information I received

22 from Mercedes Benz, that this vehicle has an

23 inquiry system in the front seat belts, so the

24 seat belt needs to be buckled in order for the

1 seat belt pre-tensioner to deploy. This is what
 2 tightens across you in an accident, or if the air
 3 bags deploy.
 4 Dr. Bilik was the only person riding in
 5 the car and the right side is the passenger's
 6 side.
 7 Q. So there was nobody in the passenger's
 8 side so the seat belt wasn't buckled?
 9 MS. EVERSMAN: Objection.
 10 THE COURT: I didn't even hear that.
 11 BY MR. NELSON:
 12 Q. So your opinion is based on the fact that
 13 --
 14 A. There was nobody in the passenger's seat,
 15 just Dr. Bilik over in the driver's seat, and yet
 16 the right side seat belt was replaced.
 17 THE COURT: Overruled.
 18 Q. Refer to line two in your report,
 19 Mr. West.
 20 A. Uh-huh. Line 2, remove and install three
 21 door weather strips, corresponding to North State
 22 Custom's estimate, number two -- line 226, 245 and
 23 268 for 1.2 hours.
 24 I understand why they would need to remove

1 part of the door's weather strips because they
 2 overlap the roof rail, but they don't need to take
 3 the whole door weather strip off, just the top of
 4 it.
 5 So I deducted from 1.8, six-tenths of an
 6 hour or two-tenths per door. That is a deduction
 7 of 1.2 hours.
 8 Q. I understand why this might be obvious in
 9 your world, Mr. West, but when you talk about why
 10 they had to remove it, what are you referring to?
 11 A. I'm referring to a weather strip that,
 12 when you shut the door, it overlaps the top a
 13 little bit and they had to repaint the top.
 14 So the weather strip was in the way. They
 15 needed to pull it out of its lock strip, tape it
 16 back, and then re-install it.
 17 Q. Refer to line three on your report,
 18 Mr. West.
 19 A. Remove and install left rear door
 20 assembly, corresponding with line 267 on North
 21 State's estimate.
 22 Q. What does that mean?
 23 A. For one hour.
 24 Q. What does that mean?

1 A. It means take the door off, put the door
 2 back on. I could see no reason why they would
 3 need to do that for that damage.
 4 Q. Refer to line four.
 5 A. Remove and install one wheel, .1. I don't
 6 know why they only had one wheel on here, but it
 7 should have been included in the bench setup and
 8 measure time.
 9 So it was an extra not-needed operation.
 10 Q. You refer to line six.
 11 A. Remove and replace four wheels
 12 corresponding with North State's estimate line
 13 119, 120, 121 and 122, three tenths of a wheel a
 14 piece for a total of 1.2 hours.
 15 Now, this was already charged for in a
 16 charge for \$100 for mount and balancing four
 17 wheels. Mount means put the tire on the new
 18 wheel, balance it. So there's a \$25 per wheel
 19 charge in there and, in addition to that, they
 20 charged 1.2 hours.
 21 So it's an overlapping charge.
 22 Q. Please refer to line 8, please, on your
 23 report 66.
 24 A. Yeah. This is repair left roof rail, four

1 hours, and it corresponds with line 178, and this
 2 has to do with the part that is right above the
 3 rocker panel that they replaced. It goes above
 4 the quarter glass window. They replaced that part
 5 and yet they charged four hours to repair that
 6 part.
 7 So my contention is that it should have
 8 been included in the five hours they had to align
 9 the left quarter and gate opening. There was no
 10 need to repair something that you were going to
 11 replace. If you were going to do that to align
 12 the area, you already charged five hours to align
 13 the quarter panel, which that is part of.
 14 Q. Refer to the next item on your report,
 15 Mr. West.
 16 A. Line 11, left inner quarter panel. That
 17 corresponds to line number 197 on North State
 18 Custom's estimate for two and a half hours.
 19 I inspected the entire left inner quarter
 20 panel. I could see no evidence other than where
 21 they may have put a jack or something in there
 22 when they were replacing the quarter itself, but
 23 there's no painting or marks in that area.
 24 It looked like it would have been included

1 in the five hours of alignment for the left
 2 quarter and tailgate opening.
 3 So it was an overlapping charge.
 4 Q. Mr. West, refer to the next line in your
 5 estimate, please.
 6 A. Line number 134, wheel alignment
 7 corresponding with line 350 on the North State
 8 Custom's estimate. Excess of 2.4 hours, an
 9 overcharge. They charged \$225 to do a four-wheel
 10 alignment. My book showed 1.8 hours.
 11 So this ended up being an overcharge of
 12 2.4 hours.
 13 If you take the 225 and divide it by North
 14 State Custom's hourly rate of 53, that comes out
 15 4.25 hours.
 16 So it was an overcharge of 2.4 hours.
 17 Q. Now, you've read some testimony in this
 18 case, correct?
 19 A. Yes.
 20 Q. Do you see anything about how many hours
 21 or time Mr. Cocco went by when he entered 2.2 on
 22 his estimate?
 23 A. I think his manual showed 2.2, yes.
 24 Q. Even 2.2 with their labor at \$53 an hour,

1 that would equate to what, sir?
 2 A. Well, even that would have equated to
 3 approximately 2.1 hour overcharge. So it was
 4 still way overcharged.
 5 Q. There's testimony in this case, Mr. West,
 6 that they had to put this car on the alignment
 7 machine several times and they could have charged
 8 Dr. Bilik for doing that.
 9 Do you have any reaction to that?
 10 MS. EVERSMAN: Objection.
 11 THE COURT: Well --
 12 Q. Do you agree with that testimony that was
 13 offered?
 14 THE COURT: Are you objecting because
 15 it's not correct?
 16 MS. EVERSMAN: Yes, your Honor, I'm
 17 objecting because that is not correct.
 18 MR. NELSON: I believe they put three
 19 alignments up.
 20 THE COURT: Sustained. If you can
 21 find the testimony.
 22 MR. NELSON: I'll move on, your
 23 Honor.
 24 THE COURT: Okay.

1 BY MR. NELSON:
 2 Q. We've already covered line 16 through 24,
 3 so if you could move on to line 26.
 4 A. Okay. Line 26, which says remove and
 5 replace parts on the estimate that were charged
 6 for but never installed, and I think they have
 7 already admitted that they put seven parts on
 8 their estimate that were never installed on the
 9 car for a total of \$636.20.
 10 The next line I have is line 28. Do you
 11 want me to move to that, Mr. Nelson?
 12 Q. Please.
 13 A. This is a wash and glaze that corresponds
 14 with line 342. They washed and glazed the car for
 15 \$195.
 16 Now, they charged 12 hours to cover, sand
 17 and polish the car. In our world, when we polish
 18 a car, we glaze it as part of the polishing.
 19 So I thought \$195 wash job was quite
 20 expensive in light of we have a \$34,000 job here.
 21 Q. Mr. West, what's next in your report?
 22 A. The last thing I had was they made a
 23 charge for body supplies that correspond to the 18
 24 and a half hours that I thought were not necessary

1 on the job at \$5 per hour coming to a total of
 2 \$92.50.
 3 Q. Now 18.5 hours you are talking about
 4 refers to the work that they charged for but they
 5 never did as shown in the photographs.
 6 A. Yes.
 7 Q. Mr. West, turn to the second page of your
 8 report. Do you see Roman numeral I -- by
 9 the way, what system was this report written on?
 10 A. The Mitchell Estimate System.
 11 Q. Is that the same system Progressive uses?
 12 A. I believe it is.
 13 Q. Under labor subtotals, you'll see an entry
 14 there that says body 23.0, rate 53, and then it
 15 talks in terms of units.
 16 Do you see that word there?
 17 A. Yes, 23 units.
 18 Q. Twenty-three. What is a unit, according
 19 to this estimating system?
 20 A. Well, in our hour, a unit is one hour, a
 21 60-minute hour.
 22 Q. From the perspective of the time that
 23 you're calculating, it is based on 60-minute
 24 hours. Is that correct?

930

1 A. Yes.

2 Q. What kind of compensation system do the

3 body repair technicians in your shop get paid on,

4 composition, based on commission or straight

5 hourly?

6 A. It's hourly with benefits.

7 Q. Why don't you use a commission system?

8 A. Well, my own personal feeling, the reason

9 I don't, is I think, as an employer, it gives me

10 more control over the quality of the job.

11 With commission, you're constantly

12 monitoring the technicians.

13 Q. The point of the commission process is to

14 get the job done as quickly as possible, right?

15 A. Yes.

16 Q. Cut corners?

17 A. It can happen.

18 MS. EVERSMAN: Objection.

19 THE COURT: Sustained. Strike that

20 question.

21 BY MR. NELSON:

22 Q. Now, you are familiar, though, with people

23 who work on a commission basis or flat rate basis

24 in the body shop industry, correct?

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1 A. Yes.

2 Q. Is it possible to beat the clock as they

3 say in the business? What does that term mean?

4 A. Oh, yeah.

5 Q. So if somebody had an hour to do a job,

6 according to an estimate, is it appropriate if

7 they get it done in eight-tenths of an hour or

8 nine-tenths of an hour?

9 A. It's appropriate.

10 Q. When does it start to cross into

11 inappropriate?

12 A. Well, according to the Automotive

13 Management Institute, a technician that's working

14 at 125 percent efficiency, in other words, you

15 have one hour, he completes it in 45 minutes, is

16 working very efficiently.

17 So I would say somewhere between 125 and

18 150, right around there, would be a very efficient

19 technician.

20 Q. How about if you saw someone doing a job

21 in half the time as allowed on the estimate?

22 So, in other words, for an hour, they

23 worked 30 minutes or 20 minutes?

24 A. You would have to have a very good

932

1 estimate that he was working for.

2 Q. In other words, too thick, too heavy?

3 A. Yeah.

4 Q. To generous?

5 A. Either he's got a really good estimate or

6 he's not doing the complete job.

7 Q. When you say "good estimate," you don't

8 mean good for the consumer?

9 A. A high estimate, yeah.

10 Q. Do you? One last line of questioning,

11 Mr. West.

12 From the standpoint of what happened

13 between Progressive and Dr. Bilik and North State

14 Custom, were you able to make any observations

15 about the way North State managed the

16 communications between Dr. Bilik and Progressive;

17 in other words, between Dr. Bilik and North State,

18 between North State and Progressive?

19 Can you speak to that?

20 MS. EVERSMAN: Objection.

21 THE COURT: Sustained. No

22 foundation.

23 Q. Mr. West, did you have an observation to

24 -- did you have a chance, as you looked through

933

1 the documents, to make an observation about the

2 manner in which North State managed the repair

3 process?

4 A. Yes.

5 Q. What is that observation?

6 A. My first observation was, when North State

7 requested Dr. Bilik to sign the authorization for

8 repair, they sent it over to her I believe on

9 December 14th, and part of that authorization

10 says, I have completely reviewed an itemized

11 statement of repairs of my vehicle or someone

12 explained them to me in full and I authorize you

13 to proceed on that basis.

14 Well, that was December 14th, 2004. They

15 never prepared the initial estimate until January

16 the 11th, 2005.

17 So they put a document in front of her

18 telling her they needed this before they could

19 begin repairs, but there was no itemized

20 statement, and the first one was over 270 lines

21 long anyway, so I can't imagine somebody

22 explaining that to you over the phone.

23 Q. What about the subsequent interaction

24 between North State and Progressive?

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1 A. Well, the only thing I can say is I
2 told -- I've told my estimators, I don't ever want
3 to see a car that we're repairing total out.
4 That's the worse thing that can happen.
5 Dr. Bilik was without an automobile for
6 over three months. She was inconvenienced all
7 that time.
8 In addition to that, if the vehicle had --
9 would have had a complete estimate written after
10 the teardown of the collision damaged parts on the
11 vehicle and a thorough inspection, they could have
12 determined whether that vehicle was going to total
13 out or not.
14 So repairing a car that ends up being
15 totaled is a loser for everybody and it makes -- I
16 told my estimators, it makes us look like an
17 idiot. We are going to lose a customer for life.
18 Q. What could have been done in, say, January
19 or February to avoid all of that taking place?
20 A. Well, what could have been done would have
21 been a very thorough, thorough inspection and
22 estimate written on the vehicle.
23 Insurers will pay you for an estimate and
24 the time that you put in preparing it if the car

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1 does total out. That's what should have been done
2 in this case.
3 Q. But, when North State took the car apart,
4 would that have been the time that that discussion
5 between Progressive and North State should have
6 occurred?
7 MS. EVERSMAN: Objection.
8 Q. When should those discussions between
9 North State and Progressive have occurred?
10 THE COURT: Overruled.
11 A. They should have occurred at the time they
12 took the car apart and did a thorough examination
13 of what it was going to take to fix that car.
14 Q. Mr. West, I've compensated you for your
15 work here, correct?
16 A. Uh-huh.
17 Q. How much an hour are you receiving?
18 A. I receive \$200 per hour as an expert
19 witness.
20 Q. Okay. How many articles have you written
21 as an expert?
22 A. I've got 42 published articles.
23 Q. Would you say that those articles strongly
24 advocate on behalf of the body shop industry or

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1 the insurance industry one way or the other?
2 A. I don't think I've ever written an article
3 advocating on the insurance industry, to tell you
4 the truth.
5 Q. They give you the money, right?
6 A. I mean, we have an ax to grind on our
7 side, but most of my articles are technical
8 articles.
9 Q. The opinions that you've given us today,
10 are they reasonable to a certain degree of
11 certainty in your field as a body repair
12 technician, as someone who is certified in these
13 areas and someone who is certified in automobile
14 estimating and in body shop management?
15 A. Absolutely.
16 MR. NELSON: Thank you, your Honor.
17 THE COURT: Cross.
18 MS. EVERSMAN: Thank you, your Honor.
19 CROSS-EXAMINATION
20 BY MS. EVERSMAN:
21 Q. Mr. West, my name is Erica Eversman. It's
22 right at noon so I'm not quite sure what to say.
23 Along with Mr. Mamo, I am counsel for the
24 defendants in this case, Mr. Coccaro and North

937

1 State Custom. Okay?
2 A. Okay.
3 Q. Now, you just testified to a number of
4 things here and one of the last things that you
5 finished up with is Mr. Nelson asked you if you
6 were being compensated.
7 A. Uh-huh.
8 Q. And you're being compensated to sit here
9 in this chair today. Is that right?
10 A. Yes, I am.
11 Q. And you are being paid \$200 an hour. Is
12 that correct?
13 A. Yes.
14 Q. And you were being paid \$200 an hour to
15 sit out in the hallway for several days, were you
16 not?
17 A. Absolutely.
18 Q. How much does your -- you said that you
19 charge by the hour for the type of repair work
20 that you and your shop do.
21 A. Yes.
22 Q. How much do you charge an hour there?
23 A. Our door rate is \$48 an hour.
24 Q. Forty-eight dollars an hour. So you're

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1 making substantially more dollars an hour by being
2 here today testifying against a body shop and the
3 body shop owner than you would if you were at home
4 fixing cars, right?
5 A. I am, but it took me 45 years to get to
6 that point.
7 Q. Now, how much in total has Progressive
8 compensated you for your testimony to date?
9 A. Today?
10 Q. To date.
11 A. To date, I have received \$18,000 from them
12 to date.
13 Q. \$18,000. And that only includes what you
14 have already billed, it doesn't include your
15 testimony today, right?
16 A. That's correct.
17 Q. And how much -- when was the last time
18 that you billed and were paid by Progressive?
19 A. I think it was about a month ago.
20 Q. So --
21 A. Yeah.
22 Q. So you've got about a month's worth of at
23 least time --
24 A. Yes.

939

1 Q. -- to be compensated for. Is that
2 correct?
3 A. Yes.
4 Q. And how many days have you been here in
5 Westchester County, New York?
6 A. Well, four days last week and then all of
7 this week.
8 Q. Four full days. Is that correct?
9 A. Yes.
10 Q. Is that an eight-hour day?
11 A. Sometimes it's not. I mean --
12 THE COURT: Let's move on.
13 Q. I'm sorry. You said four days last week,
14 correct?
15 A. Yes.
16 Q. And you said sometimes they are an
17 eight-hour day and sometimes they are not?
18 A. Yes.
19 Q. Sometimes they are more than that?
20 A. Yes, they are.
21 Q. Substantially more than that?
22 A. They can be.
23 Q. Can you tell us what's the longest day
24 that you've worked on behalf of Progressive in

940

1 this case?
2 A. Fourteen hours.
3 Q. Fourteen hours?
4 A. Yes.
5 Q. And you made \$200 an hour?
6 A. Yes.
7 Q. Progressive is also compensating you to
8 fly back and forth from your location in Seattle
9 --
10 A. Yes.
11 Q. -- is that correct, because you are a
12 Washington repair shop owner?
13 A. Right.
14 Q. Right. So it's fair to say, is it not,
15 Mr. West, that you stand to make several thousand
16 dollars more from the last time that you billed
17 Progressive until the end of your testimony likely
18 here today?
19 A. That's right.
20 Q. Okay. Can you tell us approximately how
21 much more you expect to bill Progressive?
22 A. It's hard to say, but it would be in
23 excess of the \$18,000.
24 Q. How much in excess?

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1 A. I don't really know until I add it up, all
2 up, and get the plane fares and all that stuff.
3 Q. Which you've paid for out-of-pocket but
4 expect to be compensated for?
5 A. Yes, absolutely.
6 Q. Okay. Well, Mr. West, would you agree
7 with me that it's likely that you will be charging
8 Progressive at least \$10,000 more for the
9 testimony over -- for your activities over the
10 last month?
11 A. Yes.
12 Q. Is it fair to say, that you will likely be
13 charging Progressive more than \$10,000?
14 A. I just told you it would be in excess of
15 what they already paid me. I don't know how much.
16 They already paid me 18,000.
17 Q. But you've already told us that there's an
18 additional 10,000 you're sure will be paid?
19 A. Yes.
20 MR. NELSON: Your Honor, we keep
21 going over and over.
22 THE COURT: Asked and answered.
23 Let's move on.
24 Q. All right. Now, you've never been

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1 retained to act as an expert witness on behalf of
 2 a body shop, have you?
 3 A. On behalf of a body shop, no.
 4 Q. You have only ever testified or been asked
 5 to testify by insurers. Is that right?
 6 A. That's right.
 7 Q. Now, Mr. West, you mentioned that you have
 8 your shop in the Seattle area, correct?
 9 A. Yes.
 10 Q. Would you agree with me that there are
 11 substantial differences between the way things are
 12 done in Seattle, Washington, as opposed to, say,
 13 Westchester, New York in the body shop industry?
 14 A. No.
 15 Q. You're not aware of any differences?
 16 A. From the shops that I've been in while
 17 I've been here, I can't really tell any
 18 differences. We have good to work in shops, hard
 19 to work in shops. That's what I saw here.
 20 Q. Where you say good to work in shops, you
 21 mean in terms of space or size?
 22 A. Space, equipment that they have to work
 23 with.
 24 Q. And --

943

1 A. The conditions that they are working in.
 2 Q. And the conditions that a person, a
 3 technician, working in a shop is working in have
 4 material -- has a material impact on the manner in
 5 which and the speed with which they can perform
 6 any given procedure or task. Is that correct?
 7 A. Yes.
 8 Q. You've never been in North State Custom,
 9 have you?
 10 A. No.
 11 Q. So you have no idea how the shop is laid
 12 out, correct?
 13 A. No, not at all.
 14 Q. You have no idea whether North State
 15 Custom and Mr. Coccaro have innovated a number of
 16 different techniques and arrangements to promote
 17 very efficient collision repairs?
 18 A. No.
 19 Q. You don't know if the floors in that
 20 location are so clean you could probably eat off
 21 of them, do you?
 22 A. No, but I suspect they would be.
 23 Q. And you suspect they would be because this
 24 is a Mercedes certified facility. Is that not

944

1 right?
 2 A. Yes.
 3 Q. And you expect high quality professional
 4 appearance and working conditions?
 5 A. That's what I would expect.
 6 Q. Excellent. Okay.
 7 Now, your shop -- I'm sorry. Please tell
 8 me the name of it again.
 9 A. South Town Auto Rebuild.
 10 Q. Now, your shop is not Mercedes Benz
 11 certified, is it?
 12 A. No.
 13 Q. And never has been, has it?
 14 A. Never, never.
 15 Q. So Mercedes Benz has never put its stamp
 16 of approval on your shop and the work that it
 17 does?
 18 A. Not in any way.
 19 Q. Now, you referenced -- I'm sorry. As a
 20 result of that -- sorry. You already told us your
 21 shop is -- you have already told us your shop is
 22 not Mercedes Benz certified, and you've never been
 23 in North State Custom's shop, correct?
 24 A. No.

945

1 Q. So it's fair to say, is it not, Mr. West,
 2 that you don't have any idea what the relationship
 3 is between North State Custom and Mercedes Benz?
 4 A. No, not at all. I would think from the
 5 amount of parts they are buying, it would be a
 6 very good relationship.
 7 Q. So you wouldn't have any knowledge, would
 8 you, whether Mercedes Benz actually sends people
 9 over from Munich, Germany, its headquarters, to
 10 North State Custom --
 11 MR. NELSON: Objection, your Honor.
 12 It assumes facts not in evidence.
 13 THE COURT: Sustained.
 14 Q. Now, Mr. West, you've given us, you gave
 15 us a lot of information in reference to the
 16 photographs that Mr. Nelson showed you.
 17 You remember doing that just a few moments
 18 ago?
 19 A. I sure do.
 20 Q. Okay. And that was because you had looked
 21 at the vehicle and you were present yesterday when
 22 the photographer was taking those pictures?
 23 A. That's right.
 24 Q. In fact, in a few of them I noticed there

946

1 looked like there was a hand with a pen pointing?
2 A. Yes.
3 Q. Would that have been your hand?
4 A. That was my hand.
5 Q. So you were pointing out the damage or the
6 area --
7 A. Uh-huh.
8 Q. -- in question to the photographer for
9 purpose of capturing that information?
10 A. That's right.
11 Q. Right. Now, those photographs were made
12 yesterday. Is that correct?
13 A. That's right.
14 Q. Now, when were you first hired by
15 Progressive for this case?
16 A. First time I looked at the car was May 15,
17 2007, so it would have been within a few weeks of
18 that.
19 Q. May 15, 2007 was the first time that you
20 physically saw the vehicle?
21 A. Yes.
22 Q. So you would have been retained, you
23 think, a few weeks before that?
24 A. Yes.

947

1 Q. So --
2 A. I had never met Mr. Nelson before and they
3 wanted me to inspect the car, know me first. So
4 that's why we didn't look at anything other than
5 the car first.
6 Q. Okay. When you said "know me first," you
7 meant, get to know you, Mr. West?
8 A. Yes.
9 Q. Okay. So it's fair to say, isn't it,
10 Mr. West, you didn't see this vehicle when it left
11 North State Custom on March 23rd, 2005?
12 A. That's very fair to say.
13 Q. So you have no idea what condition the
14 vehicle was in, what repairs had or had not been
15 made at that exact time, do you?
16 A. I would have to say that I have a very
17 good idea of what had been completed on the car
18 and the condition of the car looking at the
19 mileage and everything, because the mileage is
20 negligible since it left North State Custom.
21 Q. Well, Mr. West, the first time you saw the
22 vehicle was over two years after the vehicle had
23 been repaired and collected by Progressive. Isn't
24 that fair?

948

1 A. That's right.
2 Q. And you have no idea, do you, you have no
3 personal knowledge, do you, about how that vehicle
4 was kept, stored, maintained, anything, do you?
5 A. The only thing I know, the first time I
6 saw it it was completely wrapped up with shrink
7 wrap, Saran Wrap, all the way around the whole
8 car. I don't know when that was put on.
9 Q. You don't know when that was put on and
10 you don't if it was ever taken off and more put on
11 it, do you?
12 A. That's true.
13 Q. Now, Mr. West, when, since you didn't see
14 the vehicle when it left North State Custom, you
15 don't have any personal information, do you, as to
16 the manner in which the vehicle was removed from
17 North State Custom, do you?
18 A. Only what I read in the depositions.
19 Q. So you don't know, do you, or do you, do
20 you know if the vehicle was driven from North
21 State Custom or was it taken on a truck or a
22 flatbed?
23 A. According to the depositions that I have
24 read, it was taken on a ramp truck.

949

1 Q. And, when you say "a ramp truck," that is
2 a vehicle that enables the entire car to be loaded
3 and off the ground. Is that correct?
4 A. That's right.
5 Q. Now, when you said, according to the
6 depositions, one of those depositions was a
7 deposition of Mr. Nick Stanton. Is that correct?
8 A. And the other one was of Greg Cocco, or
9 yeah.
10 Q. But one of them was Mr. Stanton?
11 A. Yeah.
12 Q. And so you're aware that Mr. Stanton was
13 the individual from Progressive who came and
14 picked up the vehicle. Is that correct?
15 A. That's right.
16 Q. Right. And he was the person, as far as
17 you know, who made the arrangements with the ramp
18 truck company to move the vehicle. Is that
19 correct?
20 A. To my knowledge, that's right.
21 Q. And, in relation to damage, you don't have
22 any idea how that vehicle was towed, do you?
23 MR. NELSON: Objection.
24 A. I don't think it was towed. It was put on

950

1 a ramp truck.

2 Q. Let me rephrase that. You don't have any

3 idea, do you, that when the vehicle was being

4 removed by Progressive from North State on

5 March 23rd, 2005, the manner in which the vehicle

6 was moved on to that ramp truck?

7 A. The only knowledge I have of it from not

8 being there personally is reading the depositions.

9 Q. Well, anything that you read in the

10 depositions, were there any questions or any

11 information provided that the vehicle was actually

12 improperly chained and put on to the truck?

13 A. One of the depositions mentioned this.

14 Q. In fact, there's damage on the rear

15 portion of the car, is there not, which you don't

16 in any way suggest that North State either caused

17 or failed to fix, do you?

18 A. Absolutely not.

19 Q. And you'd agreed with me, wouldn't you,

20 that that damage occurred at some point after the

21 vehicle left North State Custom's property?

22 A. Yes.

23 Q. Now, you told us a good bit about what you

24 believe were overcharges and unnecessary repairs

951

1 that North State performed. Is that correct?

2 A. That's right.

3 Q. And I believe you said this was your

4 report; is that correct, Plaintiff's 66?

5 A. Yes.

6 Q. Now, this is a two-page document, correct?

7 A. Yeah.

8 Q. And this is a document that you personally

9 prepared; is that right?

10 A. Yes.

11 Q. And I notice up on the right-hand corner

12 the date of this is July 31st of '08. That's

13 yesterday, isn't it?

14 A. Yeah.

15 Q. Is that when you prepared this report?

16 A. I had rough drafts of it before.

17 Q. But before then, this was the first

18 report, complete report, that you prepared?

19 A. Yes.

20 Q. And you did that yesterday.

21 A. Yes.

22 Q. And you prepared this report using the

23 Mitchell's --

24 A. Yes.

952

1 Q. -- Estimating System; is that correct?

2 A. Uh-huh.

3 Q. And that is the system that Progressive

4 uses; isn't that right?

5 A. Yes.

6 Q. Which system do you use in your shop?

7 A. The Estimate.

8 Q. What?

9 A. Mitchell Estimate, yeah.

10 Q. Estimate or Ultramate?

11 A. Ultramate I guess it is, yeah. Ultramate,

12 I'm sorry.

13 Q. So you are using the same type of

14 estimating system that many shops do and many

15 insurers do?

16 A. I guess it's the same as Progressive. I

17 called it into my office girl and she e-mailed it

18 back.

19 Q. Okay. So you actually didn't put this

20 information in, you just collected it. You sent

21 that information --

22 A. That's right.

23 Q. -- off to your office and they generated

24 this report?

953

1 A. Yes.

2 Q. Now, you indicated a number of things here

3 that you feel absolutely certain North State

4 overcharged for.

5 Is that not the purpose of this report?

6 A. Those are the known overcharges.

7 Q. Known. And those are, when you say known

8 overcharges, those are known overcharges in your

9 opinion; is that correct?

10 A. Absolutely.

11 Q. Thank you. Now, I notice that you

12 actually have a figure at the bottom of your

13 report, Mr. West?

14 A. Uh-huh.

15 Q. So you've indicated that there were a

16 total of what you believe were improper charges

17 that North State charged for the repair of this

18 vehicle, right?

19 A. Yes.

20 Q. And that amount is \$2,808.65, correct?

21 A. That's right.

22 Q. Now, you'd agree with me, would you not,

23 that there were repairs made to the vehicle that

24 North State did effect; is that correct?

954

1 A. Yes.

2 Q. So North State was entitled to be paid for

3 the work that they did do, right?

4 A. Absolutely.

5 Q. Okay. So how much were they entitled to

6 be paid, Mr. West?

7 A. That, I don't know. They submitted a bill

8 for over \$34,000.

9 Q. Okay. \$34,091.37.

10 A. Yes.

11 Q. Was their bill; is that correct?

12 A. To my knowledge, that's correct.

13 Q. And you agree with me that North State was

14 entitled to be paid for work that you don't

15 dispute that it did charge for, correct?

16 A. I would never dispute that.

17 Q. Okay.

18 A. Yeah.

19 Q. And the only amount that you've given us

20 here is \$2,808.65 that you believe is incorrect.

21 A. That's right.

22 Q. Okay. So is it fair to say, Mr. West,

23 that you don't dispute that North State should

24 have been entitled at least to compensation of

955

1 \$31,282.72?

2 MR. NELSON: What's that number

3 again?

4 Q. \$31,282.72.

5 THE COURT: The record will reflect

6 that the witness is using a calculator.

7 A. 31,282.72. Is that what you said?

8 Q. Yes.

9 A. Yes. In regards to the answer to that

10 question, there were several things that North

11 State did that I could not assess a value to or

12 didn't do, so I wouldn't say that's true.

13 Q. Well, since --

14 A. These are the known overcharges.

15 Q. Since you couldn't assess a value to

16 anything, you can't tell us whether they were

17 overcharged or improperly charged, can you?

18 A. Only the things that I've submitted.

19 Q. Correct. And so the difference between

20 what was charged by North State, if you want to

21 take a look at Plaintiff's Exhibit 2, is

22 \$34,091.37.

23 I'm going to ask Mr. West if he can please

24 do the calculation for us.

956

1 THE COURT: What calculation? Just

2 brief it for me.

3 MS. EVERSMAN: Your Honor, the amount

4 that North State charged on the final bill

5 and the amounts that Mr. West says were

6 overcharged. Minus.

7 THE COURT: We did that.

8 MS. EVERSMAN: Okay.

9 THE COURT: We did that. I can even

10 tell you the figure.

11 MS. EVERSMAN: Okay.

12 BY MS. EVERSMAN:

13 Q. Now, Mr. West, are you aware of how much

14 any offer was made by Progressive to Dr. Bilik to

15 pay for these repairs?

16 Do you know of any amounts Progressive

17 said this is how much we'll give you?

18 A. No, I don't.

19 Q. All right. So if you were told that

20 Progressive actually offered Dr. Bilik \$30,445 and

21 some change, you wouldn't have any reason to

22 dispute that, would you?

23 MR. NELSON: Objection.

24 THE COURT: Just a minute.

957

1 MR. NELSON: It assumes facts not in

2 evidence, your Honor. Nobody has

3 testified to that number.

4 THE COURT: How much Progressive paid

5 for the car?

6 MR. NELSON: She just said 34,000.

7 MS. EVERSMAN: \$30,445.

8 THE COURT: And you are, in your

9 question, assuming that's what Progressive

10 paid for the car from North State?

11 MS. EVERSMAN: No, your Honor, I'm

12 not.

13 THE COURT: Ask the question again.

14 MS. EVERSMAN: Okay.

15 BY MS. EVERSMAN:

16 Q. Mr. West, are you aware that Progressive

17 offered Dr. Bilik \$30,445 as the amount of money

18 that was necessary to properly repair her vehicle

19 to its pre-accident condition?

20 MR. NELSON: Objection, your Honor.

21 How is he supposed to know what

22 Progressive offered and what the purpose

23 of the offer?

24 THE COURT: Is that in evidence?

958

1 MS. EVERSMAN: Yes, your Honor.
 2 THE COURT: What number?
 3 MS. EVERSMAN: They were part of Dr.
 4 Bilik depositions as --
 5 MR. MAMO: Exhibits T and S in
 6 evidence.
 7 THE COURT: So the question -- repeat
 8 the question again.
 9 BY MS. EVERSMAN:
 10 Q. Are you aware, Mr. West, are you aware
 11 that Progressive made a monetary offer to Dr.
 12 Bilik of \$30,445 and there's some cents in there,
 13 but my memory isn't that good to -- strike that.
 14 Are you aware that Progressive offered Dr.
 15 Bilik \$30,445 as the amount Progressive was
 16 willing to pay to properly and safely repair Dr.
 17 Bilik's car to its pre-accident condition?
 18 MR. NELSON: Your Honor, objection.
 19 THE COURT: Let me look at the
 20 exhibits. We will solve this right now.
 21 MR. MAMO: Those have my notes on
 22 them but the exhibits are up there.
 23 THE COURT: I need to know what they
 24 are.

959

1 MR. MAMO: They are in as S and T.
 2 MR. NELSON: She just said properly
 3 and safely, your Honor.
 4 THE COURT: Well, I assume that
 5 Progressive wanted to properly and safely
 6 repair this car.
 7 MR. NELSON: Of course.
 8 THE COURT: We are assuming that, so
 9 overruled.
 10 MR. NELSON: The word "safely"
 11 doesn't appear in those letters, your
 12 Honor.
 13 THE COURT: Well, Progressive is
 14 very, very concerned with safety because
 15 we know what the advertisements tell us.
 16 The Court will take judicial notice
 17 of that. Overruled.
 18 A. I can answer?
 19 Q. Please.
 20 A. No, I'm very unaware of that.
 21 Q. Okay. Now, Mr. West, you referenced the
 22 estimating systems and times; is that right, when
 23 Mr. Nelson was asking you questions?
 24 A. In my report, I referred to certain times.

960

1 Q. I'm sorry. I didn't make my question
 2 clear.
 3 THE COURT: Can we take a breath and
 4 just make your question clear because I
 5 don't want any more repeats. All right?
 6 Just ask the question.
 7 MS. EVERSMAN: Yes, your Honor.
 8 BY MS. EVERSMAN:
 9 Q. You're aware that there are a variety of
 10 different estimating systems in the collision
 11 repair marketplace, are you not, Mr. West?
 12 A. Yes, I am.
 13 Q. And you're aware, are you not, that North
 14 State does not use the Mitchell system, they use a
 15 different estimating system?
 16 A. That's right.
 17 Q. Correct. And those systems are called
 18 estimating systems, are they not?
 19 A. They are.
 20 Q. And that's for the purpose of being able
 21 to try to come up with an idea of how much any
 22 particular repair activity may likely cost. Is
 23 that fair?
 24 A. Yeah.

961

1 Q. Okay. So it's a guide; isn't that right?
 2 A. In so many words, that's what it is, a
 3 crash guide.
 4 Q. It's not an absolute science, is it?
 5 A. No.
 6 Q. And wouldn't you agree with me that the
 7 estimating systems, Mitchell's included, that when
 8 they attempted to develop these, these time
 9 estimates, were not looking at damaged cars, were
 10 they?
 11 A. No.
 12 Q. They were looking --
 13 A. New, undamaged cars.
 14 Q. They were looking at new, newly
 15 manufactured vehicles, correct?
 16 A. Yes.
 17 Q. And they were making time determinations
 18 about how long it should take or what to attribute
 19 to a particular activity of removing or
 20 re-installing new, undamaged parts as well; is
 21 that correct?
 22 A. It says so in the P pages, yes.
 23 Q. And the P pages are the procedure pages?
 24 A. Yes. And their times are based on new and

962

1 undamaged parts.

2 Q. So you would agree with me, wouldn't you,

3 Mr. West, that the estimating systems, they are

4 not a one-for-one correlation of what a repair

5 could actually expect looking at a vehicle which

6 had been driven and which has been involved in an

7 accident and was damaged. Is that fair?

8 A. If what -- can I answer that in my way?

9 Q. Sure.

10 A. I think what you're trying to say is it

11 might take more time to remove a damaged fender

12 and fit it to a previously damaged car, yes,

13 that's right.

14 Q. All right.

15 THE COURT: So let's make this clear:

16 Under the Mitchell system, say, repairing

17 a bumper may be X amount of units and

18 under the other system the name of which

19 is --

20 MR. MAMO: Pathways.

21 THE COURT: -- Pathways System, it

22 may be a different amount of units. Is

23 that fair to say?

24 THE WITNESS: It's fair to say, but

963

1 it would be a minute difference.

2 THE COURT: Well, we are not talking

3 about a lot of difference here, are we?

4 THE WITNESS: No, not in between the

5 different systems.

6 THE COURT: No, but you came up with,

7 out of \$34,000, 2,800 worth of difference,

8 right?

9 THE WITNESS: Absolutely, and that's

10 not based on any of the difference in the

11 times only the things they didn't fix or

12 they charged for that were never damaged.

13 THE COURT: Well, you can't testify

14 to something that you don't know about,

15 can you?

16 THE WITNESS: No.

17 MR. NELSON: Objection, your Honor.

18 THE COURT: Overruled.

19 BY MS. EVERSMAN:

20 Q. Now, Mr. West, these estimating systems,

21 they give time often in flat rate time. Would you

22 agree with that?

23 A. Are you -- we call them flat rate manuals,

24 yes.

964

1 Q. And that's because the units that are

2 assigned are really assigned for the task; is that

3 not correct?

4 A. Yes.

5 Q. And when I say "the task," I'm talking

6 about any individual procedure or repair activity

7 a technician has to engage in?

8 A. Not any, just the ones where you would

9 remove or replace a part, not anything you're

10 going to repair. Those aren't in the manuals.

11 Q. So, if they're not in the manuals, then

12 the repair shop has to figure out on its own,

13 doesn't it?

14 A. It's a judgment time.

15 Q. It's a judgment time. All right. Very

16 good.

17 THE COURT: May I ask a question:

18 You never figured out the hours under the

19 Mitchell system. You had your girl in the

20 shop do it; am I right?

21 MR. NELSON: Objection, your Honor.

22 THE COURT: Overruled. This is --

23 THE WITNESS: I based this --

24 THE COURT: No. Am I right? Did you

965

1 testify that you didn't figure out these

2 numbers, you asked your girl in the shop

3 to do it in Washington?

4 MR. NELSON: Objection.

5 THE WITNESS: No, no, I didn't.

6 THE COURT: You didn't say that?

7 THE WITNESS: No.

8 THE COURT: I think you did, sir.

9 THE WITNESS: I did not. I called

10 and had her enter it into the estimate

11 using my figures.

12 THE COURT: So you don't know if she

13 made a mistake, do you?

14 THE WITNESS: Yes, I do, because I

15 wrote it all out longhand and looked at

16 it. Honestly, Judge.

17 THE COURT: So you're saying, when

18 you have a third party do the work for you

19 --

20 THE WITNESS: I don't have.

21 THE COURT: You know absolutely that

22 that is correct.

23 MR. NELSON: Your Honor, this is no

24 difference than Greg Jr. writing an

966

1 estimate that Mr. Coccaro then charges
2 customers.
3 THE COURT: That's right. But he's
4 testifying and this is in evidence.
5 MR. NELSON: And he's saying the
6 figures he came up with are his figures.
7 He had simply somebody put them into a
8 system for him and then he checked the
9 figures afterwards.
10 I object to your questioning.
11 THE COURT: Did you check these
12 figures afterwards?
13 THE WITNESS: Absolutely.
14 THE COURT: And absolutely what did
15 you do?
16 THE WITNESS: I looked at them and
17 verified that they were correct.
18 THE COURT: How did you do that?
19 THE WITNESS: By looking at them.
20 THE COURT: You had to spend
21 yesterday.
22 THE WITNESS: Yes.
23 THE COURT: You've been in New York.
24 THE WITNESS: Yeah.

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1 THE COURT: Since yesterday.
2 THE WITNESS: No, I've been here
3 longer but this is when I did it.
4 THE COURT: You had somebody else
5 enter the figures on a computer.
6 THE WITNESS: Into our computer, yes.
7 THE COURT: And now you are saying
8 you checked them. How did you check those
9 numbers?
10 THE WITNESS: Those were e-mailed
11 back to us.
12 THE COURT: How did you check those
13 numbers as being correctly entered and
14 processed?
15 THE WITNESS: By looking at it line
16 by line and going over it.
17 THE COURT: So you have a memory of
18 every single amount of hours for every
19 single --
20 THE WITNESS: Yes, your Honor, these
21 are based off of North State's estimate.
22 That's all. And what I saw that they
23 didn't do.
24 THE COURT: Let's have a side bar.

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1 (Whereupon, the following discussion
2 takes place on the record, at the side
3 bar, in the presence of the Court, Mr.
4 Nelson, Ms. Eversman and out of the
5 hearing of the jury.)
6 THE COURT: Hearsay. Double hearsay.
7 MR. NELSON: Your Honor, it's not
8 hearsay. First off, it's an expert. He
9 is allowed to rely on things to form his
10 opinion, even if it is hearsay.
11 THE COURT: He didn't do the work.
12 He had his girl do it.
13 MR. NELSON: He didn't have the work
14 done. He did all these calculations. He
15 has been working on this over and over and
16 over again. He simply called.
17 THE COURT: He testified that he had
18 his girl find the figures.
19 MR. NELSON: You asked me a question.
20 I would like to respond.
21 THE COURT: Yeah. But what do you
22 respond to that?
23 MR. NELSON: Can I respond to the
24 first one first?

969

1 THE COURT: No. I want a response to
2 that because that may throw out the case.
3 MR. NELSON: I would like to know the
4 question then if you think that's going to
5 throw out the case. I'm sorry. I didn't
6 understand the question.
7 I was still focusing on what I was
8 trying to say the first time.
9 Can I hear the question again?
10 THE COURT: The question is how can
11 you introduce evidence that was compiled
12 by a third party not testifying?
13 MR. NELSON: This is no different
14 than if you drafted a letter, your Honor,
15 and you gave it to your secretary and your
16 secretary took your handwriting and put
17 the notes into a document and then you
18 looked at the letter and you approved it
19 as being an accurate reflection of what
20 you said. That's exactly what's happened.
21 THE COURT: So you are saying that he
22 did the work beforehand and then what did
23 she do?
24 MR. NELSON: She simply entered it

970

1 into the system like you would type into a
2 typewriting program or word processing.
3 THE COURT: She entered the data and
4 none of this is her judgment and, if you
5 want to ask her, none of this is his
6 judgment. You are saying that she typed
7 it out.
8 MR. NELSON: Not typed. It's entered
9 into a system, but he checked the system
10 and he's checked the data.
11 THE COURT: I don't understand
12 entered into a system. I'm pretty
13 computer literate. Tell me what this is.
14 MR. NELSON: This is a computerized
15 system that contains a data base of every
16 part on the car.
17 So, for instance, if they are going
18 to replace a fender, they will write in,
19 right front fender. They will key it into
20 the system. The system pops up and says
21 --
22 THE COURT: Right.
23 MR. NELSON: -- it says \$300 for the
24 fender and then it gives the associated

971

1 labor time.
2 This used to be, before it was
3 entered into computer programs, your
4 Honor, it used to be handwritten documents
5 and all that's being done now. You are
6 telling me this is a sensitive issue, this
7 is no different than if somebody had gone
8 and handwritten something and had a
9 secretary transcribe what he handwrote
10 except they are simply transcribing it
11 using the system.
12 THE COURT: So what if she used the
13 system and made a mistake?
14 MR. NELSON: He checked her work.
15 THE COURT: How, I asked him and he
16 can't answer it.
17 MR. NELSON: He just answered you.
18 He said he checked it.
19 THE COURT: How?
20 MR. NELSON: He went through all the
21 facts and figures and checked the math on
22 it.
23 THE COURT: Did he go into the
24 computer, go into the system, and check it

972

1 that way?
2 MR. NELSON: He doesn't have to, your
3 Honor. He is looking at a printout, just
4 like you would if you had your secretary,
5 if you had your secretary type it on a
6 word processing program, you would look at
7 a printout of it and you would check the
8 calculations or you would check the words
9 on there. You know -- let me finish.
10 He did not go into the word
11 processing program, if you are using that
12 analogy, and see what she typed in the
13 word processing. He is looking at the
14 printout.
15 THE COURT: Numbers were ejected from
16 that system on what the secretary or clerk
17 did?
18 MR. NELSON: And he put the numbers
19 into the system by calling her and saying,
20 do this, do this, do this, and he drafted
21 this a long time ago.
22 THE COURT: You are going to have to
23 call the girl.
24 MR. NELSON: She's in Seattle,

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1 Washington.
2 THE COURT: Well, you've got deep
3 pockets.
4 MS. EVERSMAN: I absolutely have a
5 problem with it.
6 THE COURT: You didn't mention it.
7 MR. NELSON: Because she knows this
8 is how it is done in that business.
9 MS. EVERSMAN: Your Honor, my
10 concern, more than anything, is Mr. West
11 was doing this. It is not as if he is in
12 the office at the same time.
13 THE COURT: No, but she gets to talk
14 now.
15 MS. EVERSMAN: It's not as if he is
16 in the office. With the analogy of the
17 word processing, if you dictate a letter,
18 to, for example, or you handwrite out a
19 letter and you ask your assistant to put
20 it, enter into the system you are there,
21 you can talk to, you can verify, you can
22 look at everything that that person is
23 doing and, if need be and if you're
24 computer literate --

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1 THE COURT: Get to the point.

2 MS. EVERSMAN: The fact that this was

3 all done via e-mail and somebody else

4 unrelated to the case was entering the

5 information, and it was only done

6 yesterday.

7 THE COURT: No. That's a problem.

8 MR. NELSON: I don't think so, your

9 Honor.

10 THE COURT: Why didn't you bring that

11 up? Why did you let me bring it up? That

12 shouldn't have gone into evidence.

13 MS. EVERSMAN: Your Honor, I started

14 --

15 THE COURT: You didn't do it.

16 MR. NELSON: I asked him if he

17 prepared this report, your Honor. He

18 testified honestly that he prepared it.

19 THE COURT: I think you better

20 prepare to bring that girl in to verify

21 what happened.

22 MR. NELSON: Your Honor, you are

23 going to make me fly in somebody from

24 Seattle, Washington?

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1 THE COURT: It is your case.

2 MR. NELSON: Please let me make a

3 record. Let me talk.

4 THE COURT: Otherwise, it's going to

5 be thrown out of evidence.

6 MR. NELSON: Your Honor, let me make

7 my point on the record: You are asking me

8 to fly in a woman from Seattle, Washington

9 to simply say that she typed in what he

10 said and then sent it to him

11 electronically. You are going to make me

12 fly in a witness?

13 THE COURT: I want to know what he

14 sent her. I want to know what she did.

15 MR. NELSON: Ask him.

16 THE COURT: He hasn't answered me

17 yet.

18 MR. NELSON: You haven't asked him

19 the question yet. He started working on

20 this draft several weeks ago.

21 He simply came out here and wanted to

22 make sure he saw the car for the last time

23 to make sure he was accurate.

24 He made some minor revisions to it

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1 and he called the minor revisions in to

2 her and they reflect his work product.

3 THE COURT: Okay. I've got to go.

4 Let's go.

5 (Whereupon, the following takes place

6 in open court.)

7 THE COURT: Back in open court.

8 We're going to take a lunch break. We

9 will get back together at 2:15. All

10 right.

11 Thank you, sir. You may step down.

12 (Whereupon, the witness was excused.)

13 (Whereupon, the jury exits the

14 courtroom.)

15 THE COURT: I'm asking him to leave

16 the courtroom.

17 MR. NELSON: He has a hearing

18 problem.

19 THE COURT: I am saying it as loud as

20 I can.

21 (Whereupon, the witness leaves the

22 courtroom.)

23 THE COURT: You've got a problem with

24 this piece of evidence. The piece of

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1 evidence is the report.

2 Why? Number one, he entered it into

3 the system not used by this repair stop.

4 Number one it is not competent.

5 Number two, he testified that he

6 didn't actually find the units on the

7 computer, he had his girl in the office do

8 it.

9 That is hearsay at that point or you

10 can bring her in to testify; otherwise,

11 I'm striking his testimony.

12 MR. NELSON: Okay. Your Honor, may I

13 respond, your Honor?

14 THE COURT: You responded quite a

15 bit.

16 MR. NELSON: These are new points you

17 just made.

18 THE COURT: You can respond after

19 lunch because I have a conference at one

20 o'clock and maybe the defense should

21 respond.

22 THE COURT OFFICER: All rise, please.

23 (Whereupon, a lunch recess was

24 taken.)

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1 AFTERNOON SESSION
2 THE COURT: Good afternoon. First of
3 all, the jury is not in the courtroom.
4 Mr. Nelson, I think when we broke,
5 you wanted to put some more things on the
6 record because it was lunch.
7 Everyone be seated.
8 So it's over to you, Mr. Nelson.
9 MR. NELSON: Thank you, your Honor.
10 If we could just for the moment put aside
11 that he even had created a report. His
12 testimony should come in any way. He made
13 observations about the car. He put
14 photographs in front of the jury where he
15 showed what he opined to be damages.
16 THE COURT: That is true.
17 MR. NELSON: And, on top of that,
18 your Honor, he made specific references to
19 North State's estimate of March 22nd, 2005
20 which has been marked as Plaintiff's
21 Exhibit 2 and he said these line entries I
22 have observed as looking at the car and
23 looking at the estimate and find them to
24 be overcharges.

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1 So just, he's looked at their
2 document and opined about specific charges
3 on their document.
4 THE COURT: But he, just not to
5 quibble, but I think he got his, what is
6 the correct charge, you know, his figure
7 from his report.
8 MR. NELSON: No, he's looking at the
9 mechanics of how those estimates go
10 together. These are processes these
11 people who do the estimating follow, and,
12 for instance, he said, they had no reason
13 to take the left door off. That's not
14 something that's workmanlike; therefore,
15 their line entry of X is an overcharge.
16 THE COURT: You're right. I remember
17 that and I agree with you.
18 MR. NELSON: And so his testimony is
19 competent even notwithstanding that
20 reporter. His report --
21 THE COURT: I agree with you. You
22 don't have to argue that. I agree with
23 you.
24 Do you have something to say about

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1 this?
2 MS. EVERSMAN: Your Honor, I don't
3 have any real objections or problems with
4 Mr. West's testimony about what he
5 observed and what he specifically saw.
6 I do have reservations, of course,
7 about how he has created this report.
8 When it was originally entered, he
9 said I created this, hence the fact that I
10 did not object to it when it was entered,
11 but now that I've discovered that he
12 himself did not create it, then I have a
13 problem with that specific document.
14 THE COURT: Well, first of all, I'm
15 going to tell you never objected. I was
16 the one who noticed and you waived it.
17 All right. So that objection is waived.
18 There are two big problems with this
19 report that I mentioned. I'm going to
20 leave the case go on and you can bring it
21 up in your summation whatever comes in
22 evidence about the report.
23 First of all, it's in the wrong
24 framework. It's a Mitchell's system

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1 report.
2 We have had no testimony as to the
3 correlation between the two, only that he
4 says it's de minimis, but that's really
5 not good enough. All right.
6 No description of, well, like if you
7 compare, you know, inches to centimeters,
8 we get a correlation. That's really what
9 we should do here, because, frankly, I
10 thought it was going to be a lot more
11 money as far as his claim of fraud.
12 Now, when he testified, oh, but,
13 there is a lot more, you can't bring that
14 in because he has not, you know, testified
15 to that at all. He has not.
16 MR. NELSON: May I address that, your
17 Honor?
18 THE COURT: Yes.
19 MR. NELSON: One, there is testimony
20 that these two systems correlate. One,
21 Mr. Coccaro himself said that the Mitchell
22 system and the CC system basically do the
23 same. He was talking about labor hours
24 and units.

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1 THE COURT: Do the same thing.
2 MR. NELSON: He was talking about
3 times, he was talking about units and
4 hours, and they are the same thing, and
5 the jury is going to remember whatever
6 that testimony is, but there was testimony
7 and then on top of that, this witness
8 testified to that.
9 The second part, your Honor, when I
10 went through the frame damages that are
11 not on his report, he said I cannot state
12 to a certainty how much they are
13 overstated. All I can tell you is that
14 they are overstated and we went through
15 all the welds. He said, I didn't see any
16 evidence of any frame repair whatsoever,
17 but since I wasn't there to see it
18 happened, I can't tell you they didn't do
19 anything, but I can tell you there's no
20 evidence of it and that evidence should go
21 in front of the jury, he saw no evidence
22 of them pulling the front or the rear
23 rails of that car.
24 THE COURT: If he said, he can't tell

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1 you it didn't happen, that's really
2 contradictory, isn't it?
3 MR. NELSON: The only person who can
4 really tell you what happened there is the
5 person who was there when it happened and
6 he is coming in behind the fact.
7 THE COURT: If you have other proof,
8 that's fine, but I -- ordinarily this
9 document is not competent evidence and I
10 am referring to number 66. Why? Because
11 it is hearsay if you have somebody else
12 doing the labor to draw up the figures and
13 almost always you have to have either
14 counsel waive, you know, calling them or
15 they have to be called. Okay.
16 And because the system itself is
17 hearsay, but having somebody else put it
18 into the evidence is double hearsay.
19 No one has ever said that I recall,
20 but I might have missed it, that the
21 Mitchell system and the other system --
22 MR. NELSON: CCC.
23 MS. EVERSMAN: Pathways.
24 THE COURT: -- are, you know, systems

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1 that are widely followed in the country.
2 I think you might have said it but the
3 recognized, you know, I think we might
4 have said that. Okay. So we get past
5 that. It still is a discrepancy and the
6 reason I'm concerned is that he comes out
7 with a figure 2,800 something dollars,
8 2808 and change on a \$34,000 and change
9 price tag, that's less than 10 percent.
10 It's not a huge figure.
11 MR. NELSON: May I be heard on that,
12 your Honor?
13 THE COURT: Yes.
14 MR. NELSON: Progressive's arguments
15 all along has been that Dr. Bilik was kept
16 in the dark. They never got authority to
17 charge him more than \$26,000. That's our
18 position. We think the law supports that.
19 THE COURT: You did pay them.
20 MR. NELSON: We ultimately paid them.
21 If I can finish making my point.
22 THE COURT: Yes.
23 MR. NELSON: They never got authority
24 to pay -- they never got Dr. Bilik's

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1 authority to pay more than -- to charge
2 more than \$26,000.
3 We are subrogated to Dr. Bilik's
4 rights. So Dr. Bilik could stand there,
5 put aside a total loss and say to North
6 State, you had no authority to charge me
7 \$34,000 to fix my car. You only had
8 authority to charge 26. We are subrogated
9 to that right to make that claim. So that
10 \$10,000 is in dispute.
11 Secondly --
12 THE COURT: It's not ten. It's
13 eight. It's \$34,000.
14 MR. NELSON: At one point it was 37.
15 Remember that \$10,000 supplement.
16 THE COURT: It's \$34,000.
17 MR. NELSON: So it's eight. I agree.
18 The second part of this, your Honor,
19 is because it now went to \$34,000,
20 Progressive had no choice but to total
21 loss the car, legally. That's their
22 argument.
23 So they had to total loss a car for
24 43,000 and then they had to pay to get it

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1 out of their shop, so they have paid, in
2 essence, \$75,000 for something that, even
3 if you believe their evidence that they
4 are entitled to charge us the 34, so
5 Progressive was harmed to the tune of
6 \$43,000.

7 THE COURT: Okay. I understand. I
8 understand beyond what you're saying
9 because I've actually read about
10 Progressive how they screwed up. I have
11 read it.

12 What I am saying this is coming down
13 to de minimis in my mind. You may be
14 right. It may be fraud. But proving
15 these types of cases is, I've told you 20
16 times, it's very difficult, and, you know,
17 I was kind of expecting or hoping that he
18 would come out with not an ant hill but an
19 Everest, and he really didn't.

20 MR. NELSON: But all his opinion
21 represents is he has now looked at the car
22 after they fixed it and, because it's
23 fixed, you can't tell much, but what you
24 can tell is that absolutely there's black

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1 and white fraud in what they are now
2 claiming. There's no question and I know
3 they disagree with this. I'm not trying
4 to create a debate, but the reason that's
5 there is to say, and I made this statement
6 in my opening, and after Progressive got a
7 chance to see what they charged him for
8 the 34, they even found a \$34,000 bill had
9 fraud in it.

10 The \$34,000 bill that North State
11 charged Progressive to get the car out had
12 fraud in it. That's that fraud.

13 THE COURT: \$2,800.

14 MR. NELSON: But it's in addition to
15 the ten, in addition to total loss on the
16 car. Eight.

17 THE COURT: The question is, though,
18 counsel, legally, you paid them and you
19 said, we had to pay them, but you really
20 didn't. You could have started suit right
21 then, brought an injunction against them
22 from charging you any more until the whole
23 thing was worked out. I do it all the
24 time. All right.

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1 You paid them.

2 Now, I think some errors in judgment
3 and, again, you didn't make them, they
4 were made during the whole course of this
5 thing, are going to make this a more
6 difficult case than it has to be, you
7 know, and I have a pretty good idea of
8 what they are.

9 You know, you work with what you've
10 got. And they made some mistakes, and I
11 think there was negligence on their part.

12 You say it is not important, but it
13 is important because it may effect the
14 facts on which you are relying. It is
15 important.

16 Will it effect the credibility of
17 certain facts you wish to prove? Yes.
18 And I'm allowing it in for that reason.

19 So, you know, I think the fairest
20 thing to do under these circumstances is,
21 with regard to your expert, everything
22 comes in. You can use it however you want
23 to use it.

24 I will counsel the defense that, once

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1 you saw how this document was prepared,
2 you should have objected and strongly, and
3 you didn't, so you waive it. All right.

4 Let's go. Bring them in.

5 Jury, bring them in.

6 (Whereupon, the jury enters the
7 courtroom.)

8 (Whereupon, the witness resumes the
9 witness stand.)

10 THE COURT OFFICER: The jury is
11 entering.

12 THE COURT: Be seated everybody.
13 Welcome this afternoon. We are
14 continuing, I believe, with the cross
15 examination of Mr. Michael West.

16 Mr. West, you are under oath.

17 THE WITNESS: Yes, ma'am.

18 THE COURT: All right. You can
19 continue, Mrs. Eversman.

20 MS. EVERSMAN: Thank you, your Honor.

21 CROSS EXAMINATION (Continued)

22 BY MS. EVERSMAN:

23 Q. Mr. West, you indicated in your testimony
24 that North State did not prepare an estimate for

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1 Dr. Bilik until January 11th of 2005. That was
2 your testimony, correct?
3 A. That's correct.
4 Q. Could you please take a look at
5 Plaintiff's Exhibit 1 for me.
6 THE COURT OFFICER: Showing the
7 witness Plaintiff's Exhibit Number 1 in
8 evidence.
9 Q. And just to move things along, sir. Can
10 you just take a look and see if, on the very first
11 page, if it has a date.
12 A. The date I see here is 1/11/2005.
13 Q. But there's nothing in there that says
14 this was the date that that document was created;
15 is that correct?
16 A. No. True.
17 Q. And you used the Mitchell system, correct?
18 You don't use CCC Pathways, the system upon which
19 that estimate was created, do you?
20 A. No.
21 Q. So you can't tell us that that was
22 actually the date upon which North State created
23 the estimate, can you?
24 A. The only date on here is 1/11/2005.

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1 MR. NELSON: Stop interrupting the
2 witness.
3 Q. You don't have any information or evidence
4 to know when North State actually first put
5 information into the estimating system to create
6 an estimate for Dr. Bilik's car, do you?
7 A. I assume that it was 1/11/2005.
8 Q. You assumed, sir --
9 A. Because there's a date on it.
10 THE COURT: But let's answer the
11 question. Do you know for an actual fact
12 that that bill was created on 1/11/05?
13 Yes or no please.
14 THE WITNESS: Yes.
15 THE COURT: You know for an actual
16 fact and what basis is that?
17 THE WITNESS: It says 1/11/2005 at
18 3:46 p.m. in the upper left-hand corner.
19 THE COURT: Can you imagine other
20 scenarios where a fax document would say
21 1/11/05 or a printed document off a
22 computer?
23 THE WITNESS: I'm just going by what
24 this says and it says 1/11/2005.

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1 THE COURT: So you're saying for an
2 actual fact that you know this was created
3 at 1/11/05 because it has a date in the
4 right-hand corner?
5 THE WITNESS: That's right.
6 THE COURT: So you know for an actual
7 fact --
8 THE WITNESS: That's right.
9 BY MS. EVERSMAN:
10 Q. Mr. West, could you please take a look at
11 Plaintiff's Exhibits 44 and 45 for me.
12 A. Okay.
13 Q. Let me withdraw that and let me ask you
14 this, Mr. West. In the Mitchell system, is it not
15 a fact that when you print a document, it marks
16 the print date that the document was printed?
17 A. Yes.
18 Q. So when we took a look at your report of
19 7/31/2008 is a print date; is that not correct?
20 A. Uh-huh.
21 Q. That's the date that document was printed?
22 A. Uh-huh.
23 Q. You told us that that was the date that
24 the document was also created, right?

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1 A. Uh-huh.
2 Q. But that doesn't mean that the document
3 could not have been created on a different day; is
4 that correct, a prior date?
5 A. Well, it means this document was printed
6 on July the 31st, 2008.
7 Q. Printed. Is that correct?
8 A. Yeah.
9 Q. Now, is there anything on this document
10 that tells us the date that it was created?
11 A. Just the 7/31/2008 date up in the top of
12 the corner.
13 Q. Okay. So, if you took a look at other
14 estimates that have been entered in this case that
15 were used, that were created using the Mitchell
16 system that have a date of, for example,
17 March 31st of 2005 after this car was repaired,
18 are you telling us, based on your testimony, that
19 because it had that date on it, that was the date
20 that document was created?
21 A. That's the printed date up in the corner,
22 yes.
23 THE COURT: So you don't see any
24 difference between printing, print date

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1 and creation date?
2 THE WITNESS: On these estimates,
3 that's why they're on there. That's
4 right.
5 THE COURT: So there is no
6 difference, as far as you're concerned,
7 with an estimate which has a date on it;
8 it must be created that same date.
9 THE WITNESS: That's right.
10 THE COURT: That's what you think.
11 THE WITNESS: That's what I think.
12 BY MS. EVERSMAN:
13 Q. Are you telling us that a document cannot
14 be created and kept, stored in a computer system
15 on one date and not printed until a week later,
16 for example?
17 A. Oh, no, not at all. If it's inside the
18 system. I said that this was printed on this
19 date.
20 Q. You also testified, however, that
21 Plaintiff's Exhibit 1, which bears a date of
22 January 11, 2005, was created on that date.
23 Is that not what your testimony is?
24 A. That's what I said.

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1 Q. But you don't know whether --
2 A. This copy.
3 Q. -- that copy, you don't know whether North
4 State had actually created its estimate, its
5 blueprint for repair, on a much earlier date, do
6 you?
7 A. And it was in the system, you mean?
8 Q. Yes.
9 A. No, I have no way of knowing that.
10 Q. So when you told us that North State did
11 not create an estimate until --
12 THE COURT: May I just stop you.
13 Creation and printing are two different
14 terms. Creation means to actually compose
15 and draw up and make something.
16 Printing means to duplicate it.
17 Right?
18 THE WITNESS: When I answered that, I
19 meant created this right here in my hands.
20 MS. EVERSMAN: I see.
21 THE COURT: But that's not a
22 creation. It's a copy. It's a print.
23 BY MS. EVERSMAN:
24 Q. Just for clarification, Mr. West, so I'm

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1 clear and the jury is, too, that when you said it
2 was created, that was the date that the
3 document -- that's the date the document bears; is
4 that correct?
5 A. That's right.
6 Q. That doesn't mean that an estimate or a
7 blueprint of a repair had not been created by
8 North State and either provided or discussed with
9 Dr. Bilik at some earlier point in time than
10 January 11th of 2005?
11 A. I have no -- I've no evidence to that.
12 Q. Now, Mr. West, you indicated earlier that
13 you had reviewed deposition testimony and a
14 variety of other things; is that not correct?
15 A. Yes.
16 Q. And, in fact, earlier this year, you had
17 executed an affidavit?
18 A. Yes.
19 Q. Is that not right?
20 A. That's right.
21 Q. And that was in relation -- scratch that.
22 In that affidavit, you identified a number
23 of things that you looked at in preparation for
24 making that affidavit. Is that right?

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1 A. That's right.
2 Q. And I noted in there there were no
3 photographs. You did not specifically mention
4 photographs that you had looked at.
5 Did you, in fact, look at any photographs?
6 A. Yes, I did.
7 Q. And were they photographs of the vehicle
8 in its damaged condition?
9 A. Yes. Some of them were, yeah.
10 Q. I'm going to ask you if you will please
11 take a look at a number of these photographs and
12 I'm going to ask you if you can tell us whether
13 these were any of the photographs that you
14 reviewed.
15 MS. EVERSMAN: And, your Honor, these
16 actually were part of Plaintiff's Exhibit
17 13. Plaintiffs have only introduced the
18 very first photograph, but you should have
19 copies.
20 We have them remarked as Defendant's
21 Exhibits, the individual ones.
22 THE COURT: Tell me what they are; 13
23 what? What are they now marked as?
24 MS. EVERSMAN: They are now marked as

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1 Defendant's II 1 through 23.
2 THE COURT: Are they in evidence?
3 MS. EVERSMAN: They are not yet in
4 evidence, your Honor.
5 THE COURT OFFICER: Showing the
6 witness what has been marked Defendants
7 II. Any objection?
8 MR. NELSON: I don't have their
9 copies marked their way so I'm not sure
10 we're on the same page.
11 I know what I marked as 13-A through.
12 THE COURT: Is this the same as 13?
13 It is 13?
14 MR. NELSON: But I only entered in
15 evidence, your Honor, 13-A.
16 THE COURT: But it has been marked, we
17 will mark them as defense exhibits at this
18 point, all right, but take out the
19 photograph that's has been marked as 13-A.
20 Do not mark it.
21 Did you take it out?
22 MS. EVERSMAN: I did, your Honor.
23 THE COURT: Then the rest will be
24 marked. Any objection to it being moved

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1 into evidence?
2 MR. NELSON: No, your Honor.
3 THE COURT: We will deem them marked.
4 We will mark them another time. Deemed
5 marked.
6 (Whereupon, the photographs referred
7 to were received and deemed marked
8 Defendant's Exhibits II 1 through 23 in
9 evidence.)
10 THE COURT OFFICER: I am showing the
11 witness Defendant's II 1 through 23.
12 MS. EVERSMAN: Correct.
13 THE COURT OFFICER: In evidence.
14 A. Thank you.
15 Q. Could you please, Mr. West, look at those
16 photographs and tell us if you recognize any of
17 those.
18 A. Yes, except for one. I don't recognize
19 that one.
20 Q. Could you please tell us what the one is
21 that you do not recognize.
22 A. It looks like a very dark picture of maybe
23 the interior or something.
24 THE COURT: What is that?

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1 MS. EVERSMAN: Five.
2 THE COURT: II 5 is not recognized.
3 Q. Mr. West, are these photographs that you
4 have 1 II -- II 1 thorough 23 except for II 5.
5 Are those photographs that you reviewed?
6 A. Yes.
7 Q. Prior to creating your affidavit?
8 A. Yes.
9 Q. Okay. And did you review those
10 photographs prior to actually inspecting the
11 vehicle -- I'm sorry. The very first time you saw
12 it.
13 THE COURT: The answer is yes?
14 THE WITNESS: Yes.
15 Q. You did. Now, it's fair to say, is it
16 not, that those photographs depict damage that was
17 caused to Dr. Billik's vehicle, correct?
18 A. Yes. I'm sorry.
19 Q. Now, Mr. West, in relation to those
20 photographs, you indicated that when you were
21 answering questions Mr. Nelson asked you, that the
22 vehicle did not indicate that it had been damaged
23 in particular areas. Is that correct?
24 A. In particular areas, yes, that's right.

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1 Q. And that was based on your observations
2 that certain portions of the vehicle did not
3 indicate that there had been any alteration from
4 the state in which it left the factory. Is that
5 fair?
6 A. That's right.
7 Q. All right.
8 THE COURT: Go ahead.
9 Q. Now, Mr. West, your perception that there
10 had been no repairs effected to the vehicle was
11 based on the fact that you could discern no
12 evidence of alteration, that I think you said it
13 was indistinguishable from its original condition?
14 MR. NELSON: I object, your Honor.
15 He didn't say that he saw no repairs
16 effected and that's what she just asked
17 him.
18 It mischaracterizes his testimony.
19 THE COURT: All right. Sustained.
20 Q. Mr. West, is it not true that you
21 testified you saw no evidence to indicate in
22 certain areas of the vehicle that the vehicle had
23 been altered from its factory condition?
24 A. Yes, I did.

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1 Q. All right. And that you made a
2 determination that the charges, at least some of
3 the charges, that North State had made and asked
4 to be paid for were false, they had not actually
5 performed any repairs to those certain areas of
6 the vehicle because you were unable to detect any
7 change. Is that correct?
8 A. Yes, concurrent with my summary.
9 Q. Concurrent with your summary. All right.
10 Now, Mr. West, isn't it true that
11 collision repairers can do a very good job
12 repairing vehicles?
13 A. It is true.
14 Q. And, in fact, isn't that a position that
15 you've taken in the past that said that collision
16 repairers should always be striving to perform un-
17 detectable repairs?
18 A. That's true.
19 Q. In fact, you wrote an article on
20 diminished value issues, did you not?
21 A. I did.
22 Q. In 2002?
23 A. Uh-huh.
24 Q. And in that article, you specifically say

1003

1 that sometimes vehicles are better when they have
2 been repaired than actually when they left the
3 factory. Was that not your position?
4 A. That's right.
5 Q. And, in that particular article --
6 A. I would like to correct that statement --
7 Q. Certainly.
8 A. -- you just made.
9 Q. Please.
10 A. I didn't say better than when they left
11 the factory. I said better than prior to the
12 accident.
13 Q. Okay. Were you talking about a relatively
14 new vehicle like Dr. Bilik's car of 4,000 some
15 miles?
16 A. Yeah, say something like that or maybe a
17 car that's been driven down the road and had some
18 rock chips on it or something, needed the hood
19 repainted in the front, yeah.
20 Q. In fact, didn't you say in that article
21 that sometimes the accident and the repair was the
22 best thing that happened to the vehicle?
23 A. Sometimes it is.
24 Q. Now, Mr. West, you would agree with me,

1004

1 wouldn't you, because you wrote this, that
2 customers, and you mean individual lay people,
3 consumers -- is that right?
4 A. Yeah, the owners of the cars.
5 Q. -- owners or lessees of the car?
6 A. Right.
7 Q. That customers aren't necessarily the best
8 judges of whether a vehicle has been well or
9 properly repaired.
10 A. That's true.
11 Q. Because lay people, we usually can't tell
12 very well whether a vehicle has been repaired or
13 not; is that correct?
14 A. When they buy a car, they often buy for
15 price and end up with something that was a little
16 worse for wear than what they thought.
17 Q. Would the answer to my question, sir, be
18 yes, that customers are not always able to
19 determine whether a vehicle has been damaged and
20 repaired?
21 A. That's right.
22 Q. Is that not the reason that companies like
23 Car Fax and Auto Check exist, to help consumers
24 find out information about the vehicle's history?

1005

1 A. Yes.
2 Q. Okay. And in this 2002 articles, you
3 wrote -- you said that a shop owner should strive
4 for an undetectable repair?
5 A. Yes.
6 Q. Is that correct?
7 A. That's right.
8 Q. And, since you've just told us that
9 customers are not the best judges of whether there
10 has been a quality repair, you obviously were
11 talking, when you said undetectable repair, about
12 your fellow collision repairers. Is that not
13 correct?
14 A. Yes, that's right.
15 Q. So you are of the opinion, are you not,
16 that a collision repairer can actually perform a
17 repair in such a manner as to be undetectable to
18 fellow collision repairers; is that not right?
19 A. I believe that they should be able to
20 repair it so it's undetectable to the consumer.
21 Q. But that's not what you said in your
22 article.
23 A. That's the way you are interpreting it. I
24 don't believe that's true.

1006

1 I said that the collision repairer should
2 strive for the undetectable repair. Strive for
3 it.
4 I believe I can repair a car so that you
5 can't detect that I repaired it.
6 Q. Oh, but you're saying that when you wrote
7 that, you're saying that only lay people would not
8 be able to detect that a repair had been made to
9 the car; is that right?
10 A. A customer. That's what I was talking
11 about.
12 Q. But you're not saying then that a fellow
13 collision repairer would perhaps not be able to
14 recognize that a repair had been made to the
15 vehicle?
16 A. In this case, I was able to detect –
17 THE COURT: That's not the answer.
18 Q. That was not my question, sir.
19 A. Can you restate your question.
20 Q. Are you saying that there is no situation
21 in that collision repairers cannot effect a repair
22 so well that their fellow collision repairers are
23 unable to see that there has been any repair to
24 that portion of the vehicle?

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1 MR. NELSON: Objection, your Honor.
2 I don't understand that question.
3 MR. MAMO: It's not for you to
4 understand, Mr. Nelson.
5 MR. NELSON: I need to understand the
6 question.
7 THE COURT: That's the question.
8 That's very hard to answer.
9 She's really asking, right, did you
10 state in your article that some collision
11 repairers are able to repair damaged
12 vehicles in such a fashion that their
13 fellow vehicle repairers might not detect
14 it?
15 THE WITNESS: I understand the
16 question but I didn't say that in that
17 article.
18 I said that we should strive for
19 that.
20 BY MS. EVERS MAN:
21 Q. Are you of the opinion that a fellow
22 collision repairer could repair a vehicle in such
23 a manner that you or other collision repairers
24 might not be able to tell that it had been

1008

1 damaged?
2 A. Might not, might.
3 Q. Might?
4 A. Yeah.
5 Q. Very good. Now, you've already told us
6 that you're not Mercedes – your shop is not
7 Mercedes Benz certified, right?
8 A. That's right.
9 Q. And so you don't necessarily know what the
10 training, what the obligations, what the
11 information is that a Mercedes certified shop and
12 its technicians might have at its finger tips to
13 be able to effect a perfect repair, do you?
14 A. I have been to the Mercedes website. I've
15 gone in there when I have been repairing Mercedes.
16 As far as the finish and these type of
17 things go, there isn't any difference between
18 repairing a floor pan on a Jaquar, steel car, and
19 this one.
20 Q. Okay. You said you know this because you
21 have been to the Mercedes website.
22 A. Yeah. Well, that's where their
23 information comes from.
24 Q. Now, you told us that you have repaired

1009

1 Mercedes Benz vehicles; is that right?
2 A. Yes.
3 Q. You have repaired them in the past?
4 A. Yes.
5 Q. Correct? Have you repaired any since
6 2003?
7 A. Yes.
8 Q. Have you repaired, in 2004, beginning of
9 2005, had you repaired a 2004 Mercedes E320 4
10 matic station wagon?
11 A. No.
12 Q. Now, if I understand your prior statement,
13 it was that you've been to the Mercedes Benz
14 website and that there's no information provided
15 there that indicates that certified Mercedes Benz
16 facilities would have any greater knowledge or
17 abilities than you might have. Is that your
18 testimony?
19 A. Not at all.
20 Q. Okay. Can you please clarify that for me
21 then.
22 A. I'm talking about the areas that I wrote
23 up, the areas I wrote up on this summary: Floor
24 pan, rocker panels. There's no information on

1010

1 those specific areas for repairing damage on how
2 to do that, how to effect the proper repair so it
3 would be undetectable.
4 Now, if you wanted to know how to replace
5 the rocker panel, it would be in there.
6 Q. So your position is, if I understand you,
7 because Mercedes Benz doesn't give that on their
8 website, that information, and you don't have that
9 information, that it can't exist. Is that your
10 testimony?
11 MR. NELSON: Objection, your Honor.
12 I'm not sure what "that it can't exist"
13 means. I don't understand the question.
14 THE COURT: That what can't exist?
15 Q. The ability or the mechanism to be able to
16 repair the vehicle so it's undetectable.
17 MR. NELSON: Same objection, your
18 Honor.
19 THE COURT: You can answer that. You
20 can answer it.
21 A. Oh, okay. There's no information on
22 repairing a dent in the rocker panel. It doesn't
23 mean it can't be done.
24 Q. And you say it doesn't mean it can't be

1011

1 done because you have a number of years of
2 experience in collision repair. Is that not
3 right?
4 A. Sure.
5 Q. And you've encountered, I'm certain, many
6 of these situations. Is that fair?
7 A. That's right.
8 Q. And you've had to use your best
9 professional judgment about how to make certain
10 repairs, right?
11 A. That's right.
12 Q. Now, is it possible, Mr. West, that North
13 State repaired those portions of the vehicle that
14 you've said showed no evidence of repair so well
15 that you could not discern that they had been
16 damaged?
17 A. After inspecting it, no.
18 Q. And that was an inspection that took place
19 for the first time two years after the vehicle had
20 been repaired and in the shop at North State; is
21 that right?
22 A. The first time.
23 Q. The very first time. Okay.
24 Did you make notes or did you take

1012

1 photographs of your initial inspection, sir?
2 A. I did.
3 Q. Do you have those with you here today?
4 A. No.
5 Q. Can you tell us where they are?
6 A. I don't know where they're at.
7 Q. Did you provide them to someone?
8 A. I gave them to Mr. Nelson.
9 Q. And you retained no copies?
10 A. No. I may have some. I don't know where
11 they're at. They didn't show anything really
12 because we didn't take the covers off the car at
13 that initial inspection.
14 Q. When did you take the covers off the car?
15 A. April 6th of 2008.
16 Q. Three months ago. Is that approximately
17 right?
18 A. Approximately.
19 Q. So you said you didn't take the covers.
20 You were talking about those plastic pieces –
21 A. Yes.
22 Q. – that are bolted –
23 A. Yeah.
24 Q. – underneath; is that correct?

1013

1 A. Yes.
2 Q. So, when you initially looked at this
3 vehicle and you did not take the covers off, you
4 had no idea whether there had actually been damage
5 to those portions of the vehicle that had been
6 repaired by North State; is that right?
7 A. That hadn't been repaired?
8 Q. That had been repaired.
9 A. Oh. Could you restate your question,
10 please.
11 Q. Sure. If I'm understanding your
12 testimony, you didn't actually see the damage
13 which you're testifying about here today until
14 April of 2008; is that right?
15 A. That's right.
16 Q. And that was three years after North State
17 fixed this car, right?
18 A. Yes.
19 Q. And there were portions of the vehicle
20 that you said were taken apart?
21 A. The portions that you viewed yesterday and
22 I did, were the ones that I took off.
23 Q. And you personally took them off; is that
24 right?

1014

1 A. Yes.
2 Q. You took off the plastic covers for the
3 floor pans. You took off the rocker panels; is
4 that right?
5 A. That's right.
6 Q. Okay. And then --
7 A. Rocker panel covers, the moldings.
8 Q. Thank you. And did --
9 A. Wheel houses.
10 Q. Did you make photographs of your
11 investigation in April of 2008?
12 A. Yes, I did.
13 Q. Okay. Did you make notes?
14 A. Yes, I did.
15 Q. Do you have those here with you today?
16 A. I don't have those with me today.
17 Q. Do you have copies of them?
18 A. I probably have copies of the notes.
19 Q. Did you provide those to Mr. Nelson or one
20 of the other attorneys for Progressive?
21 A. The photographs, yes.
22 Q. Well, Mr. West, you indicated when you
23 looked at -- you kept referring to a jagged area?
24 A. In the area of the rock.

1015

1 Q. On the right-hand side and your opinion
2 was that was where the vehicle had hit the rock;
3 is that correct?
4 A. That's right.
5 Q. And you are holding up, is that
6 Plaintiff's Exhibit 13?
7 A. Yes, 13-A.
8 Q. Yes. You are holding up Plaintiff's
9 Exhibit 13-A. Could you please take a look at
10 Defendant's Exhibit II Number 1.
11 A. This?
12 Q. Okay. Now, you see where that rock is
13 placed; is that correct?
14 A. Yes.
15 Q. It is very close?
16 A. Right there.
17 Q. It is very close to the opening where the
18 right -- where the front passenger door opens; is
19 that not correct?
20 A. That's right.
21 Q. And you're telling us that the damage that
22 was caused to the pinch weld area and that jagged
23 area was caused by that rock; is that correct?
24 A. That damage is about that long and, as you

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1 can see in this picture, the car rolled forward a
2 number of inches and then went back to this final
3 location, resting location.
4 Q. Okay. And you're holding up Defendant's
5 Exhibit what number, please?
6 A. II.
7 Q. II what number, please?
8 A. Seven.
9 Q. And in that photo, it actually depicts
10 where the vehicle struck the house, does it not?
11 A. Yeah, and then it's away from the house
12 now where it ended up. Right.
13 Q. Can you tell us, from looking at those
14 pictures, approximately how far that vehicle is
15 from the house?
16 A. I don't know. It's a number of inches.
17 It could be somewhere between eight, ten, a foot,
18 something like that. It probably went back and
19 forth.
20 Q. But you don't know that that's what
21 happened, do you, sir?
22 A. We know it went up that far.
23 Q. You know that that house did not have that
24 mark on it prior to the date of the accident. Is

1017

1 that what you are telling us?
2 A. No, I don't know that, but it does line up
3 perfectly with the front bumper.
4 Q. Very good. Now, Mr. West, that jagged
5 area, those damaged portions of the pinch weld
6 were obvious to you, were they not, once you
7 removed the plastic pans and the rocker moulding?
8 A. Yes, ma'am.
9 Q. And but you can't tell us, as you sit here
10 today, whether that was the condition of the
11 vehicle, that damage existed at the time that it
12 left North State, can you?
13 As you sit here today, can you tell us
14 that?
15 A. As I sit here today, and I was the one
16 that removed those coverings off of that car at
17 that time, and supposedly the car has been in
18 custody ever since, when I removed those, those
19 were under there, and there's no damage to those
20 coverings, indicating that that was that way when
21 those coverings were put back on.
22 Q. But you didn't remove those coverings
23 until just about three or four months ago; isn't
24 that right?

1018

1 A. Yes.
2 Q. So you don't have -- and you told us you
3 don't have any idea how it was transported, how it
4 was towed, do you? Is that correct?
5 A. If you are asking me did somebody else
6 take those coverings off and then damage it and
7 put it back on, I don't have any idea about that.
8 Q. You don't?
9 A. It was in custody, supposedly, all this
10 time.
11 Q. And, when you say it was in custody, it
12 was in Progressive's possession, wasn't it?
13 A. It was shrink wrapped completely when I
14 got the car and we took it off.
15 Q. That wasn't my question, sir.
16 A. Yes.
17 Q. As far as you know, the car was in the
18 possession of Progressive Insurance Company?
19 A. As far as I know.
20 Q. And, as you sit here today, you don't have
21 any idea whether the shrink wraps had been
22 removed, whether there had been changes to that
23 vehicle, do you?
24 A. The only way that would have been possible

1019

1 would have been if I stayed with the car the full
2 four years that it has been tied up, so, no.
3 Q. I was just going to say thank you, sir.
4 The answer is no?
5 A. Uh-huh.
6 Q. Now, Mr. West, isn't it true, that you are
7 of the opinion that insurance companies and
8 insurance company involvement can actually cause
9 decreases in the value to a car?
10 A. That's true.
11 Q. It is, and you refer to that, if I'm
12 correct in your article, as insurance related
13 diminished value. Is that not correct?
14 A. That's correct.
15 Q. And you say that that can occur because an
16 insurance company refuses to pay for necessary
17 repairs; is that right?
18 A. That's true. If a repair shop goes ahead
19 and repairs it according to maybe what an
20 inexperienced adjuster would want them to do, it's
21 possible to create insurance related diminished
22 value.
23 Q. And you say that could happen if you had
24 an inexperienced adjuster; is that right?

1020

1 A. It's possible.
2 Q. Well, it can also happen if you have an
3 experienced adjuster, too, can't it?
4 A. If it was intentional. I think it's the
5 intention of all of us in the industry to work
6 together to try to satisfy the customer and not
7 create diminished value.
8 Q. It's your belief, when you say all us work
9 together, are you talking about repairers and
10 insurance companies?
11 A. Yeah.
12 Q. Okay. So it's your belief that insurance
13 companies and collision repairers have the same
14 interests in satisfying the customer; is that
15 right?
16 A. I believe that.
17 Q. Okay. Now, did you not write in your
18 articles that part of the reason that collision
19 repairers are not actually earning what they
20 should be is because of insurance company
21 involvement?
22 A. Yes, I probably wrote that.
23 Q. Did you not write an article called "By
24 Door Rate Dollars We Are In The Dumper"?

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1 A. That's right.
2 Q. And a door rate is, I believe you
3 testified, what you charge for your labor time; is
4 that correct?
5 A. Door rate means the charge that you have
6 per hour when a car comes through the door.
7 Q. Okay, and is that something that you have
8 to have posted?
9 A. Yes, in the State of Washington.
10 Q. In the State of Washington. Do you know
11 what the requirements are in the State of New
12 York?
13 A. Not really, I don't, in regard to that.
14 Q. Do you know what a body shops requirements
15 are under New York law, sir?
16 A. Some of the requirements.
17 Q. Okay. And --
18 A. I haven't made a legal study of it, in
19 other words.
20 Q. Okay. When you say you know what some of
21 those requirements are, what are those specific
22 requirements that you believe to be true?
23 A. Well, regarding saving the parts after a
24 car has the damaged parts taken off, and, if the

1022

1 customer can only give a verbal consent over the
2 telephone, the shop is required to hold those
3 parts until either them or their agent inspects
4 them thoroughly.
5 Q. That's your understanding of New York law;
6 is that correct?
7 A. Yes.
8 Q. Now, you also indicated that at your shop,
9 in this article, I apologize, in your 2004 article
10 --
11 MR. NELSON: Objection, your Honor.
12 I think he has written more than one 2004
13 article.
14 MS. EVERSMAN: I apologize.
15 Q. April 4th of 2004 in Body Shop Business.
16 A. The Door In The Dumper article.
17 Q. Yes. And in that article did you not say
18 that insurance companies actually control the
19 collision repair industry?
20 A. That's what I said. I was talking about
21 by prevailing rates, holding us to the prevailing
22 rates, they have inspired us to get very
23 efficient, a good thing, but in some cases it's
24 caused some to commit fraud, a very bad thing, for

1023

1 the consumer.
2 Q. Okay. And is it not fair to say that in
3 comparison to what you as an experienced collision
4 repairer can charge for the skilled work that you
5 perform is a significantly lower dollar amount
6 than your companion mechanical repair shops?
7 A. That's true.
8 Q. In fact, in your article, did you not say
9 that you're charging \$46 an hour for your skilled
10 labor whereas the mechanical shops are able to
11 charge over \$74 per hour?
12 A. I did.
13 Q. And you take issue with that, do you not,
14 sir?
15 A. I do.
16 Q. Do you not believe that your skills are
17 worth at least what the mechanical repair shops
18 are making?
19 A. I do but the rates are determined by all
20 the shops complying with the survey, that we're
21 the ones that send those rates in and the average
22 them out, and then they hold us to that average.
23 Q. You are saying a survey. This is a survey
24 --

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1 A. It's collected, yeah.
2 Q. There's only one insurance company, is
3 there not, there's only one insurance company that
4 typically performs a rate survey, is there not?
5 A. That I know of, yes.
6 Q. And that is State Farm, is it not?
7 A. It is.
8 Q. It is not Progressive Insurance?
9 A. No.
10 Q. Okay. So it's fair to say, isn't it, that
11 when Progressive writes an estimate that says a
12 shop's rate, they are only willing to pay X number
13 of dollars per unit or per hour, that's something
14 they have self-determined, correct?
15 A. I don't know how they determined that, to
16 be honest with you.
17 Q. In fact, insurance companies, they don't
18 share that information with collision repairers,
19 do they?
20 A. No.
21 Q. Mr. West, do you charge a different rate
22 for the mechanical work that you actually perform
23 than the collision repairers?
24 A. Yes, Yes, I do.

1025

1 Q. What is that rate?
2 A. I believe right now it's 52 an hour, yeah.
3 Q. Do you charge a different or a higher rate
4 for the frame or unibody type work that you
5 perform?
6 A. Yes. Structural repairs, 52.
7 Q. So when you told us before that your door
8 rate is \$46 an hour --
9 A. Forty-eight, yeah.
10 Q. I apologize. Forty-eight dollars an hour,
11 that is actually simply for the body portion of
12 the work that you perform.
13 A. Body and painting.
14 Q. And painting. In fact, Mr. West, isn't it
15 true that in your shop, insurance companies pay
16 for about 90 percent of the repairs that go
17 through your shop?
18 A. That's true.
19 Q. And so how often; is it only 10 percent of
20 the time that you have an individual customer who
21 decides to pay for the repairs themselves?
22 A. We work on cars that are ten years old and
23 newer, so most of those cars are insured.
24 Sometimes a customer will want additional

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1 work done on an insurance job that isn't covered
2 by insurance, so that's where I was coming up with
3 that 10 percent figure.
4 Q. So you're saying that, if a job comes into
5 your shop because it has been damaged and an
6 insurance company is expected to be paying for
7 repairs, that, if there is additional damage or if
8 there are changes that the customer wants to make,
9 they can do that at the same time that the vehicle
10 is in your shop?
11 A. Basically, yes. Sometimes we point this
12 out to them; you've got a dent right here in this
13 blended panel. If we fix it now, it will save you
14 some painting time. It's already going to be
15 painted over.
16 Q. And that, of course, is paid for
17 individually by the customer?
18 A. That's right.
19 Q. Now, are you aware of any prohibition in
20 New York that prevents a collision repairer from
21 entering into a contract directly with the
22 customer and not an insurance company?
23 A. Not at all.
24 Q. So North State Custom, for example, is

1027

1 entitled to enter into a contract with Dr. Bilik
2 and not Progressive Insurance; is that correct?
3 A. As far as I know, yes.
4 Q. All right. And, if that's the case, would
5 you not agree with me then that it's Dr. Bilik who
6 was responsible for paying for the repairs?
7 A. She signed the authorization for repairs
8 saying that she would pay for them.
9 Q. Is the answer to your question then, sir,
10 yes?
11 MR. NELSON: Your Honor, this is
12 asking this gentleman for a legal
13 conclusion about contracts.
14 MS. EVERSMAN: I am not asking him
15 for a legal conclusion.
16 MR. NELSON: She is asking does he
17 have an obligation.
18 THE COURT: He knows. He apparently
19 says he does know, he does know some of
20 the laws of the State of New York.
21 A. When she signed that authorization for
22 repair, ultimately she was responsible for it.
23 Q. Okay.
24 A. Whether she knew it or not. She didn't

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1 have an itemized accounting of the bill, so she
2 signed it right there.
3 Q. And how do you know she didn't have an
4 itemized accounting of the bill, sir?
5 A. Because of this.
6 Q. And what's this that you're holding?
7 A. This is North State's Preliminary Estimate
8 that was printed on 1/11/2005.
9 Q. But you don't have any information as to
10 whether that estimate had been previously provided
11 to Dr. Bilik, do you?
12 A. How was it going to be provided to her, by
13 the phone or something?
14 Q. I'm asking you.
15 THE COURT: You know what. We are
16 going back to this and I will let the jury
17 decide what this issue is. I think they
18 got the point. Okay?
19 BY MS. EVERSMAN:
20 Q. Mr. West, you testified earlier today that
21 a shop, if I recollect your testimony, that a shop
22 should consider or indicate when the vehicle is
23 approaching or passing a total loss threshold; is
24 that right?

1029

1 A. That's right.
2 Q. It's your belief that that is an
3 obligation that the shop has; is that correct?
4 A. It's my belief that, when you have a large
5 accident of that size, it's incumbent upon the
6 shop to try to determine in advance if it is going
7 to be a total, not repair a total.
8 Q. Do you believe it's incumbent upon the
9 insurance company to look at and try to determine
10 if that vehicle is likely to become a total loss?
11 A. If they are trying to protect their best
12 interest, yes.
13 Q. When you say their best interests, who are
14 you referring to?
15 A. Progressive.
16 Q. In this situation?
17 A. Yes.
18 Q. Okay. So --
19 A. And their customer.
20 Q. If I understand you, you're saying that
21 early on Progressive should make a determination
22 as to whether a vehicle will become a total loss;
23 is that correct?
24 A. Yes.

1030

1 Q. Do you know when Progressive began looking
2 into or investigating whether the cost of repairs
3 was going to cause the vehicle to be required to
4 be a total loss?
5 A. In looking at the log notes from the
6 insurer, it looked like they tried to make contact
7 at North State several times to review the car.
8 So I don't know when that was but other
9 than the initial contact that the first adjuster
10 made.
11 Q. Okay. You may want to refer to
12 Plaintiff's Exhibit 11, but when you said the log
13 notes, you were referring to the claim file
14 information that Progressive has prepared?
15 A. Yes.
16 Q. All right. And when you said they tried
17 to contact the shop, is that correct, you only
18 know that because of information that you read in
19 the log notes. Is that right?
20 A. That's right.
21 Q. So, you are just assuming that that's
22 correct?
23 A. Yes.
24 Q. Now, you also indicated that you don't

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1 know exactly when Progressive actually started
2 making any type of effort to determine what a
3 total loss dollar value would be for this car,
4 right?
5 A. That's true.
6 Q. Okay. If Progressive did not start making
7 any type of determinations until March 16th or
8 March 17th of 2005, you wouldn't have any reason
9 to dispute that, would you?
10 A. Not really.
11 Q. But it's fair to say, is it not, that from
12 reviewing the log notes, Progressive did not make
13 an initial determination in December of 2004 when
14 this vehicle was damaged --
15 A. That's true.
16 Q. -- as to what the total loss value number
17 was?
18 A. As far as the information I've reviewed,
19 that would be true.
20 Q. Don't you think it's the insurance
21 company's responsibility to do that?
22 A. I would say they should be working in
23 concert with the shop and they both should be
24 making sure they don't repair a total.

1032

1 Q. Now, you reviewed these claim file notes,
2 correct?
3 A. Yes.
4 Q. And, again, as I said, if you need to
5 review it, it's Plaintiff's Exhibit 11, right.
6 And, in reviewing those notes, did you see
7 information, notations, that were made by the
8 original adjuster that the vehicle would require
9 additional repairs and costs beyond what he had
10 determined? Did you read that?
11 A. I believe so.
12 Q. Okay. And that was even after he had been
13 to North State on December 10th of 2004 and had
14 written his estimate saying that it would cost at
15 least \$26,804.20 to repair this vehicle. Is that
16 right?
17 A. I can't answer that question. It may or
18 may not be.
19 Q. Could you please take a look at
20 Plaintiff's Exhibit 11 for me.
21 THE COURT: Let's save time. 11 is
22 the Pacman notes.
23 A. Okay. What do you want me to look at?
24 Q. Could you please take a look at the notes

1033

1 and there are a number of pages of notes that
2 relate to December 12th of 2004, December 10,
3 2004.
4 A. That's where I'm starting, December 10th,
5 and this looks like Joe Lovero's notes.
6 It says, there are still open items.
7 Q. And you understand what is referred to by
8 open items, do you not, Mr. West?
9 A. Yes.
10 Q. That means that there are items that
11 either are known to be damaged that will have to
12 be repaired or paid for or they're not known at
13 the moment. Is that correct?
14 A. Unknown because of the covers that were on
15 everything at that time.
16 Q. So when this vehicle was reviewed at North
17 State on December 10th of 2004 by Mr. Lovero, the
18 original adjuster, this vehicle had not been
19 disassembled, had it?
20 A. From the looks of the photos, no.
21 Q. And, when you say "the looks of the
22 photos," you are referring to documents --
23 A. Some of these photos here.
24 Q. And when you say "some of these photos,"

1034

1 you were referring to Defendant's Exhibit II; is
2 that not correct?
3 A. Yes.
4 Q. Now, Mr. Lovero wrote almost a \$27,000
5 estimate on December 10th of 2004 and indicated
6 that there were still open items, right?
7 A. Uh-huh.
8 Q. And --
9 THE COURT: Yes?
10 THE WITNESS: Yes.
11 Q. Some of those open items included
12 replacing three wheels?
13 A. Yes.
14 Q. All right. And one of the reasons that
15 they were not included in the actual estimate that
16 he wrote is because he did not have prices for
17 that; is that correct?
18 A. I saw where he replaced the three wheels,
19 but why he didn't commit them in there, I don't
20 know. Three of the wheels need to be replaced but
21 Mitchell's had no parts prices.
22 Also, two tires warrant replacement as
23 well.
24 Q. So it's fair to say that Mr. Lovero did

1035

1 not include in his original -- in his December 10,
2 2004 estimate, the cost, the price, and the cost
3 to actually replace at least three wheels and two
4 tires because he didn't have prices?
5 A. That's right.
6 Q. Right, and when you said that Mitchell's
7 didn't have prices, that's because those prices
8 were not existing. They had not been entered into
9 the Mitchell's estimating system, right?
10 A. Evidently that's what he meant. He
11 couldn't find them in their data base.
12 Q. Now, do you know, Mr. West, in December of
13 2004, do you know whether this 2004 Mercedes Benz
14 E320 4 matic station wagon was a new model for
15 Mercedes or a newly redesigned model for Mercedes?
16 A. I think it was newly redesigned. Probably
17 the wheels weren't in there yet.
18 Q. So, if this were a newly redesigned
19 vehicle, you wouldn't be surprised, would you, to
20 find that there were some price and parts
21 information that was not included in the
22 estimating data base?
23 A. Not at all.
24 Q. That happens commonly?

1036

1 A. It's common, yes.
2 Q. Thank you. So isn't it fair to say that
3 Mr. Lovero noted in his Progressive Pacman claims
4 files notes that there were going to be additional
5 things that had to be paid for on this car that
6 were not included in that \$26,804.20 figure?
7 A. From what I read, yes.
8 Q. And that was because the car not --
9 scratch that. That was because there were not
10 part prices for certain things that had been
11 damaged and needed to be replaced, correct?
12 A. Yes.
13 Q. And also because the vehicle had not been
14 disassembled to fully indicate what the damage to
15 it might have been.
16 A. Yes.
17 Q. All right. Is it not commonplace,
18 Mr. West, for repair shops to discover that
19 there's additional damage when they actually take
20 off those plastic portions and the moldings?
21 MR. NELSON: Objection to the
22 question, your Honor. Is it not common
23 practice?
24 Maybe I need to hear the question

1037

1 again. I didn't understand it.
2 MS. EVERSMAN: I'll rephrase it.
3 BY MS. EVERSMAN:
4 Q. How frequently does it happen, Mr. West,
5 that when the pans are taken off and moldings are
6 removed and the vehicle is otherwise disassembled,
7 that there is additional damage that is
8 discovered?
9 A. That's common.
10 Q. Very common?
11 A. Yes.
12 Q. All right.
13 A. That's why really the complete disassembly
14 of the damaged parts when you are working on a
15 close line like that is necessary in the very
16 beginning of the job.
17 Q. And when you say a close line, you are
18 talking about the dollar figure, aren't you?
19 A. Yes, if you think the car could possibly
20 total out, you want to get an accurate bid up
21 front to begin with.
22 Q. When you say "an accurate bid," you are
23 actually talking about what you believe the cost
24 to repair the car will actually be, correct?

1038

1 A. Yes. Final.
2 Q. Mr. West, I don't have much more for you,
3 sir.
4 Mr. West, you indicated that you've dealt
5 with titling issues for automobiles; is that
6 right?
7 A. Yes.
8 Q. And you're aware, of course, that in some
9 states, vehicles have to be title branded if the
10 cost of repair exceeds a certain threshold; is
11 that correct?
12 A. The title and the car in some states.
13 Q. Okay. And is it your belief that
14 Progressive has branded the title of this vehicle?
15 A. I have no knowledge of that at all.
16 Q. Have you seen a copy of the title?
17 A. No.
18 Q. But you were involved, if I understood
19 your testimony, in titling issues because you were
20 involved in the State of Washington with some anti
21 fraud activities; is that correct?
22 A. Absolutely. That's my only connection
23 with the title.
24 Q. It's in relation to making sure that fraud

1039

1 doesn't occur; is that right?
2 A. Right.
3 Q. And that fraud is fraud on a consumer who
4 might buy the vehicle after it has been declared a
5 total loss by an insurance company, right?
6 A. Sure. You can take a car across state
7 lines, retitle it there and bring it back and
8 title it in another state and the title is not
9 branded any more.
10 Q. You would agree with me, wouldn't you,
11 that the insurance company has an obligation to
12 title brand that vehicle, do you not?
13 A. If it's totaled out, the title should be
14 branded when they send it in to the state.
15 Q. Could you please take a look at
16 Plaintiff's Exhibit 87 for me.
17 MR. NELSON: Objection, your Honor.
18 There has been testimony on this as to why
19 this title is the way it is and Mr. West
20 has not been here for this testimony.
21 It is also a legal conclusion as to
22 New York State law as to why this title
23 has to be branded and when it has to be
24 branded.

1040

1 They are going to stick a title in
2 front of him that has been put in evidence
3 —
4 THE COURT: I don't want testimony.
5 MR. NELSON: I'm not testifying, your
6 Honor.
7 THE COURT: It sounds like it. I
8 mean, he says he understands the
9 procedures in New York law. So fine.
10 Show him the title.
11 MS. EVERSMAN: It's a two-page copy,
12 copy of a title.
13 THE COURT: Eighty-seven.
14 MS. EVERSMAN: Plaintiff's Exhibit
15 87.
16 THE COURT OFFICER: Showing
17 Plaintiff's Exhibit 87 in evidence to the
18 witness.
19 A. Your question?
20 Q. Could you take a look at both pages of
21 that document for me, please, Mr. West.
22 A. Okay.
23 Q. Does there appear to be a signature on the
24 top of the second page?

1041

1 A. With some writing underneath it I can
2 read.
3 Q. Now, part way down, there is a
4 line section with two boxes?
5 A. Yes.
6 Q. And it indicates?
7 A. One box says reflects actual mileage as
8 seen on the odometer of the vehicle.
9 Q. Actually, could you go down just a little
10 bit further for me, please.
11 THE COURT: Just define what you want
12 him to look at.
13 Q. I want you to take a look, please,
14 Mr. West, at the section pertaining to total loss.
15 A. The damage disclosure statement?
16 Q. Yes.
17 THE COURT: Where is that? Second
18 box down.
19 Q. Do you see that there are two smaller
20 boxes in that second box?
21 A. Where you check something?
22 Q. Yes.
23 A. Yes.
24 Q. And one box says that the vehicle has been

1042

1 damaged in excess of 75 percent of its value; is
2 that right?
3 A. It says, "This is a damage disclosure
4 statement to be completed by owner named on face
5 of title. I certify that, to the best of my
6 knowledge, this vehicle" and then there's a place
7 to check off, "has been or has not been wrecked,
8 destroyed or damaged to such an extent the total
9 estimate or actual cost of parts and labor to
10 rebuild or reconstruct the vehicle to the
11 condition it was before the accident and for legal
12 operation on the road or highways is more than
13 75 percent of the retail value at the time of the
14 loss."
15 Q. Thank you.
16 A. Neither one of those boxes has a check in
17 it saying it either has or hasn't.
18 Q. Now, can you please take a look at the
19 face of it.
20 THE COURT: You haven't finished
21 what's in the box.
22 A. "Checking the 'has' box means that the
23 vehicle must have an anti-theft examination before
24 being registered and that the title issued will

1043

1 have the statement rebuilt salvage on it."
2 THE COURT: Rebuilt salvage New York
3 on it.
4 A. "Rebuilt salvage New York on it," if you
5 check one of the boxes.
6 THE COURT: Are any boxes checked?
7 A. No, none of the boxes are checked.
8 Q. So there's no indication from the owner of
9 the vehicle that the vehicle had or had not been
10 damaged in excess of 75 percent of its retail
11 value?
12 A. No indication on this.
13 Q. No indication. But that title actually
14 expects and requires it, does it not?
15 MR. NELSON: Objection, your Honor.
16 The document speaks for itself and I don't
17 know where we're going.
18 THE COURT: Overruled. Wouldn't it
19 be nice if we knew who the owner of the
20 vehicle is.
21 Why don't you ask that question.
22 BY MS. EVERSMAN:
23 Q. If you take a look at the first page, does
24 it indicate who the owner of the vehicle is?

1044

1 A. It looks like DCFS Trust in Roanoke,
2 Texas.
3 Q. Do you have any idea whether DCFS Trust
4 stands for Daimler Chrysler Financial Services?
5 A. No.
6 Q. So you don't know?
7 A. No. I knew it was a leased car to begin
8 with.
9 Q. So the owner of the vehicle, when
10 Progressive declared the vehicle to be a total
11 loss, the owner had an obligation to turn the
12 title over to Progressive; is that correct?
13 A. Yes.
14 Q. And the owner obviously knew, receiving
15 payment, that Progressive had determined or
16 declared this vehicle to be a total loss; is that
17 not correct?
18 A. I believe that's what she was instructed
19 and they settled the claim with whoever owned the
20 car.
21 Q. But there's nothing to indicate that that
22 car has been declared a total loss because the
23 damage disclosure statement was not checked
24 indicating that the vehicle had been damaged in

1045

1 excess of 75 percent of its retail value.
2 A. Not on this.
3 Q. And, based on your activities with
4 anti-fraud, it's fair to say, isn't it, Mr. West,
5 that that title could be negotiated and sold, that
6 vehicle could be sold with a clean title?
7 MR. NELSON: Objection, your Honor.
8 It calls for speculation. We are asking
9 him about how –
10 THE COURT: If he knows.
11 A. I really couldn't say in regard to that
12 because it's not even licensed. You know, it has
13 been off the road for four years. I don't know
14 what their intentions are with this. Probably
15 don't have any at this point.
16 Q. But at least, just a to wrap up, Mr. West,
17 it is fair to say, is it not, that nothing on that
18 title document that plaintiff's introduced as
19 Plaintiff's Exhibit 87 indicates that that vehicle
20 has been damaged in excess of 75 percent of its
21 retail value?
22 A. There's nothing on this that states that.
23 Q. Thank you. Mr. West, you mentioned that
24 you believe that North State, in your opinion,

1046

1 did -- they should have talked to Progressive in
2 January or so of 2005 about the cost to repair
3 this vehicle.
4 Was that your testimony, sir?
5 A. I believe that, yes.
6 Q. And that is your opinion?
7 A. Yes.
8 Q. That North State should have done that?
9 A. They should have been in communication
10 with not only Dr. Bilik but the insurer.
11 Q. And you base that opinion on what, sir?
12 A. I base that on my training and my
13 experience in all of our Inter-industry Conference
14 of Auto Collision Repair classes. We preface
15 those classes with every repairer should stay in
16 constant communication with not only the owner but
17 the insurer and keep them in the loop about what's
18 happening on the car.
19 Q. And that's just your belief that that is a
20 proper way to do collision repair?
21 A. What I just quoted you was from ICAR, the
22 Inter-industry Conference on Auto Collision Repair
23 and I believe that. I agree with it.
24 Q. Now, ICAR is an organization that offers

1047

1 training; is that correct?
2 A. Yeah, it's the preeminent organization
3 that offers training.
4 THE COURT: I thought you said, Miss
5 Eversman, don't worry. I'm done. What
6 happened?
7 MS. EVERSMAN: I'll hurry, Judge.
8 Q. ICAR you said is the preeminent training
9 entity?
10 A. Yes.
11 Q. There's no obligation that any collision
12 repairer belong to it, is there?
13 A. We don't belong to it, no.
14 Q. There's no obligation, of which you are
15 aware, there's no law, there's no regulation,
16 nothing?
17 A. If you want to get certain certifications
18 like Audi or Jaguar, they have their training
19 certification facilities at Appleton, Wisconsin at
20 ICAR training facility up there so some
21 manufacturers use them for training.
22 Q. That was not my question, sir.
23 A. Oh.
24 Q. Sorry. As far as you know, there is no

1048

1 requirement here in New York, for example, for a
2 collision repairer to attend or to be trained by
3 ICAR?
4 A. Not at all.
5 Q. Okay. You don't --
6 A. You don't have to.
7 THE COURT: Anything else?
8 Q. Mr. West, to wrap up, you mentioned in one
9 of your articles in 2002 that there are a number
10 of -- that there are over zealous insurance
11 industry people who are trying to save money for
12 the insurance company.
13 A. Yeah.
14 Q. Is that right?
15 A. I also said it was our obligation --
16 THE COURT: That's not the question.
17 Strike the answer. Next question.
18 Q. And, Mr. West, wouldn't you agree with me
19 also that in your 2004 article, The Door Rate
20 Dollars Were In The Dumper, you indicate that one
21 of the things that insurance company do sometimes
22 to collision repairers is to point the fraud
23 finger?
24 A. You are taking that out of context, right.

1049

1 Q. Is that not what you wrote, sir?
2 THE COURT: Strike that answer.
3 Q. You are nodding your head. Did you write
4 that?
5 A. Yes, I did write that as part of a
6 complete sentence.
7 Q. Okay. Well, the sentence says: "It's not
8 uncommon for insurers to point the fraud finger at
9 us while asking for discount on labor and parts."
10 Is that not fair?
11 A. Yes.
12 Q. And you wrote that?
13 A. Yes.
14 Q. And you believe that, don't you?
15 A. Yes, I do.
16 MS. EVERSMAN: All right. Thank you.
17 Mr. West. I don't believe I have any
18 further questions at this time.
19 At this time, I would like to move
20 Defendant's Exhibits II 1 through 23
21 except for 5 into evidence.
22 THE COURT: I already did that.
23 Deemed marked. We will mark them later.
24 Redirect.

1050

1 Ten minute break.
2 (Whereupon, the jury exits the
3 courtroom.)
4 (Whereupon, a recess was taken.)
5 THE COURT OFFICER: Ladies and
6 gentlemen step into the courtroom, please.
7 (Whereupon, the jury enters the
8 courtroom.)
9 THE COURT OFFICER: The jury is
10 entering.
11 THE COURT: You may sit down. All
12 right. Mr. West, you are still under
13 oath. Understood.
14 REDIRECT EXAMINATION
15 BY MR. NELSON:
16 Q. I'll be brief, your Honor.
17 Mr. West, I am showing you three
18 photographs. They are marked as -- it's crossed
19 out -- II, I think. There's a picture of you.
20 Do you see that there are two other
21 photographs?
22 A. Yes.
23 Q. They were handed to you as a package of
24 other photographs.

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1 A. That's right. These were pictures from
2 yesterday.
3 Q. The photograph that was taken of you, when
4 was that taken?
5 A. Yesterday, July 31st.
6 MR. NELSON: Your Honor, they stuck
7 them in a package of photographs and
8 suggested that these were a package of
9 photographs that Progressive took a long
10 time ago.
11 MS. EVERSMAN: Your Honor, those
12 three photographs were mistaken as
13 photographs that were -- they were
14 inadvertently included; however, Mr. West
15 did testify that he recognized them and
16 that he had looked at them.
17 Q. Okay. Mr. West, this photograph that's 21
18 --
19 THE COURT: They are in evidence.
20 Q. This photograph 21, do you see the scrapes
21 on the bottom of that item?
22 A. Yes.
23 Q. What item is that?
24 A. Rear bumper cover on the Mercedes.

1052

1 Q. What's it made out of?
2 A. It's made out of plastic.
3 Q. Can you tell me why those scratches are on
4 that bumper?
5 A. From probably loading it on to a flatbed
6 truck.
7 Q. Besides damages associated with loading
8 this car on to a flatbed truck that are scrapes,
9 did you see any other dents in the rear of the
10 car?
11 A. Not at all.
12 Q. Do you work on Mercedes Benz, Mr. West?
13 A. I have worked on Mercedes Benz, yes.
14 Q. How many Mercedes Benz do you think you
15 have worked on in the last five years?
16 A. Oh, probably 20. We're not a Mercedes
17 Benz neighborhood.
18 Q. Mr. West, this article that you wrote
19 where they quoted a section of the article where
20 the fraud finger was used, can you tell me what
21 the point of that article was?
22 A. The insurance industry holds us to the
23 prevailing rate and that this inspires us to
24 become very efficient --

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1 Q. You say us.
2 A. -- the collision repairers to become very
3 efficient, but it also inspires some to commit
4 fraud, a very bad thing for the consumer. I said
5 that right in the article.
6 Q. Were you blaming in any way the insurance
7 industry for people committing fraud?
8 A. No.
9 Q. Is fraud something you condone?
10 A. I absolutely do not condone fraud. That's
11 one of the main reasons I'm here, not -- there's
12 not many people --
13 THE COURT: Let's object to that.
14 Strike that. No more speeches. All
15 right.
16 Q. Mr. West --
17 THE COURT: Forget what he just said.
18 Q. Mr. West, has it been easy for you to come
19 here and testify against another body shop owner?
20 THE COURT: Sustained.
21 MR. NELSON: Then I'm done, your
22 Honor.
23 THE COURT: Thank you. You may step
24 down.

1 (Whereupon, the witness was excused.)
2 THE COURT: Ladies and gentlemen, we
3 are breaking for the day and you will be
4 happy to know that we will not be working
5 on this case Monday. All right.
6 We will not be working on this case
7 Monday. So you have a long weekend.
8 Have a good weekend. We will see you
9 at 10:30 on Tuesday. Thank you.
10 (Whereupon, the jury exits the
11 courtroom.)
12 THE COURT: See you Tuesday.
13 (Whereupon, the jury trial is
14 adjourned until August 5, 2008 at 10:30
15 a.m.)
16 *****
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Proceedings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
PROGRESSIVE NORTHEASTERN
INSURANCE COMPANY,
Plaintiffs,

-against-

Index No.
8750/05

NORTH STATE AUTOBARN, INC. d/b/a,
NORTH STATE CUSTOM AUTO, and
GREGORY T. COCCARO,

Defendants.

-----X
Courthouse
White Plains, New York

AUGUST 5, 2008

BEFORE:

HON. MARY H. SMITH,
Justice of the Supreme Court

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DEBRA L. RINALDI,
Senior Court Reporter

Proceedings

examined this Exhibit.

MR. MAMO: I have examined this Exhibit.

THE COURT: And I have found that it is
acceptable evidence?

MR. MAMO: Yes, your Honor. I have and it
is acceptable.

THE COURT: 81.

MR. NELSON: Thank you, your Honor.

(Whereupon, Plaintiff's Exhibit Number 81 was
admitted into evidence at this time.)

MR. NELSON: I think this can be off the
record.

THE COURT: I decide what's off the record,
and in this case everything is on the record.
Yes.

MR. NELSON: Your Honor asked the parties to
engage in discussions to see whether the case
could be settled, your Honor.

THE COURT: Well, I think the parties agreed
among themselves. I had nothing to do with the
arrangement of this conference whatsoever, and I
recognize it's hopeless that I can settle this
case. And I understand it produced nothing.

MR. NELSON: Your Honor, there is -- based

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(OPEN COURT; ALL PARTIES PRESENT; JURY NOT
PRESENT:)

THE COURT: Good morning, everybody. Be
seated, everybody.

MR. NELSON: Before we bring the jury in.

THE COURT: Yes.

MR. NELSON: Okay. One, Exhibit 81, I was
waiting for Mr. Mamo to go through to make it
comported to what he thought was the pile. I've
been waiting to put it into evidence. I'd like to
put it in now, your Honor.

MR. MAMO: Oh, yes, that's fine, Judge.

MR. NELSON: Okay. Number 2 --

THE COURT: Well, wait a minute. Just
because of our experience last week, have you
really taken a look at 81?

MR. MAMO: We did, Judge. It's what we sent
to them. Now, whether it's every page -- I
believe it's every page.

THE COURT: I'm just now questioning some of
these Exhibits.

MR. MAMO: Sure.

THE COURT: I'm just now questioning. You
agree. I want you to say on the record, I've

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on what I heard from yesterday, I don't think
there is any chance this case could ever get
settled.

THE COURT: Okay.

MR. NELSON: The last thing. Your Honor
wanted some briefing on whether or not there were
certain requirements under 398 and 82.2, 82.5 and
802.16. And your Honor asked for briefing. I've
prepared a brief -- this all came up as Mr. Ceasar
was on the stand, and I'd like to present that
brief to your Honor.

THE COURT: Yes. Do you have a --

MR. MAMO: Yes, Judge. We did the same. I
prepared it in the form of a memorandum with the
applicable Case Law, but it's similar to what Mr.
Nelson, it's on the same point, obviously.

THE COURT: Okay. Thank you. Anything else?

MR. NELSON: Your Honor, when you were
questioning Mr. Ceasar you were --

THE COURT: Mr. Ceasar is --

MR. NELSON: The person who --

THE COURT: The young man who visited -- yes.
And he was looking at parts.

MR. NELSON: Right. Then you had suggested

<p style="text-align: right;">1059</p> <p>1 Proceeding.</p> <p>2 to Mr. Caesar and then questioned him that there</p> <p>3 was a duty for Progressive to provide advanced</p> <p>4 written notice to North State.</p> <p>5 THE COURT: Yes.</p> <p>6 MR. NELSON: And I explained to the Court</p> <p>7 after the jury left that there was no such</p> <p>8 obligation. I'd like to have --</p> <p>9 THE COURT: I'm just not sure. Because I'd</p> <p>10 I've also read some cases this this regard and</p> <p>11 they all seem to adopt the -- adopt the -- they</p> <p>12 all seem to adopt 82.5(d), return replaced parts</p> <p>13 in timely written demand is made by customer.</p> <p>14 Now, I'm aware that work is authorized over</p> <p>15 the telephone but here is the problem,</p> <p>16 gentlemen -- and I don't know the answer at this</p> <p>17 point.</p> <p>18 Initially I believe but I'm not -- I haven't</p> <p>19 heard from Dr. Bilik who is not here so I can't</p> <p>20 know everything that she said, told them to start</p> <p>21 work and then she signed some kind of document.</p> <p>22 All right.</p> <p>23 I can't know everything that she said told</p> <p>24 them to start work. There afterward the insurance</p> <p>25 company -- and again the date I'm not sure of --</p>	<p style="text-align: right;">1061</p> <p>1 Proceedings</p> <p>2 incredibly important here as you're pointing out.</p> <p>3 Progressive looked at the car in December before</p> <p>4 any repairs were started. In January Progressive</p> <p>5 called and said we'd like to look at the car and</p> <p>6 North State said, no. That's our position, but I</p> <p>7 believe Mr. Coccaro also testified that they did</p> <p>8 not allow them in after January 13th. Until March</p> <p>9 8th Progressive is not in that shop. Dr. Bilik is</p> <p>10 the one having conversations with North State.</p> <p>11 THE COURT: Well, that's not quite true.</p> <p>12 Because you know that Greg -- what's his name,</p> <p>13 Greg or Joe?</p> <p>14 MR. NELSON: Joseph Lovero.</p> <p>15 THE COURT: Lovero went to the place, so</p> <p>16 that's not quite true.</p> <p>17 MR. NELSON: Yes, it is, your Honor.</p> <p>18 December 10th. He did not go to that shop after</p> <p>19 December 10th. But he went to the shop December</p> <p>20 10th before repairs were started.</p> <p>21 THE COURT: Am I right or wrong?</p> <p>22 MR. NELSON: Yes, that's right, your Honor.</p> <p>23 THE COURT: So as of December 10th no repairs</p> <p>24 are authorized over the telephone. Progressive</p> <p>25 has now given notice that they are involved in the</p>
<p style="text-align: right;">1060</p> <p>1 Proceedings</p> <p>2 but thereafter before the car was repaired -- in</p> <p>3 fact, because, Cesar stated that the -- well,</p> <p>4 withdrawn.</p> <p>5 I believe it was Stanton, Mr. Stanton visited</p> <p>6 the shop before the car was repaired.</p> <p>7 MR. NELSON: No, your Honor. Mr. Stanton</p> <p>8 did not visit the shop until after the car was</p> <p>9 completely repaired on March 22nd. 23rd.</p> <p>10 THE COURT: Then my recollection is somewhat</p> <p>11 different. But anyway, once Progressive came on</p> <p>12 the scene there were written -- a lot of written</p> <p>13 work went back and forth, and in fact the last</p> <p>14 stage of the so-called repairs was in writing, as</p> <p>15 well as the \$26,000 and change was their decision.</p> <p>16 So I'm not sure that there is already intervening</p> <p>17 writing when Progressive got involved in the case,</p> <p>18 so Progressive actually, you know, had a very</p> <p>19 active hand in this.</p> <p>20 So the question is, does Progressive's</p> <p>21 intervention so to speak, and assumption of Dr.</p> <p>22 Bilik's right, also include an increased duty upon</p> <p>23 Progressive to give them a written demand</p> <p>24 regarding return of replaced parts?</p> <p>25 MR. NELSON: Your Honor, the sequence is</p>	<p style="text-align: right;">1062</p> <p>1 Proceedings</p> <p>2 case.</p> <p>3 MR. NELSON: Then after January 11th they</p> <p>4 had Dr. Bilik sign the estimate and they took the</p> <p>5 position with Dr. Bilik, and it's in their</p> <p>6 testimony we are no longer dealing with</p> <p>7 Progressive, we're dealing just with you, and they</p> <p>8 are saying she authorized the repairs. And</p> <p>9 January 11th is when she becomes the person who</p> <p>10 we're communicating with.</p> <p>11 THE COURT: So you're saying that you stand in</p> <p>12 her shoes? That's your basis for standing.</p> <p>13 MR. NELSON: Yes. And she only authorized</p> <p>14 on that one document that January 11th estimate</p> <p>15 that we were talking about this North State's</p> <p>16 26,804.</p> <p>17 THE COURT: Did Mr. Cesar take the replaced</p> <p>18 parts.</p> <p>19 MR. NELSON: Mr. Cesar went to look at the</p> <p>20 replaced --</p> <p>21 THE COURT: Did he take them.</p> <p>22 MR. NELSON: Did he take them with him?</p> <p>23 THE COURT: Yes.</p> <p>24 MR. NELSON: No. He went to take</p> <p>25 photographs -- he went to look at them and that's</p>

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1 Proceedin_g

2 when he was asked to leave according to Mr.

3 Cesar's testimony. He went to look at them on

4 March 8th. This is a month or two months after

5 Dr. Bilik signed 26804 in authority. In the

6 meantime it increased their estimate by \$10,000.

7 THE COURT: Okay. Because the next issue I

8 have 82.5(d) only goes to return of parts, not

9 inspection of parts. Only refers to -- apparently

10 Progressive had no interest in the return of

11 parts. They were inspecting the parts and looking

12 for them. Because he could have taken those parts

13 as of that day if he wished them.

14 MR. NELSON: He could not, your Honor. They

15 weren't available for him to look at. And Mr.

16 Coccoaro even testified that he did not save all

17 the parts. They had an obligation to save the

18 parts for Dr. Bilik and for Progressive, because

19 Dr. Bilik authorized this work over the phone.

20 THE COURT: What are you saying?

21 MR. NELSON: According to them.

22 THE COURT: What do you say?

23 MR. MAMO: Obviously I could only

24 cross-examine based on what Mr. Nelson had brought

25 up, and he did a good job of limiting things.

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1 Proceedings

2 However, the only parts that we did not save were

3 the -- was the glass, which cannot be saved, and

4 what Mr. Cesar was looking for was glass, broken

5 glass. And you can't save broken glass.

6 THE COURT: Are you saying that there were

7 all those parts there? Is --

8 MR. MAMO: Anything that we --

9 THE COURT: No. Yes or no.

10 MR. MAMO: Yes, Judge. But Mr. Cesar did

11 not take the time to look through the parts. He

12 just assumed to, okay, he seen, says the Pacman

13 notes, some parts are here, some parts aren't

14 here, I can't find --

15 THE COURT: It appears to me right now that

16 when the Progressive representative went in

17 December to look at the car and determine the

18 amount of money that will be paid -- which he did,

19 it's in evidence -- he is at least giving notice

20 to the repair shop that they are going to pay at

21 least the bill. They are going to pay the bill.

22 MR. NELSON: \$26,800, your Honor. Not

23 \$37,000.

24 MR. MAMO: 34.

25 MR. NELSON: Your Honor --

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1 Proceedings

2 THE COURT: It doesn't matter what the bill

3 is. Progressive is now given notice that they are

4 going to pay \$26,000 and change. That's what they

5 agreed to. Okay. The rest of it is in dispute,

6 but I'm only talking about 82.5. You gave notice

7 before the repairs began that you were going to

8 pay.

9 MR. NELSON: Your Honor --

10 MR. MAMO: That's correct.

11 THE COURT: And it was not clear until the

12 very end when you wanted that car back that you

13 were willing -- going to pay \$34,000. Therefore I

14 am going to tell you that this, this whole section

15 does not apply to Progressive. You had to give

16 notice you wanted all the parts.

17 MR. NELSON: Progressive does not --

18 THE COURT: Written notice.

19 MR. NELSON: Progressive does not have an

20 obligation to give written notice but on top of

21 that, your Honor --

22 THE COURT: You know what, this is no longer

23 being argued. I'm telling you that that is a

24 fact. You went, you showed them that you were

25 going to pay, before they started the repairs, the

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1 Proceedings

2 excess you didn't agree to -- perhaps that's a

3 whole different issue, but then you did decide to

4 pay the excess. And that's, again, you took that

5 on too.

6 Yes, they were still dealing with Dr. Bilik.

7 It would appear that maybe she had to pay excess

8 for a while, but you agreed to pay \$26,000 and

9 change, you were involved. You wrote up an

10 estimate, exchange estimate. It appeared that you

11 were all on the same page at least on December

12 11th, and then it fell a part. That's why we're

13 here: It fell a part.

14 But I am ruling now that a part under 30 --

15 withdrawn. 82.5 of what is it?

16 MR. NELSON: 82.5-A through D, your Honor.

17 THE COURT: Of what? Of the what?

18 MR. MAMO: Motor Vehicle Repair Shop

19 Regulations.

20 THE COURT: And is it McKinney or what? Give

21 me a site.

22 MR. MAMO: VTL sections 215, 398. That's what

23 it is always under, 215 and 398.

24 THE COURT: Under the plain language of the

25 Statute as of the date that you said you would pay