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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT SUCV2005-1360

MARCIA RHODES, HAROLD RHODES, INDIVIDUALLY, HAROLD RHODES, ON BEHALF OF HIS MINOR CHILD AND NEXT FRIEND, REBECCA RHODES, Plaintiffs, vs. AIG DOMESTIC CLAIMS, INC. f/k/a AIG TECHNICAL SERVICES, INC., NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., and ZURICH AMERICAN INSURANCE COMPANY, Defendants,

JURY-WAIVED TRIAL - DAY 4

BEFORE: GANTS, J. BOSTON, MASSACHUSETTS FEBRUARY 8, 2007

PAULA PIETRELLA FAYE LEROUX

National Union Fire Insurance Company

APPEARANCES

BROWN RUDNICK Mr. Frederick Pritzker Daniel J. Brown Margaret M. Pinkham Attorneys At Law One Financial Center Boston, MA 02111

FOR: The Plaintiffs Marcia Rhodes, et al.

ROBINSON & COLE, LLP Gregory P. Varga Elizabeth C. Sackett Stephen Goldman Attorneys At Law 1 Boston Place Boston, MA 02108

FOR: The Defendant Zurich American Insurance Company

ANTHONY A. ZELLE BRIAN McDONOUGH Attorneys At Law 4 Longfellow Place, 35th Floor Boston, MA 02114

FOR: The Defendants AIG Domestic Claims and National Union Fire Insurance Company

THE McCORMACK FIRM, LLC Mark E. Cohen Robert Maselek Attorneys At Law 1 International Place Boston, MA 02110

FOR: The Defendants AIG Domestic Claims and

INDEX

Table with columns: WITNESS, DIRECT, CROSS, REDIRECT, RECROSS. Includes Kathleen Fuell (By Mr. Varga) 26, (By Mr. Zelle) 136.

EXHIBITS

Table with columns: NO., DESCRIPTION, PAGE. Includes 105 Reservation of Rights Letter, 3/7/03 111; 106 Reservation of Rights Letter 116; 108 Letter from Timothy. Bray from Lawrence Boyle 5/29/03 132; 109 Letter from Timothy Bray from Timothy Corrigan, 5/29/03 132.

FOR I.D.

None

PROCEEDINGS

(In court at 9:30 a.m.)

THE COURT: All right. Good morning. Let's call the case.

THE CLERK: Suffolk Superior Civil Court Case No. 2005-1360, Rhodes, et al versus AIG Domestic Claims, Incorporated, et al.

THE COURT: Good morning. So far this morning I have seen the "Day In The Life" video. It's marked as Exhibit -- does anybody recall what exhibit number?

MR. PRITZKER: It's Plaintiffs' Exhibit 10, part of --

THE COURT: It's part of 10?

MR. PRITZKER: Yes.

THE COURT: Okay. So I have seen that. Mr. Pritzker has explained to me that this is the video with audio, which was sent to defense counsel, past on by defense counsel to various insurance adjustors, and that it was not the video that was shown to the jury at trial. So that can be now made part of the record.

Before we here from --

MR. PRITZKER: Excuse me, your Honor. Just for clarification, it was mostly the -- I mean the

video. It wasn't identical.

THE COURT: Right. I know. A subset without sound was shown to the jury, so I gather Judge Donovan required redaction of some parts of it. So that's probably a clearer description of what you had said.

Okay. Before we get back to Ms. Fuell, let's discuss Mr. Todd.

I received the motion and I've read it and the opposition. Before we get started on that, with regard to the so-called settlement value, what did Mr. Todd say it was before?

MR. ZELLE: He said that all of the offers made by AIG were in the reasonable range. I can give you the page number, if you'd like. No, I can't because they don't have page numbers, but ...

THE COURT: All right. So he's going --

MR. ZELLE: I think I --

THE COURT: He's going now further and saying that the reasonable range was between 4 and 6 mil?

MR. ZELLE: Well, the offers that AIG made started at mediation three and a half and went up trial to six and a half. Again, his testimony -- I'll give you the specific disclosure statement.

I'm sorry, we went through this once before,

but I don't have the pages numbered, but it's on the supplemental answer of AIG to the interrogatories, and it's one, two, three, four, five -- the sixth page, the third paragraph.

THE COURT: I don't have it in front of me, but go ahead.

MR. ZELLE: You are looking at it?

THE COURT: No, I don't have it.

MR. ZELLE: Okay. I can read it. It says: AIG's offers were reasonable in relation to both the plaintiffs' demand and the settlement and verdict values of similar cases in this jurisdiction.

I did not put -- and only in this discussion with -- in this disclosure, we did not put a numeric range for the reason that it's arbitrary. And as the court will hear, ranges can be all over the place. What the court is going to judge is whether the offers were reasonable and his opinion is directly on that point.

The court indicated in one of our past hearings that it was interested in numbers and also interested in comparable cases. And, again, in our initial disclosure, we make it clear, I think, that comparable cases were not going to be discussed. We

were pressed by plaintiffs. Plaintiffs suggested that, at least in my mind, they would be cross-examining on comparable cases. So following the hearing on the 26th, we asked Owen Todd to pull some comparable cases. To the extent the plaintiffs want to pursue it, they can; they now have the cases. If plaintiffs don't want to pursue it, we aren't going to pursue it. That's the gist of the supplemental disclosure. I think it's made clear in the supplemental disclosure that it's there if they want to pursue it. If they don't, that's fine by us.

I also tried to factor in the court's, what I interpreted was the court's interest in hearing from this expert, and perhaps the court's view is that it should be heard regardless of what the plaintiff thinks.

Our point, your Honor -- the only point I wish to make here is this was a candid, open disclosure from the start, and while comparables, as we make clear in the supplemental disclosure, may have limited value, it certainly wasn't our intent to go into that, but we leave it up to the court to decide whether that's appropriate.

THE COURT: All right. I'll hear from Mr.

1 Pritzker. I don't know that you've accurately  
2 characterized what I said, frankly.

3 MR. PRITZKER: Not only, your Honor, has Mr.  
4 Zelle not accurately characterized what you said, but  
5 the sequence of events I think at least needs some  
6 clarification.

7 The expert disclosures were supposed to have  
8 been made in September of this year -- I'm sorry, '06.  
9 It was only because we moved to exclude certain parts  
10 of Mr. Todd's expert opinion, because he makes  
11 reference to the fact that he had relied in his opinion  
12 on certain cases, on comparable cases and jury verdict  
13 reports which had not been disclosed by September, that  
14 this court ordered those disclosures to be made by  
15 February 2. Mr. Zelle represented that's not so; Mr.  
16 Todd is not relying upon any comparables. He has in  
17 the past -- I believe is an accurate representation --  
18 subscribed to certain jury verdict reports as part of  
19 his general knowledge, but he's not going to point to  
20 any particular comparables as part of his expert  
21 testimony. And, certainly, in his expert testimony  
22 there was no opinion as to what the reasonable range,  
23 settlement range, was.

24 Now, at 9 o'clock the day before yesterday, 9

1 o'clock p.m., we get a supplemental answer to  
2 interrogatories dealing with cases which Mr. Todd  
3 researched, apparently, between he dialogue on February  
4 2 and the day before yesterday, or the night before  
5 last night, and then comes up with a new opinion, in  
6 the middle of a trial. I think that's absolutely  
7 inappropriate.

8 THE COURT: All right. Well, let me go back  
9 to Mr. Zelle.

10 I get the impression this was being done for  
11 me because you understood that I said I wanted it.  
12 What I said was if he did in fact -- he had written  
13 something that said that in making his decision he  
14 relied upon his understanding of jury verdicts and  
15 whatever else, and I thought -- my memory of what I  
16 said is, if all he's going to say is I generally review  
17 "Lawyers Weekly" settlements and verdicts and I keep up  
18 with the general literature, and he did not focus on  
19 any particular case, then that's fine, that's what he  
20 did. But if he's going to say that I was influenced by  
21 particular cases, then he has to identify those cases.

22 I didn't say I really want to hear, I really  
23 wanted to go out and find cases that he says will be  
24 comparable. I asked for him to flush out what he had

1 already done when he set forth his opinion. I get the  
2 impression, from what you wrote, that you basically go  
3 to Mr. Todd and you say Gants thinks it would be really  
4 helpful to have you identify particular comparables, so  
5 Todd goes back and says, okay, I'll find some, and he  
6 goes back and he finds some and he says here are two  
7 which I could probably use, if Gants wants them, so  
8 I'll make reference to them. But it doesn't sound like  
9 he used -- are you telling me that he used those two  
10 cases when he formulated his original opinion?

11 MR. ZELLE: There were 12 that we disclosed  
12 to them and the answer is no, he didn't.

13 THE COURT: Okay. So when he formulated his  
14 original opinion, he didn't rely.

15 MR. ZELLE: That's correct.

16 THE COURT: So why would he then say, okay,  
17 well I made my opinion without it but now I'm going to  
18 go back and find cases? I don't understand why that --  
19 I assume you did it for me, as if I had asked for it,  
20 which I hadn't. I had only asked for him to tell me  
21 what he had used when he set forth his original  
22 opinion, not to say, okay, go find some comparable  
23 cases that can be used to offset Oliveira, which is  
24 what apparently you seem to have done.

1 MR. ZELLE: That's not quite right, your  
2 Honor, although you mention Oliveira, and that is  
3 correct. Inasmuch as this Oliveira case came up or was  
4 raised by plaintiffs very late, after expert  
5 disclosures, and the court has allowed them to permit  
6 the cross-examination of at least one witness on  
7 Oliveira, yeah, we wanted to arm our expert so that in  
8 the event, on cross-examination, he is asked were you  
9 aware of the Oliveira case, he can respond to that.  
10 That certainly was part of the motivation for asking  
11 Judge Todd to look at other cases. And, again, it's up  
12 to plaintiffs whether they want to bring up Oliveira.

13 The disclosure, however, was again to provide  
14 a backdrop if plaintiffs open the door on cross-  
15 examination and say: You knew about the Oliveira case,  
16 didn't that have an influence. Or you didn't know  
17 about the Oliveira case, that Mr. Todd does have  
18 specific cases to respond with. I certainly did not  
19 want to be in a position where that door was open on  
20 cross-examination and Mr. Todd rebutted it based on  
21 specific cases and put plaintiff in the position of:  
22 I've never heard of these cases.

23 Again, it is not my intent to elicit what is  
24 there in the supplemental disclosure. If they bring it

1 up, however, I think we are in a position now where  
 2 they can't argue surprise.  
 3 THE COURT: All right. So it's not to be a  
 4 part of his direct?  
 5 MR. ZELLE: Absolutely not.  
 6 THE COURT: And it was not something with  
 7 regard to these cases that he reviewed. Had he  
 8 reviewed them before he put forth his original opinion?  
 9 MR. ZELLE: The specific cases? Perhaps. He  
 10 read and -- after the court determined that we should  
 11 disclose to that --  
 12 THE COURT: You say "perhaps." I mean either  
 13 he did or he didn't.  
 14 MR. ZELLE: No. It is perhaps.  
 15 THE COURT: Are you saying that when he set  
 16 forth the original opinion, he had in mind these 12  
 17 comparable cases, or are you saying, no, that's not how  
 18 I did it. No, that's how I did. I just basically had  
 19 a sense as to what -- I think I know what cases are  
 20 worth and I didn't focus on any particular case. I  
 21 basically --  
 22 MR. ZELLE: I can answer the question: That  
 23 is correct, he didn't focus on any particular case. I  
 24 can't answer the question that, yes, that he didn't

1 experience and supported by the research recently  
 2 undertaken into specific cases, it is his opinion now  
 3 -- a brand new opinion that we've never seen before --  
 4 that the reasonable settlement value of the Rhodes case  
 5 was between 4 and 6 million. That's just a new opinion  
 6 based upon new research that was disclosed for the  
 7 first time, a little more than 24 hours ago.  
 8 THE COURT: All right. Well, here's what I'm  
 9 going to do. He is going to be permitted to testify as  
 10 to his original opinion based on his original answers  
 11 to ints. He'll be permitted to say that what AIG did  
 12 was reasonable and to tell me how he came to that  
 13 conclusion. It seems as if he did not come to that  
 14 conclusion based on the additional research that he  
 15 appears to have done, thinking it was being done for  
 16 me.  
 17 If I'm wrong on that, then that will have to  
 18 be clarified. But as part of his direct case - well,  
 19 in general, he didn't formulate his opinion based on  
 20 particular case, so he's stuck with that. That's what  
 21 he did. He made an opinion and that's how he did it.  
 22 So if that's how he did it, that's how he did it.  
 23 MR. ZELLE: That's right.  
 24 THE COURT: So I don't think it's fair to

1 review them because these were in the general  
 2 publications that he does typically review, but I will  
 3 suggest that he didn't have those cases in mind, but I  
 4 can't say he didn't read them.  
 5 THE COURT: Well, I mean --  
 6 MR. ZELLE: That was your initial question.  
 7 THE COURT: To say that I review "Lawyers  
 8 Weekly," I assume you have to read it in order to --  
 9 MR. ZELLE: Right. So I'm sure he did read  
 10 it.  
 11 THE COURT: So I'm sure he read it. I'm sure  
 12 he read a lot of things over the course of the last 20  
 13 years, but it doesn't mean that's different from saying  
 14 I had a particular case in mind as a comparable.  
 15 All right. Well, it seems that this is  
 16 actually much ado about very little. What I will do is  
 17 he will -- with regard to this 4 to 6 million, where  
 18 did that -- that's new, I gather. I mean, he  
 19 previously planned to say that what AIG and National  
 20 Union had done was reasonable.  
 21 MR. ZELLE: That's right.  
 22 MR. PRITZKER: If you look at the actual  
 23 wording, your Honor, of what has now been disclosed,  
 24 Mr. Todd will testify that based on his personal

1 then say now I have gone back and done it again and  
 2 done a wholly new analysis based on particular cases  
 3 and now I'm going to supplement it and now say it's  
 4 based on review of particular cases. That's not what  
 5 he did. And I don't think he can change his analysis  
 6 over the last days approaching trial. So he did what  
 7 he did. He did, frankly, what I expected that he did,  
 8 which is I expect said I've been around here, I know  
 9 what cases are worth and that's how I did it, and I  
 10 know what cases are worth because I keep up with the  
 11 literature as to what cases settle for. That's, I  
 12 gather, what he did. That's a different analysis from  
 13 doing essentially what an appraiser would do, to say I  
 14 took six comparables. I went to the house and I found  
 15 six comparable sales, and based on those comparables,  
 16 this is what the house is worth. He didn't do an  
 17 appraisal type analysis, he did a -- I'm a realtor, I  
 18 know what properties -- I've been a realtor for 20  
 19 years. I know what property sells for. I can eyeball  
 20 it and get a sense of it. I keep up with generally the  
 21 sales in the community and I have a good sense of what  
 22 property's worth.  
 23 So he can't really change it from a realtor  
 24 analysis to an appraiser analysis at the end. So he

1 did what he did, and so he'll be able to testify to  
2 that. Whatever he said here is fair game, but fair  
3 game on cross. I mean, you are correct. The issue  
4 for me is not what -- I don't necessarily need to  
5 determine what a reasonable settlement value is, except  
6 to the extent that I'm determining whether what AIG did  
7 was appropriate. And it may be implicit in his  
8 previous opinion, but I'm not going to permit it to be  
9 materially supplemented now.

10 So the gist of it is, he basically did a  
11 realtor type analysis. If that's what he did, that's  
12 what he'll testify to. It's just as a realtor who's  
13 testifying as to value could be cross-examined and  
14 said: Did you know, Mr. Realtor, that a house across  
15 the street sold for 1.2 mil and that is well above what  
16 you say the house was worth across the street? That's  
17 fair game for cross-examination. So the Oliveira case  
18 is essentially the house across the street. That's the  
19 house in the next state. He can say yeah, I know that  
20 house and that house has six bathrooms and this house  
21 only has three, so I took that into account. It  
22 doesn't materially change my opinion, but it's  
23 certainly fair game on cross.

24 So he did a realtor analysis, not an

1 THE COURT: If the answer is yes, he can deal  
2 with it, but I don't think it's fair to say, no, I  
3 didn't consider it, but now that you mention it, I have  
4 now conducted my own independent inquiry and I've  
5 determined there's a house three doors down which sold  
6 a year ago and that sold for less. So it's that part  
7 of it that he can't do.

8 He basically is testifying to how he came to  
9 his opinion. That opinion was arrived at, I don't  
10 know, six months or a year ago. That's his opinion.  
11 And if he said I was aware of Oliveira, I considered  
12 it, here's why it did not affect my analysis, that's  
13 perfectly fine. If he said I considered Oliveira and I  
14 also went to look at other cases to see whether  
15 Oliveira really set the market -- but I don't think he  
16 did that. It sounds like he didn't.

17 MR. ZELLE: He did not do that.

18 THE COURT: So he did what he did.

19 MR. ZELLE: I suspect, your Honor, that this  
20 is something that we deal with when it comes up on  
21 cross. But if plaintiffs' counsel asks, well now that  
22 that I've described for you the facts of Oliveira, why  
23 isn't Oliveira something that you should have  
24 considered?

1 appraiser, and he can't change it to an appraisal type  
2 analysis at the end of trial.

3 MR. ZELLE: That's fine, your Honor. When  
4 Mr. Todd -- if Mr. Todd is asked about the house across  
5 the street, I would again seek to elicit from him, or  
6 he may volunteer on his own, if the court permits it,  
7 that when I heard about the house across the street, I  
8 looked at the house around the corner, which is  
9 essentially what he's done because, having been  
10 presented with the Oliveira case, he was advised by me,  
11 hey, this is coming in.

12 So, again, I don't want to surprise anybody.  
13 I'll tell Mr. Todd not to make that comparison if the  
14 court directs that. I certainly submit that it is  
15 fair. At that point, if he's asked about Oliveira,  
16 just say I saw the house across the street and that  
17 made me look at the house around the corner.

18 THE COURT: But the real focus is when you  
19 made your opinion as to value --

20 MR. ZELLE: Of course.

21 THE COURT: -- did you take into account the  
22 house across the street? If the answer is no, the  
23 answer is no.

24 MR. ZELLE: Right.

1 THE COURT: Right. But the analogy would be  
2 -- going back to my realtor example, which I actually  
3 like. I think that's actually about right. I don't  
4 know whether or not this could be an appraisal analysis  
5 by the expert -- or that, too, must be a realtor  
6 analysis, I don't know. But that's analogous to say,  
7 you know, what about the house across the street, did  
8 you consider it, and the person says no and then we  
9 break for the day and then that person goes out that  
10 night and goes on Zillow.com and finds four or five  
11 other comparables and says, you know, since I learned  
12 of that, I have gone and done some additional work and  
13 determined that there were other comparables which  
14 would rebut that.

15 Well, that's what he can't do because that's  
16 additional work that's done on the very eve of trial  
17 and is not a fair matter for cross-examination.  
18 Moreover, that's not what he did when he arrived at his  
19 conclusion. So he can defend what he did, but he can't  
20 go out and do additional research on the eve of trial  
21 to change what he did.

22 MR. ZELLE: I understand, your Honor.  
23 Oliveira wasn't part of the equation when he did his  
24 original disclosure.

1 THE COURT: Because it had not been -- I  
2 guess there had been no judgment or no settlement?  
3 MR. ZELLE: No. Because plaintiffs hadn't  
4 made it a part of this case. This court has determined  
5 that Oliveira is something that they can present as  
6 evidence.  
7 THE COURT: Right. Okay. But it doesn't --  
8 MR. ZELLE: So to suggest that our expert  
9 can't speak to something that he wasn't aware of at the  
10 time of his initial disclosure I think is unfair to our  
11 expert, if he is cross-examined about Oliveira.  
12 THE COURT: No, because just as the realtor  
13 can be said how did you come to the appraisal that the  
14 house is worth half a mil when a house across the  
15 street just sold for one mil, did you consider that  
16 it's a fair question.  
17 MR. ZELLE: It is a fair question if --  
18 THE COURT: And if the answer is no, I didn't  
19 consider it, then I can use that in evaluating whether  
20 or not his valuation of the house as being worth half a  
21 mil is a reasonable valuation.  
22 MR. ZELLE: I think to be fair, your Honor,  
23 the analogy, though, is that the house across the  
24 street wasn't disclosed or wasn't available information

1 evaluation of purporting comparables. That's what it  
2 means to essentially be giving an estimate of value.  
3 So we're obviously not talking about property  
4 values, but we're talking about settlement values, but  
5 they're not necessarily so different in terms of the  
6 analysis that would be used, perhaps. I don't know.  
7 All right. I think we can move on.  
8 MR. COHEN: Your Honor, just a point of  
9 clarification with regard to Mr. Kiriakos. He also  
10 engaged in the so-called realtor analysis.  
11 THE COURT: Mr. Kiriakos is whom?  
12 MR. COHEN: Is the plaintiffs' expert.  
13 THE COURT: Oh, okay. And?  
14 MR. COHEN: He engaged in the realtor  
15 analysis in his interrogatory answer and affidavit. He  
16 said that I think the case is worth \$6 to \$8 million.  
17 He didn't use any comparables and subsequently filed an  
18 affidavit that said I think the case is worth -- was  
19 worth \$6 to \$8 million at the beginning and then later  
20 was worth much more than that, but he didn't put any  
21 number on it. So I assume the same analysis would  
22 apply to him. He won't be able to introduce any  
23 comparables and won't be able to introduce any numbers  
24 other than the 6 to 8.

1 to the appraiser at the time he did his appraisal.  
2 That's where Oliveira here wasn't evidence, wasn't  
3 expected evidence. It is now.  
4 THE COURT: Meaning that it wasn't in  
5 verdict? It was not published anywhere in any verdict  
6 or settlement?  
7 MR. ZELLE: We sought to exclude it. The  
8 court said -- I mean, it wasn't disclosed as evidence  
9 to be presented in this case.  
10 THE COURT: But my memory is it was found by  
11 the adjuster on LEXIS, I think, wasn't it?  
12 MR. ZELLE: Anybody can find it, your Honor.  
13 It's the fact of admissibility. It was only through an  
14 emergency motion by plaintiffs that this court was  
15 apprised of Oliveira and ultimately decided it's not  
16 discoverable but it is admissible.  
17 THE COURT: All right. Well, I think we've  
18 explored it. I'm going to stick to my realtor analogy.  
19 It would be undisputedly fair game in the example I  
20 give for someone to cross-examine and say what about  
21 the house across the street, did you consider that.  
22 I'm allowed to consider that as to whether or not the  
23 realtor, knowing the overall property values of a  
24 community, is a better estimate of value than an

1 MR. PRITZKER: His opinion is what it is,  
2 your Honor. It has not changed.  
3 THE COURT: Each of the opinions -- the  
4 question is, when you reached your opinion, what did  
5 you base it on, and you're permitted to cross-examine  
6 him to say: When you reached your opinion, did you  
7 consider these other things, which arguably would show  
8 that your evaluation is wrong. Each side can do that.  
9 You know, I'll allow each side to do that, all right?  
10 So if the answer is no, I didn't know about it, didn't  
11 consider it, that's the answer.  
12 If the answer is I considered it but did not  
13 determine -- did not believe it to be a fair  
14 comparable, that too is fine. So I think it's fair to  
15 say that what is good for the goose, though, is good  
16 for the gander; that is, I have obliged the plaintiff  
17 to identify for the defendants any case that they plan  
18 to cross-examine Mr. Todd with, as essentially to say  
19 did you consider this as a comparable. I think the  
20 same thing should be actually required of the  
21 defendants.  
22 If you intend to question Mr. Kiriakos and  
23 say did you consider this comparable, you should give  
24 notice to the plaintiffs so that Mr. Kiriakos is in a

1 position to say I did not consider it but don't  
 2 consider that to be a fair comparable, in the same way  
 3 Mr. Todd now can do that.  
 4 MR. COHEN: Already having disclosed the 12  
 5 cases with regard to Mr. Todd; is that sufficient?  
 6 THE COURT: That would be sufficient.  
 7 MR. COHEN: Thank you.  
 8 THE COURT: So Mr. Kiriakos is now on notice  
 9 that those 12 cases may be used to cross-examine him so  
 10 that he's in a position to say whether or not those are  
 11 fair comparables -- well, first whether he considered  
 12 them, yes or no, and to then determine whether or not  
 13 those are fair comparables and whether or not the  
 14 existence of those cases or settlements should affect  
 15 the reliability of his analysis.  
 16 Okay. Ms. Fuell. Day 3.  
 17 How far behind target are we?  
 18 MR. PRITZKER: As far as I can determine, a  
 19 day.  
 20 THE COURT: All right. Let's see if we can  
 21 keep it one day behind and not make it -- we lose one  
 22 day for every three that we --  
 23 THE WITNESS: I know this has been a  
 24 challenge.

1 you. Go ahead.  
 2 MR. VARGA: Well, Ms. Fuell is from the  
 3 Chicago area, if you wanted to talk about the recent  
 4 one.  
 5 THE COURT: No, no. She's had a tough enough  
 6 week as it is.  
 7  
 8 KATHLEEN FUELL, Resumed  
 9 DIRECT EXAMINATION BY MR. VARGA, Continued:  
 10 Q Good morning again, Kathy.  
 11 A Good morning.  
 12 Q In your position, in the Liability TPA Claims Oversight  
 13 Unit at Zurich, are you responsible for making  
 14 decisions regarding the disposition of claims, whether  
 15 by settlement or litigation?  
 16 A Yes.  
 17 Q That's part of your job responsibilities?  
 18 A Yes, it is.  
 19 Q And was that true in September of 2003 and throughout  
 20 the time you worked on the Rhodes case?  
 21 A Yes.  
 22 Q Did your job require you in connection with that to  
 23 make judgments regarding the potential value of bodily  
 24 injury claims?

1 THE COURT: I'm sorry?  
 2 MR. PRITZKER: We'll try to take steps to  
 3 accelerate and get back on target.  
 4 THE COURT: Okay. Good. Remember that there  
 5 are diminishing returns as I learn more about the case.  
 6 Somebody asked how come I haven't got upset with you  
 7 yet and the answer is because I'm still learning  
 8 things. It's when I feel that I'm not learning very  
 9 much that I get upset, but I am still learning things.  
 10 So as long as I'm still learning things, then I can't  
 11 say the time is not well spent.  
 12 MR. PRITZKER: Keep in mind that as is  
 13 evident from Ms. Fuell that the defendant is now  
 14 putting on a significant portion of his case.  
 15 THE COURT: I understand. But the key is,  
 16 it's supposed to be value added. I'm supposed to learn  
 17 something. And when I say I've heard it now twice or  
 18 three times, then I begin to say now we're not using  
 19 our time well, but I'm not there yet.  
 20 THE COURT: Mr. Varga.  
 21 MR. VARGA: Your Honor, we're not going to go  
 22 to any more real estate analogies for the next few  
 23 hours, so it's going to be clear.  
 24 THE COURT: Move to sports analogies, thank

1 A Yes.  
 2 Q Does it also require you to make judgments regarding  
 3 the potential value of loss of consortium claims?  
 4 A Yes.  
 5 Q To your knowledge -- and you work with Mr. McIntosh at  
 6 least for some period of time in the same department,  
 7 correct?  
 8 A Yes, I did.  
 9 Q He was in Florida, though; you were in Schaumburg,  
 10 Illinois.  
 11 A That's correct.  
 12 Q To your knowledge does Mr. McIntosh also have the  
 13 responsibilities that you just discussed?  
 14 A Yes, he did.  
 15 Q And while he was handling the Rhodes claim in 2002 and  
 16 2003, for parts of those years did he have those  
 17 responsibilities then?  
 18 A Yes, he did.  
 19 Q Now, when you're in the Liability TPA Claims Oversight  
 20 Unit -- besides from being a mouthful -- when, in that  
 21 unit, you evaluate a case involving serious bodily  
 22 injury, in general can you describe to the court the  
 23 type of information that you look to.  
 24 A I would look to more than just secondhand information.

1 I would look to some kind of proof of verifiable  
 2 damages; the diagnosis, a prognosis, course of  
 3 treatment, so that I could get the -- yes.  
 4 Q Could you give us some examples of particular types of  
 5 documents?  
 6 A Specific type of documents?  
 7 Q Yes.  
 8 A Sure. I would look at hospital admission and discharge  
 9 records. I would look at operative reports. I would  
 10 look at diagnostics for MRIs, x-rays, CAT-scans. I  
 11 would look at psychiatric records if they applied,  
 12 occupational therapy. In cases like this, if there was  
 13 a long-term rehab facility involved, I would look at  
 14 their admit and discharge records, their progress  
 15 notes.  
 16 I would look at the treating doctors, any type of  
 17 reports or analysis they did on their ongoing treatment  
 18 and what the future might hold.  
 19 Q Anything else?  
 20 A There are voluminous things. I just didn't know how  
 21 long you wanted me to go on, sorry.  
 22 Q What about things like nursing notes, for example?  
 23 A And nursing notes I would look at, you know, and how  
 24 the family interacts, if there was any particular

1 have received. We looked at what was the family  
 2 financial situation, how were those needs being met.  
 3 Q And are there also times when you considered things  
 4 like occupational therapy?  
 5 A I'm sorry. And we looked at what was presented to us  
 6 as we didn't -- for the family financials it's more of  
 7 was Mrs. Rhodes a working person, was she unable to go  
 8 back to work, that kind of thing.  
 9 THE COURT: In this case, there was no  
 10 economist report.  
 11 THE WITNESS: There was an economist report, I  
 12 believe, in the demand package. There was a life-care  
 13 plan and then an economist's value of what some of the  
 14 future costs might be.  
 15 THE COURT: So when you say an economist report,  
 16 are you referring to a report with regard to wages  
 17 foregone or present value analysis?  
 18 THE WITNESS: Present value analysis.  
 19 THE COURT: In this case, there was no issue in  
 20 terms of wages foregone.  
 21 THE WITNESS: Correct.  
 22 THE COURT: Which you would look to that in  
 23 appropriate cases.  
 24 THE WITNESS: Yes, I would.

1 problems in the course of treatment, anything that  
 2 could give me the big picture, specific documentation  
 3 of what the injury was and what the future might hold.  
 4 Q And you mentioned, I think the list of things that you  
 5 just gave us was primarily related to the condition and  
 6 the medical reports relating to the injuries and the  
 7 treatment.  
 8 A Correct.  
 9 Q Would you also for any reason consider anticipated  
 10 future costs or treatment or care?  
 11 A Oh, absolutely. That's a big part of the picture,  
 12 especially in a case -- yeah, that's a big part of the  
 13 picture, if there were going to be future care needs,  
 14 if there was future support needed by the family or  
 15 outside parties, what the economic future might hold,  
 16 medical supplies.  
 17 Q Can I ask you if there are particular types of  
 18 documents that you might look for or hope to receive  
 19 to perform or conduct that kind of evaluation, what  
 20 would those be with respect to future care or future  
 21 treatment or future expenses?  
 22 A For example, in a case like this, we looked at the  
 23 life-care plan. We looked at an economist report. We  
 24 looked at any vocational rehab counseling they might

1 MR. VARGA: May I approach, your Honor?  
 2 THE COURT: Sure. And all counsel may approach  
 3 without asking.  
 4 MR. VARGA: Very good. Thank you.  
 5 (By Mr. Varga)  
 6 Q I'd like to direct your attention to Exhibit 10.  
 7 A Okay.  
 8 MR. VARGA: With the court's indulgence, I do  
 9 want to walk through Exhibit 10 a little bit with the  
 10 witness. It might be faster if I just used my copy  
 11 with her, if that's okay.  
 12 THE COURT: Sure.  
 13 MR. VARGA: Because I do have it tabbed.  
 14 (By Mr. Varga)  
 15 Q Mrs. Fuell, this is Exhibit 10, which I know you saw  
 16 yesterday when you were testifying with Mr. Pritzker.  
 17 MR. PRITZKER: Excuse me. Is it a highlighted  
 18 copy?  
 19 MR. VARGA: No, it's not highlighted. The only  
 20 thing, Mr. Pritzker, that's in there are tabs. Nothing  
 21 is highlighted.  
 22 (By Mr. Varga)  
 23 Q Again, the demand package was received in your  
 24 department at what point in time, if you could remind

1 us?  
 2 A Mid-September of 2003.  
 3 Q And when you received it at that time, did you go  
 4 through the entire demand package?  
 5 A Yes, I did.  
 6 Q And the "Day in the Life" video that we saw this  
 7 morning, did you review that as well?  
 8 A Yes.  
 9 Q I want to just ask you to turn to, it's about, for the  
 10 record, about three-quarters of the way into the  
 11 package. Further way in there's a Bates number on it  
 12 of 000740. This is a -- well, why don't you tell us  
 13 what the title of that document is, please.  
 14 A It's the Milford-Whitinsville Regional Hospital  
 15 emergency department record. So basically the  
 16 emergency room report.  
 17 Q And is that pertaining to Marcia Rhodes?  
 18 A Yes.  
 19 Q And what is the admit date there?  
 20 A January 9, 2002.  
 21 Q Prior to the time that the demand package was received  
 22 at Zurich, do you know if the company ever received  
 23 that document before, that Milford-Whitinsville  
 24 Regional Hospital document?

1 A Yes, it is.  
 2 Q I just want to go a few exhibits in again and ask you  
 3 to identify that document there, if you can. Just read  
 4 the title for us.  
 5 A Okay. It's the Fairlawn Rehabilitation Hospital  
 6 records from her February 5, '02 date of admission to  
 7 her April 16, 2002, date of discharge.  
 8 Q Okay. And --  
 9 A And it's a discharge summary. I'm sorry to interrupt.  
 10 Q That's all right. To your knowledge, did Zurich have a  
 11 copy of this document at any point prior to your  
 12 receipt of the demand package in September 2003?  
 13 A No, we didn't.  
 14 MS. SACKETT: Could I ask for the Bates number of  
 15 that one?  
 16 MR. VARGA: Yes. 001314, counsel.  
 17 MS. SACKETT: Thank you.  
 18 (By Mr. Varga)  
 19 Q And then a little further in there's another, what  
 20 looks like a letter here. Can you just identify what  
 21 that is for the record. There is no Bates number on  
 22 this document.  
 23 A It's an April 16, 2003 letter from Elizabeth Roaf, M.D.  
 24 in Worcester, Mass. to Margaret Pinkham with Brown

1 A We did not have it before the demand package.  
 2 Q And you know that how?  
 3 A I know because I went through the entire imaging system  
 4 several times. It wasn't in our claim file.  
 5 Q So you went through the imaging system. Any other  
 6 documents that you looked at to see?  
 7 A I looked at everything that we had available on line.  
 8 I looked at Crawford reports. I looked at what we had  
 9 available prior to receiving the demand package.  
 10 Q And let me flip just a little further in to this  
 11 document, which is entitled "UMass Memorial Medical  
 12 Center Discharge Summary."  
 13 What is the date on there, if you can see a date?  
 14 It lists an admit date, correct?  
 15 A Admit date, January 9, 2002.  
 16 Q And the Bates number on that document is, just for the  
 17 record?  
 18 A 000490.  
 19 Q My question for you is this. Did Zurich, to your  
 20 knowledge, ever receive a copy of this document at any  
 21 point prior to the demand package being served?  
 22 A No.  
 23 Q Is this a document that relates to Marcia Rhodes' care  
 24 at UMass Medical Center?

1 Rudnick.  
 2 (Reading): This letter is in response to your  
 3 request for a narrative report summarizing Marcia  
 4 Rhodes' inpatient hospital stay.  
 5 Do you want me to keep reading?  
 6 Q At what facility?  
 7 A It says inpatient hospital stay, outpatient progress,  
 8 stay at Fairlawn Rehab Hospital.  
 9 Q And did Zurich, to your knowledge, ever have a copy of  
 10 that document in its file prior to receiving the demand  
 11 package in September 2003?  
 12 A No, we didn't.  
 13 Q I just want to review a few more of these with  
 14 you, Ms. Fuell.  
 15 A Okay.  
 16 Q There's a collection of what appears to be  
 17 bills, medical bills, from UMass Memorial  
 18 Medical Center; do you see those?  
 19 A Yes.  
 20 Q And the front page is the certification that  
 21 appears and it says there are 58 pages attached?  
 22 A Correct.  
 23 Q To your knowledge, did Zurich ever receive any  
 24 of those medical bills at any point prior to

1 receipt of the demand package of December 2003?  
 2 A No.  
 3 Q The next exhibit is a collection, it appears, of  
 4 some additional medical bills; can you tell us,  
 5 if you can from the cover page, where they're  
 6 from?  
 7 A I'm going to mutilate the name,  
 8 Milford-Whitinsville Regional Hospital I think.  
 9 Yes, Whitinsville.  
 10 Q And that exhibit or that document, to your  
 11 knowledge, had Zurich received any of those  
 12 bills or that collection of bills at any point  
 13 prior to receipt of the demand package in  
 14 September of 2003?  
 15 A No.  
 16 Q And when we get toward the end of the demand  
 17 package there's a summary of medical bills that  
 18 appears; do you see that here?  
 19 A Yes. It doesn't have a Bates number on it?  
 20 Q No. What does that appear to be to you? I  
 21 won't summarize it; you can tell us what you  
 22 think it is.  
 23 A It looks to be a summary of the various medical  
 24 bills that were received throughout the course

1 A Future. It's all future costs.  
 2 Q And the next document -- there are several more  
 3 in the binder. This next one here, can you just  
 4 tell us what that document is?  
 5 A That's also from the Case Management Associates  
 6 and its potential complications and associated  
 7 risks for future issues that Mrs. Rhodes might  
 8 encounter, and estimated costs of those future  
 9 episodes she might have.  
 10 Q All right. And those two documents that we just  
 11 looked at from Case Management Associates, prior  
 12 to receipt of the demand package in September of  
 13 2003, had Zurich received either of those  
 14 documents?  
 15 A No.  
 16 Q And the last one is a document you referred to  
 17 earlier in your direct testimony. Could you  
 18 tell us what that one is, please? This is the  
 19 last document in the binder.  
 20 A It's a document from Dana Hewins, Economic  
 21 Consultant. It states it's an evaluation of the  
 22 lost household services and future medical and  
 23 personal care costs of Marcia Rhodes.  
 24 Q All right. And can you tell us the date on that

1 of Mrs. Rhodes' treatment.  
 2 Q All right. And do you see the total on the  
 3 bottom there?  
 4 A \$413,977.68.  
 5 Q At any point prior to receipt of the demand  
 6 package in September of 2003, did Zurich, to  
 7 your knowledge, ever have a copy of that summary  
 8 of medical bills or expenses?  
 9 A No, we didn't.  
 10 Q The next document I'd ask you to look at is a  
 11 document entitled "Case Management Associates,  
 12 Inc.", and then it says "Future Episodic Costs  
 13 Worksheet B." You've seen that in the demand  
 14 package, correct?  
 15 A Yes, I have.  
 16 Q Do you know what that pertains to?  
 17 A It gives an analysis from a health provider,  
 18 usually a nurse or a doctor, that states the  
 19 various types of care that Mrs. Rhodes would  
 20 need on an ongoing basis, either nursing care,  
 21 medical supplies, any rehab required for her  
 22 house --  
 23 Q Is that a summary of incurred expenses or is it  
 24 future?

1 document?  
 2 A July 29, 2003.  
 3 Q And who is it prepared for, if you know?  
 4 A It was prepared for Brown Rudnick's office.  
 5 Q All right. And do you have an understanding  
 6 that that is a forecast by an expert of what  
 7 future economic or lost household services Mrs.  
 8 Rhodes might experience?  
 9 A Yes, right, and what they would be in present  
 10 value.  
 11 Q Okay. At any point before September 2003 when  
 12 Zurich received the demand package, did it ever  
 13 have a copy of that document in its file?  
 14 A No.  
 15 Q Okay. Thank you.  
 16 And one other question for you. I'm  
 17 taking you back toward the front of the binder,  
 18 there's a document entitled "Rollins Leasing  
 19 Corp. Agreement to Lease and Service Agreement",  
 20 which has a Bates number beginning BMCA-0041 and  
 21 it runs through BMCA-0045. Prior to the receipt  
 22 of the demand package, did Zurich ever have that  
 23 document in its file?  
 24 A Rollins being part of Penske or of DLS?

1 Actually, no. I don't recognize that document  
 2 as something we had to review before the demand  
 3 package.  
 4 Q Thank you.  
 5 MR. VARGA: Your Honor, with your  
 6 indulgence we just have to check to see if there  
 7 is a particular exhibit in the binder that the  
 8 witness has. We're looking for Plaintiffs'  
 9 Exhibit 75.  
 10 (By Mr. Varga:)  
 11 Q Kathleen, I'm showing you what has been  
 12 previously marked and introduced into evidence  
 13 as Plaintiffs' 75.  
 14 A Yes.  
 15 Q Can you tell us what that is, please?  
 16 A It's the answer to Building Material  
 17 Corporation's Interrogatories to Plaintiff  
 18 Marcia Rhodes. It would be Marcia Rhodes  
 19 responding to Nixon Peabody's requests for  
 20 interrogatories. I think it was from Nixon  
 21 Peabody.  
 22 Q And to your knowledge, did Zurich ever have that  
 23 document in its imaging system or anywhere else  
 24 in its file at any time?

1 Zurich's possession at that time?  
 2 A Yes, I did.  
 3 Q Okay. If you turn to Exhibit 66C, please, is  
 4 that among the documents that you did have in  
 5 the file at the time that you took over  
 6 responsibility for the Rhodes case?  
 7 A Yes, we did have this.  
 8 Q All right. And that's among the ones that you  
 9 reviewed?  
 10 A Yes.  
 11 Q All right. Can you direct us in that document  
 12 to any information that relates to Mrs. Rhodes'  
 13 personal or bodily injuries that were known as  
 14 of that time?  
 15 A Yes, if you go to page 2 of the document under  
 16 "Remarks and Current Status".  
 17 Q Yes.  
 18 A It talks about, about half-way down: The last  
 19 word we have is that the claimant remains unable  
 20 to walk and is in a long-term rehab center  
 21 coming back to strength after some serious  
 22 complication and secondary infections.  
 23 Q Okay. Is there anything else in that document  
 24 that relates to the issue of injuries?

1 A No, we didn't.  
 2 Q In your review of the file, including the  
 3 imaging system and any other documents you  
 4 looked at, did you ever see any sort of a cover  
 5 letter or a fax cover sheet saying that it was  
 6 transmitting any interrogatory answers to you or  
 7 to Zurich?  
 8 A No, I didn't.  
 9 Q Did you ever see any e-mail messages that  
 10 suggested it was attaching or enclosing copies  
 11 of answers to interrogatories in the Rhodes  
 12 case, the underlying case?  
 13 A No, I didn't.  
 14 Q I'd ask you to turn to Volume 2 of plaintiffs'  
 15 exhibits. You can put Exhibit 75 aside please.  
 16 THE COURT: I'm sorry, which exhibit?  
 17 MR. VARGA: Volume 2, your Honor. And  
 18 it would be beginning with Exhibit 66, or the  
 19 documents in that.  
 20 (By Mr. Varga:)  
 21 Q Kathleen, I want to be clear. At the time that  
 22 you assumed oversight responsibility for the  
 23 Rhodes file, did you review the liability  
 24 transmittal letters that were actually in

1 A Under "Reserves" it states that: We see  
 2 permanent paralysis likely for the claimant,  
 3 who's only in her 40's, with permanent long-term  
 4 care needed.  
 5 Q At the time that you reviewed that document in  
 6 September 2003, did it appear to you when that  
 7 document was written that Crawford & Company  
 8 possessed any medical records or other  
 9 injury-related documentation on Mrs. Rhodes?  
 10 MR. PRITZKER: Objection.  
 11 THE COURT: When she read it, when she  
 12 came on board, did she read this and think as to  
 13 whether Crawford had documents?  
 14 MR. VARGA: Yes, if she formed an  
 15 impression in her mind when she read it as to  
 16 whether or not Crawford & Company had any  
 17 documentation --  
 18 THE COURT: I'll allow it.  
 19 A No, he's saying the last word we have is that  
 20 this is what her status is.  
 21 (By Mr. Varga:)  
 22 Q And you notice also in that document, again on  
 23 the second page under "Reserves" --  
 24 A Yes.

1 Q I'm sorry. On the first page, if you could turn  
 2 back to the first page, under "Reserves," it  
 3 says: Low. Recommend policy limits.  
 4 A Yes.  
 5 Q We talked a little bit about reserves, but can  
 6 you explain for the court what a bodily injury  
 7 reserve is, if you would, in your own words?  
 8 A Sure. As an insurance company we're obligated  
 9 by, you know, we're regulated and we have to set  
 10 up enough funds to pay for any future possible  
 11 financial obligation that we might have under  
 12 the policy. So we'll reserve basically -- it's  
 13 kind of a living, you know, changing target  
 14 based on the information we have about what the  
 15 future might hold.  
 16 Q Based on your experience in working with  
 17 Crawford & Company and other TPAs, when a TPA  
 18 makes a reserve recommendation, what are they  
 19 saying to Zurich?  
 20 MR. PRITZKER: Objection.  
 21 THE COURT: Overruled.  
 22 A They're saying that we have a sense that this is  
 23 where their case might end up. But when they  
 24 make a recommendation like that, we ask them to

1 back it up with something.  
 2 (By Mr. Varga:)  
 3 Q Do you ever construe it as a recommendation to  
 4 settle the case for that certain amount?  
 5 A No, not at all.  
 6 Q All right. If I can ask you to turn in --  
 7 THE COURT: Before you leave the  
 8 reserve issue.  
 9 THE WITNESS: Yes.  
 10 THE COURT: Insurance companies, as you  
 11 observed, are regulated by the state, correct?  
 12 THE WITNESS: Correct.  
 13 THE COURT: And you expect that  
 14 auditors will be reviewing the books of the  
 15 insurance company?  
 16 THE WITNESS: Correct.  
 17 THE COURT: And part of what an auditor  
 18 would be expected to do would be to determine  
 19 whether or not the insurance company is solvent,  
 20 correct?  
 21 THE WITNESS: Correct.  
 22 THE COURT: And part of that is to  
 23 determine what obligations they're likely to pay  
 24 pursuant to their policies?

1 THE WITNESS: Yes.  
 2 THE COURT: And is it fair to say that  
 3 a reserve is essentially an estimate of what  
 4 obligations the insurance company anticipates it  
 5 will need to pay on claims?  
 6 THE WITNESS: Yes, considering a lot of  
 7 factors with regard to the claim, not just the  
 8 injury but what our coverage exposure might be.  
 9 On a case this complex the reserve would also be  
 10 based on what was our obligation under the  
 11 policy; and so in addition to looking at the  
 12 injury, we were looking at what does GAF's  
 13 policy obligations have, is there any other  
 14 coverage that's primary or excess, and we didn't  
 15 have a handle on that as of June 2002.  
 16 THE COURT: All right. But a reserve  
 17 doesn't obligate you to pay anything.  
 18 THE WITNESS: No, it does not.  
 19 THE COURT: It's simply financial due  
 20 diligence to provide an accurate picture of what  
 21 the anticipated obligations are going to be.  
 22 THE WITNESS: Right. But as part of  
 23 that due diligence, for us to even get the  
 24 authority for a reserve, we have to have some

1 verifiable damages, more than just, you know,  
 2 this is what someone is telling us.  
 3 THE COURT: All right. But if an  
 4 auditor had looked at the books of Zurich back  
 5 in September of '03, that auditor would have  
 6 seen that \$50,000 is in the reserve for this  
 7 claim.  
 8 THE WITNESS: Correct.  
 9 THE COURT: Would that have been an  
 10 accurate estimate for the appraiser to rely upon  
 11 in evaluating the fiscal health of that  
 12 insurance company at that time?  
 13 THE WITNESS: Well, we --  
 14 MR. ZELLE: Your Honor, I apologize,  
 15 but I need to object because I'm not sure this  
 16 witness has a foundation to be asking -- pretty  
 17 technical questions you're asking concerning  
 18 reserving.  
 19 THE COURT: Okay. Well, it's  
 20 overruled. It's not very technical.  
 21 THE WITNESS: The auditor would be  
 22 looking at the entire file. So as of September  
 23 2003, we had just received the detailed demand  
 24 package. We still had a Reservation of Rights

1 letter out to Mr. Zalewski and DLS saying we  
2 don't know what our indemnify obligation is to  
3 you. And we were looking at our own experts,  
4 our own defense analysis as to the merits of our  
5 legal liability and responsibility under the  
6 policy. So with all of that unresolved, they  
7 would be saying you don't have enough factual  
8 basis to have, you know, to evaluate the case.

9 THE COURT: So are you saying that it  
10 would be fair, then, for the auditor to be  
11 informed that the anticipated liability of this  
12 claim is \$50,000?

13 THE WITNESS: That everything that we  
14 had was speculative at that point and whatever  
15 reserve we put out there, it would have still  
16 been subject to speculation and secondhand  
17 information, plus coverage issues, such as: was  
18 there any primary insurance that might indemnify  
19 someone. We still didn't know if GAF and  
20 Zurich's policy was the primary policy to  
21 indemnify Mr. Zalewski and DLS.

22 So DLS is a big company, Penske is a  
23 big company, and there's a lot of other  
24 insurance available that we had to look at and

1 get a handle on, which policies' coverage would  
2 come into play first.

3 THE COURT: Well, let me ask you this.  
4 Should a reserve be a best estimate of the  
5 anticipated liability?

6 THE WITNESS: Of the anticipated  
7 liability, which includes the coverage and the  
8 damages and the negligence.

9 THE COURT: Okay. Was \$50,000 a best  
10 estimate in September 2003 of what the  
11 anticipated liability was on this claim?

12 THE WITNESS: Prior to our receipt of  
13 the demand package and all of the other  
14 information, it was a figure they placed on the  
15 file; it wasn't unreasonable because we were  
16 still trying to get the factual basis for what  
17 the exposure might be.

18 THE COURT: But in September of 2003,  
19 when you received the demand letter with  
20 attached documents, was it a best estimate of  
21 what the anticipated liability was going to be?

22 THE WITNESS: At that point I became  
23 aware that it was not -- that my sense was that  
24 there was a higher exposure, which is why I read

1 the demand package. I reviewed the file and I  
2 asked for further clarification.

3 At that point for me to go to my  
4 manager and say, you know, we have this case  
5 where everything is -- we're finally getting the  
6 facts in on the case, we need to put more money  
7 up on the case for the reserve, we need to  
8 consider what our future strategy is, I needed  
9 to -- I couldn't just go in and say we have all  
10 of this information. I had to prepare a report  
11 for my management and analyze all of those  
12 factors and pull it all together.

13 THE COURT: Okay. Well, lets go back  
14 to my question. Was \$50,000 the best estimate  
15 of the anticipated liability on this claim by  
16 the end of September 2003?

17 THE WITNESS: Not by the end of  
18 September, because by that point we'd received  
19 the demand package.

20 THE COURT: And when was it changed?

21 THE WITNESS: It was changed in January  
22 of 2004.

23 THE COURT: And why, if it was not the  
24 best estimate as of the end of September, why

1 was the reserve not changed to a best estimate  
2 until January?

3 THE WITNESS: Because I was getting  
4 clarification on coverage, there's a transmittal  
5 letter that you'll see that comes out that gives  
6 some clarity as to DLS. I was going to my own  
7 experts in terms of our defense attorney as to  
8 the merits of the case. I was asking for our  
9 own life-care analysis response to what was  
10 presented. And you just don't know that -- the  
11 plaintiffs' economist and life-care plan is not  
12 something we would just agree to. I would need  
13 an expert with greater expertise in that issue  
14 to look it over and tell me if it seemed  
15 reasonable.

16 And we needed jury verdict research.  
17 We needed to find out what the case was going to  
18 cost so we could look at the overall legal  
19 costs. So we were looking at all of those  
20 factors together. It's a very big, complicated  
21 case and we had a lot to pull together.

22 THE COURT: And were all those factors  
23 considered when the estimate of \$50,000 was  
24 made?

1 THE WITNESS: Before September we  
 2 didn't have that information to look at.  
 3 THE COURT: All right. Continue.  
 4 (By Mr. Varga)  
 5 Q Kathleen, just staying with the issue of a reserve for  
 6 a moment, is a reserve an estimate or anticipated  
 7 estimate of what a case value may be or what it will  
 8 be?  
 9 A What it may be based on the facts you know at the time,  
 10 not -- right.  
 11 Q And in June of 2002, because that's what started our  
 12 discussion of reserves, was the June 2002 report of  
 13 Crawford & Company in which there was a recommendation  
 14 to raise the reserve to \$2 million, at the time that  
 15 Mr. McIntosh received that in August of 2002 --  
 16 MR. PRITZKER: 2002, you said?  
 17 MR. VARGA: Yes.  
 18 (By Mr. Pritzker)  
 19 Q -- was there sufficient information, in your view, in  
 20 the file to support an increase of the reserve to \$2  
 21 million?  
 22 A No.  
 23 Q Why is that?  
 24 A Because everything that he is stating is something he's

1 stating he was told by someone, but it's secondhand  
 2 information. We don't know what it was based on or if  
 3 it was correct.  
 4 Q And we know from Ms. Mills' testimony that even at that  
 5 time Crawford didn't have any medical records or any  
 6 other damages or injury-related records in its file,  
 7 correct?  
 8 A Correct.  
 9 Q Now, you mentioned earlier in your discussion with  
 10 Judge Gants that you had to go to your superiors to get  
 11 authority to raise the reserve; is that accurate?  
 12 A Above my own authority, yes.  
 13 Q And what was your authority in September of 2003?  
 14 A It was \$500,000 for loss and legal.  
 15 Q Can you explain what that mean? I've used the term  
 16 "authority" but you could explain to the court, please?  
 17 A Right. Within the insurance -- within my area, I was  
 18 given permission to set a reserve to settle a case up  
 19 to a \$5,000 limit and it was an aggregate limit of loss  
 20 and/or legal per claim.  
 21 Q I see. And in order to raise the reserve at any point  
 22 in time in the life of the Rhodes case, up to an amount  
 23 above \$500,000, would you have had to go to your  
 24 superiors to get authority to do that?

1 A Yes, I would have.  
 2 Q And what is the procedure for doing that?  
 3 A I would complete the detailed bodily injury claim  
 4 report that we reviewed yesterday.  
 5 Q And that was Exhibit 19?  
 6 MR. PRITZKER: Yes.  
 7 MR. VARGA: I'll state for the record that  
 8 was Exhibit 19.  
 9 (By Mr. Varga)  
 10 Q The BI claim report?  
 11 A Yes, it was.  
 12 Q Okay. So just to be clear, at any point in time if you  
 13 thought there was sufficient information and  
 14 documentation of injuries, such as we talked about  
 15 earlier, the whole list of materials, if you thought  
 16 there was sufficient documentation of injuries in the  
 17 file such that you wanted to increase the reserve above  
 18 500,000, you had to go and complete that report and get  
 19 approval for it from your superiors?  
 20 A Yes, I did.  
 21 Q If you could please turn to Exhibit 66F, as in Frank.  
 22 A Yes.  
 23 Q Okay. That is a May 6, 2003 liability transmittal  
 24 letter authored by Jody Mills, correct?

1 A Yes.  
 2 Q And you read that when you took over the oversight  
 3 responsibility for the Rhodes case?  
 4 A Yes, I did.  
 5 Q Can you identify in that document -- now this is May  
 6 2003. Can you identify for us what, if any,  
 7 information is stated regarding the injuries to Mrs.  
 8 Rhodes, or other documentation relating to damages or  
 9 information regarding damages.  
 10 A Right. On page 2 under the current status, it states  
 11 that: Tim Corrigan -- no: We have spoken with defense  
 12 for GAF, Greg Deschenes. He states that he feels the  
 13 matter should not run the usual litigation course due  
 14 to the severity of the injury. Medicals are being  
 15 forwarded and will approach the \$1 million mark, but no  
 16 demand has been made in this matter.  
 17 Q Okay.  
 18 A Then it says: We may need to hire an expert to review  
 19 the demand package concerning cost of living increases,  
 20 et cetera.  
 21 Q All right. When you read that report from May of 2003,  
 22 when you read that in September of 2003, did you form  
 23 an impression as to whether or not Crawford & Company  
 24 had any medical records or medical bills or any other

1 medical-related or damages-related information or  
 2 documentation in its file?  
 3 A No, it looked like they were still waiting to get it  
 4 from defense counsel or wherever.  
 5 Q They were waiting to get what?  
 6 A The medical documentation.  
 7 Q Return to Exhibit 66G, please. I'll ask you the same  
 8 question here: Could you identify for us what, if any,  
 9 information is in this report, again offered by Jody  
 10 Mills, that relates to injuries and damages, medical  
 11 expenses, that sort of thing?  
 12 A Yes. On page 2 of the report under section one of the  
 13 defense section --  
 14 Q Yes.  
 15 A -- it states: As the claimant was in hospital for  
 16 three months and is paralyzed from the neck down, with  
 17 bipolar disorder -- and then there is a blank -- we're  
 18 following up for documentation to confirm this. We  
 19 shall then be in a better position in order to fully  
 20 evaluate this matter.  
 21 Q And the notation in there that the claimant is  
 22 paralyzed from the neck down, was that correct at that  
 23 time, to your knowledge?  
 24 A She didn't have the documentation that would later show

1 on one occasion she fell off the toilet and fractured  
 2 both of her legs but did not know this right away as  
 3 she had no feeling in her legs. We're following up for  
 4 copies of the transcripts of the deposition.  
 5 Q And again, this is a report that you read when you took  
 6 over the oversight responsibility for the Rhodes claim,  
 7 yes?  
 8 A Yes.  
 9 Q All right. Did it appear to you from anything in this  
 10 document that at that time that they wrote this report,  
 11 Crawford & Company possessed any medical documents, any  
 12 medical bills or any documentation regarding potential  
 13 future care needs for Mrs. Rhodes?  
 14 MR. PRITZKER: Objection.  
 15 THE COURT: I'll allow it.  
 16 A No, it didn't appear they had that medical information.  
 17 (By Mr. Varga)  
 18 Q And in your view, as the oversight person who was  
 19 handling the Rhodes case in September of 2003, based on  
 20 those reports that we just read, the May 2003 report,  
 21 the June 2003 report, did you believe that there was  
 22 enough documentation of the injuries in those reports  
 23 or elsewhere in the file to enable you to make a  
 24 judgment as to the value of Mrs. Rhodes claimed bodily

1 she was paralyzed from the waist down.  
 2 Q Okay.  
 3 A And that's what -- it wasn't correct.  
 4 Q And that last sentence: We shall then be in a better  
 5 position in order to fully evaluate this matter; what,  
 6 if any, impression did that leave on you when you read  
 7 that?  
 8 A That she still was seeking further information so she  
 9 could come to a better -- get a better handle on the  
 10 case.  
 11 Q Would you turn to the next page, please, and I'd ask  
 12 you the same question --  
 13 A The same report, right?  
 14 Q Yes, ma'am. If you could show us, please, or point to  
 15 any information regarding injuries or damages on that  
 16 page.  
 17 A The second caption down, medical status, it states: We  
 18 do not have any current medical information. This may  
 19 have been forwarded to GAP directly from defense. We  
 20 do know that the injury is a fracture to the 12th  
 21 vertebrae, causing the claimant to be paralyzed from  
 22 the neck down. She is now indicating she has bipolar  
 23 disease and spent three months in the hospital. There  
 24 was mention in the claimant deposition indicating that

1 injuries?  
 2 A At the time I read all of this information?  
 3 Q Just based on those reports?  
 4 A Just based on these transmittal letters from Crawford,  
 5 no.  
 6 Q What about the prior transmittal letters written by  
 7 Crawford that you reviewed?  
 8 A They were all pretty much all the same thing, very  
 9 brief, that they were seeking medical documentation.  
 10 Q Now, when you took over oversight responsibility for  
 11 the Rhodes case, you reviewed the -- I think you said  
 12 yesterday you reviewed the Z notes, the Zurich  
 13 electronic claim notes?  
 14 A Yes, I did.  
 15 Q All right. Can you turn to Exhibit 68, please, in  
 16 Volume 2  
 17 A Yes.  
 18 Q When you reviewed the Z notes and the other  
 19 documentation that Zurich had in its file, liability  
 20 transmittal letters, reports and other information, did  
 21 you make any observations at that time with respect to  
 22 efforts that your predecessor on this file, David  
 23 McIntosh, had made to gather information from Crawford  
 24 & Company or other sources regarding the injuries to

1 Mrs. Rhodes, medical expenses past and future, and  
 2 things of that nature; did you make any observations?  
 3 A Yes.  
 4 Q Okay, can you tell us what observations you made?  
 5 A I saw that on a regular basis he had been asking for  
 6 either verbally or via e-mail or in letters to get such  
 7 medical documentation of her current and future medical  
 8 needs.  
 9 Q All right. Were your observations based in part on  
 10 anything you saw in the Z notes, Exhibit 68?  
 11 A Yes.  
 12 Q Would you show the court, please, what notes or  
 13 comments you saw within the Z notes in Exhibit 68 that  
 14 informed your observation as to Mr. McIntosh's efforts  
 15 to gather injury-related information and documentation  
 16 from Crawford & Company or other sources?  
 17 A Sure. If you look at ZA-1163, there is a note on  
 18 January 21st, 2003, authored by David McIntosh to John,  
 19 which I think is John Chaney at Crawford: Please note  
 20 that we'll now extend coverage to GAF, Penske and  
 21 Driver Logistics. Could you please advise as to the  
 22 possible exposure now that the coverage issue has been  
 23 resolved.  
 24 Q And to your knowledge, had Mr. McIntosh spoken with Mr.

1 Chaney prior to Mr. McIntosh's creating that note that  
 2 you just read?  
 3 A Yes, he had.  
 4 Q Do you know whether if at any point prior to January  
 5 2003, there was a conversation between them, just based  
 6 on your review of the file or knowledge you obtained in  
 7 this case --  
 8 MR. PRITZKER: Objection.  
 9 Q -- regarding --  
 10 THE COURT: You can ask her to point to  
 11 anything in the file that reflects that conversation,  
 12 but apart from that, it's hearsay. She can't tell me  
 13 what McIntosh told her orally.  
 14 MR. VARGA: I understand.  
 15 (By Mr. Varga)  
 16 Q At the time that you reviewed that Z note, did you have  
 17 any reason to believe that Mr. McIntosh had had such a  
 18 conversation with Mr. Chaney or ever requested  
 19 previously any information regarding Mrs. Rhodes  
 20 injuries or damages or case exposure?  
 21 MR. PRITZKER: Objection.  
 22 MR. VARGA: Well, it's a state of mind.  
 23 THE COURT: Was there any written reflection  
 24 of it; is that what you're asking?

1 MR. VARGA: I'm asking if she had any reason  
 2 to believe that --  
 3 THE COURT: Well, she could have had a reason  
 4 to believe based on the conversation with Mr. McIntosh,  
 5 but that's hearsay. That's basically her telling me  
 6 that McIntosh told her that he spoke with Mills.  
 7 MR. VARGA: Well, we're offering it not for  
 8 the truth, your Honor, but for her state of mind and  
 9 whether she was aware of it and what efforts had been  
 10 made by her predecessor, or whether she'd become aware  
 11 of that.  
 12 THE COURT: All right. I'll take it for her  
 13 state of mind.  
 14 A Based on my review of the Z notes and the file, it was  
 15 documented in transmittal letters and others that David  
 16 had been asking for the medical documentation.  
 17 Q Even prior to January 2003?  
 18 A Yes, that Zurich has been asking for this medical  
 19 documentation.  
 20 Q You've shown us the January 2003 note. Are there other  
 21 notes that are in the Z notes that reflect, to your  
 22 view, efforts by Mr. McIntosh to gather injury-related  
 23 information from Crawford & Company?  
 24 A Yes, there is January -- there is actually a March 6

1 2003, note that would be ZA-1162.  
 2 Q Okay, could you direct us to the note?  
 3 A It's the second one down on that page. It's from Dave  
 4 McIntosh and it looks like it's a cut-and-paste of an  
 5 e-mail he may have sent.  
 6 Q Would you read that into the record please?  
 7 A Sure.  
 8 MR. PRITZKER: Can we have a Bates?  
 9 A It's ZA-1162: I've approved the draft ROR from  
 10 coverage counsel with the amended complaint on Penske.  
 11 Will likely need to review that ROR as well. I'll ask  
 12 the TPA to address the defense costs given that we are  
 13 now looking at defending a substantial number of  
 14 defendants. They also need to get the exposure  
 15 reviewed as well. Dave.  
 16 And then afterwards it looks like he either  
 17 wrote another note. He was cutting and pasting  
 18 something: Jody, I've approved the ROR letter from  
 19 Attorney Shoulkin. This is going to have an impact on  
 20 both the indemnity exposure as well as the expense.  
 21 Please provide me with an updated report with your  
 22 current evaluation of our exposure, as well as a legal  
 23 budget for all the defendants we're now responsible  
 24 for. I know this will take a little time to obtain,

1 but please try to get this to me as soon as practical.  
 2 David Mc.  
 3 Q All right. And there is a reference in the second-to-  
 4 last sentence, again it says: Please provide me with  
 5 an updated report with your current evaluation of our  
 6 exposure.  
 7 What does that mean? In your business when  
 8 -- strike that.  
 9 Have you ever used the term "exposure" in  
 10 your work in the liability TPA claims?  
 11 A Yes, I have.  
 12 Q What does that mean in your business?  
 13 MR. PRITZKER: Objection.  
 14 THE COURT: I'll allow it.  
 15 A It would be for a reserve exposure; what do you think  
 16 that the exposure is on the case.  
 17 (By Mr. Varga)  
 18 Q Is it just reserve exposure or is it anything else?  
 19 A It could be settlement exposure, but it would be too  
 20 early on with no documentation in the file.  
 21 Q Does an assessment of exposure -- we were talking about  
 22 efforts or judgments earlier that you make in your job  
 23 about the value of bodily injuries of a particular  
 24 claimant. Is that what "exposure" refers to as well?

1 Q Yes. Would you please turn to Exhibit number 107 in  
 2 that book?  
 3 A Yes.  
 4 Q Can you tell us is that a document that was in -- did  
 5 Zurich have a copy of this document in its file at the  
 6 time that you took oversight responsibility?  
 7 A Yes, we did.  
 8 MR. VARGA: Your Honor, for the record, 107.  
 9 (By Mr. Varga)  
 10 Q Can you tell us what that document is; just summarize  
 11 that for us, please?  
 12 A It's a May 16, 2003 letter from David McIntosh to John  
 13 Chaney at Crawford & Company. Do you want me to read  
 14 it or just describe it?  
 15 Q Why don't you go ahead and read it for us into the  
 16 record, if you would, please.  
 17 A Okay: Dear John Chaney: I know this is not your claim  
 18 any longer, but the new adjustor has sent only a single  
 19 update on this and it doesn't contain any information  
 20 regarding contact information. If you could please  
 21 forward this onto her. I'm in urgent need of a full  
 22 captioned report in this case. It should include a  
 23 complete evaluation and reserve recommendation. While  
 24 I recognize that her update report -- she is suggesting

1 A Yes. It would be we need to get information so we can  
 2 find out what the case -- what our exposure might be,  
 3 and part of that is to get the background  
 4 documentation, the verifiable damages.  
 5 Q Now, in addition to the March 6, 2003, Z note on page  
 6 ZA-1162, are there any others that you could direct us  
 7 to in this Z notes that you believe reflect efforts by  
 8 Mr. McIntosh to gather injury-related information  
 9 regarding the Rhodes case from Crawford & Company?  
 10 A Yes, if you go to ZA-1161, almost at the bottom of the  
 11 page there is a May 16 2003 note from David McIntosh  
 12 and it states: I've written to Crawford & Company.  
 13 They have a recommended reserve of \$2 million, but I  
 14 have yet to get a captioned report that would support  
 15 or explain the reserve. It is noted that they indicate  
 16 that the whole value is between 5 million to \$10  
 17 million. Clearly we are not getting the reporting we  
 18 need if the case indeed has such a value. I also  
 19 called and left a voicemail but the adjustor indicates  
 20 that she does not work on Friday and Mondays.  
 21 Q All right. Can I ask, please, in the binder of  
 22 Zurich's exhibits there, which you have also on the  
 23 bench in front of you.  
 24 A The trial exhibits?

1 that we post the policy limit of \$2 million -- I still  
 2 have not received a full report that would support such  
 3 a recommendation. Please provide this as soon as  
 4 practical.  
 5 Q And after that May 16th letter was sent, if you could  
 6 go back into the Z notes, please, and let us know if  
 7 there are any other notations in the Z notes that you  
 8 believe reflect Mr. McIntosh's efforts to gather  
 9 injury-related information from Crawford & Company.  
 10 A Yes.  
 11 Q The last one that you looked at, just to keep it  
 12 straight, was the May 16th note on ZA-1161?  
 13 A Correct.  
 14 Q So if you could continue from there, please.  
 15 A On that same page right above it, there is a May 27,  
 16 2003 note from David McIntosh.  
 17 Q Yes, ma'am.  
 18 A And it states: Spoke to the TPA and explained that I  
 19 needed a full captioned report. Given the potential  
 20 exposure, I need more than the updates I have received.  
 21 Dave.  
 22 Q Do you know, based on your review of the file, what, if  
 23 any, report was received from Crawford & Company  
 24 following that May 27, 2003, Z note?

1 A I believe there was a June 4th report.  
 2 Q That's a report we looked at a few moments ago?  
 3 A Right.  
 4 Q Exhibit 66G, if you could just verify that.  
 5 A Yes, June 4, 2003.  
 6 Q Okay. Then if I could ask you -- I don't mean to make  
 7 you keep flipping back and forth between books and I  
 8 apologize, but if you would not mind going back to the  
 9 Zurich exhibits to No. 110, please.  
 10 A Yes, the ZA-1059?  
 11 Q Yes, ma'am. Can you tell us what that document is?  
 12 A This is a letter from David McIntosh dated June 11,  
 13 2003, and July 11, 2003, addressed to the claim manager  
 14 at Crawford & Company.  
 15 Q Yes. Again, this is a fax or is this a letter, do you  
 16 know?  
 17 A This is, I believe, a letter.  
 18 Q Okay. Now the original date typed in there is June --  
 19 A I think -- I'm sorry, I think the format of this, it  
 20 doesn't have any fax documentation, it looks like the  
 21 format with the message section is something he would  
 22 have faxed.  
 23 Q All right. Is this a document that was in Zurich's  
 24 file at the time that you took over oversight

1 There is a June note from David that he sent this  
 2 letter out, and then if we don't get a response  
 3 frequently a claim adjuster will cross out a date and  
 4 put another date on there and resend the information.  
 5 MR. PRITZKER: I ask that that be stricken,  
 6 your Honor.  
 7 THE COURT: Do you know whether or not he  
 8 did?  
 9 THE WITNESS: I don't know for sure.  
 10 THE COURT: Okay. The move to strike is  
 11 denied.  
 12 (By Mr. Varga)  
 13 Q Ms. Fuell, if I may ask you to once again flip back to  
 14 -- I'd ask you to keep open Exhibit 110, but also go  
 15 back to Exhibit 68 in Volume 2, please, and I'd like to  
 16 direct your attention when you get there, to page ZA-  
 17 161?  
 18 A Yes.  
 19 Q Do you see the top note there?  
 20 A The very top note?  
 21 Q Yes.  
 22 A Yes.  
 23 Q That one is authored -- I'm sorry, if you go back to --  
 24 if you look at ZA-1160, please, at the very bottom?

1 responsibility?  
 2 A Yes.  
 3 Q For the Rhodes case?  
 4 A Yes.  
 5 Q Okay. Now the original date is typed in, June 11,  
 6 2003, and then it appears that that is crossed out and  
 7 there's another date written there, July 11, 2003. Can  
 8 you explain that?  
 9 MR. PRITZKER: Objection.  
 10 THE COURT: I'm sorry, explain what?  
 11 MR. VARGA: Explain the cross-out.  
 12 MR. PRITZKER: This is Mr. McIntosh's letter.  
 13 THE COURT: How can she explain the cross-  
 14 out?  
 15 MR. VARGA: Because she has --  
 16 THE COURT: How can she explain why McIntosh  
 17 or why somebody crossed it out unless she did?  
 18 MR. VARGA: Your Honor, I believe that the  
 19 witness has an understanding of the reason why this was  
 20 done based on custom and practice in the industry. I'd  
 21 like to just see if we can lay a foundation for that.  
 22 THE COURT: Is it the custom and practice to  
 23 change the month on -- by a month and to add a month?  
 24 THE WITNESS: It's kind of a timesaver thing.

1 A Uh-huh.  
 2 Q There is a note that says: Investigation 6/11/2003?  
 3 A Right.  
 4 Q And then if flip to the next page, the first note says:  
 5 Sir, I am attaching.  
 6 A Yes.  
 7 Q Can you tell us if that's all part of the same note  
 8 from June 11, 2003?  
 9 A Yes. In our system we only have so many letters and  
 10 digits we can enter into one section and then we have  
 11 to open up a new page, or the system does.  
 12 Q And if you would just for a second compare the  
 13 information typed in there: Sir, I am attaching; and  
 14 compare it to the Document 110, and just let us know if  
 15 those are essentially the same, if it is identical  
 16 language based on your review of these documents  
 17 previously?  
 18 If I may withdraw that question and let me  
 19 just try to cut to the chase.  
 20 A Okay.  
 21 Q Can you tell us whether the Z note that is on pages  
 22 1160 and 1161 of Exhibit 68 of June 11, 2003, is  
 23 essentially a cut-and-paste of the letter or the body  
 24 of the letter that Mr. McIntosh -- or the facts that

1 they were okay with it. We were brainstorming  
 2 throughout this telephone call to try to figure out how  
 3 we could move the case forward.  
 4 Q But just to be clear, you did not decide at that time,  
 5 did you, that you wanted to offer that 2 million to the  
 6 plaintiffs?  
 7 MR. PRITZKER: Objection.  
 8 THE COURT: Sustained in that form.  
 9 (By Mr. Varga)  
 10 Q Did you make a decision at that time, again on that  
 11 conference call, that you wanted to offer Zurich's \$2  
 12 million policy limits to the plaintiffs as opposed to  
 13 tendering it to AIG?  
 14 MR. PRITZKER: Objection.  
 15 THE COURT: Well, what did you say?  
 16 THE WITNESS: I said I wanted to tender it to  
 17 AIG. We talked about how we could get the case to  
 18 mediation and it was indicated to me that we needed to  
 19 come to the mediation with an offer in the range of \$5  
 20 million. That was indicated that that's what Mr.  
 21 Pritzker had said.  
 22 (By Mr. Varga)  
 23 Q And I want to ask you about that, Ms. Fuell, because  
 24 you testified a little bit about that yesterday. But

1 A That's right.  
 2 Q All right. And on that day or the next day, you  
 3 telephoned Nicholas Satriano of AIG?  
 4 A Yes, I did.  
 5 Q All right. And just remind us again of the  
 6 conversation. If you'd tell us your best recollection  
 7 of the conversation you had with Mr. Satriano on that  
 8 telephone call.  
 9 A I called him to let him know that I now was in a  
 10 position where I had the authority to proceed as I had  
 11 discussed in our November 19 teleconference, that I was  
 12 offering up our policy limits, and he said that it  
 13 wasn't a formal tender of our policy because there were  
 14 open questions about the defense costs. So I told him  
 15 that was a good question, and I wasn't sure of the  
 16 answer so I would research that part of the question so  
 17 that I could get a formal response out to him about not  
 18 only, you know, that we were offering up our limits, as  
 19 I had I our conversation, but that what our position  
 20 was as to the ongoing defense obligations.  
 21 Q Okay. And when you ended that telephone conversation,  
 22 was there any question in your mind as to whether you  
 23 had communicated that Zurich was tendering its policy  
 24 limits to AIG?

1 staying in your notes, the comment there: No way --  
 2 again, this is under the note -- I don't know, it's  
 3 about eight lines down -- under the name Steve Penick,  
 4 and under the "I committed to tender" note there. You  
 5 say: No way plaintiff attorney will agree to mediate  
 6 unless we offer beforehand of 5 million.  
 7 Did you understand, when you wrote that note  
 8 during the conference call, that Mr. Pritzker had said  
 9 to someone prior to the conference call that plaintiffs  
 10 would not mediate unless there is an offer of \$5  
 11 million on the table?  
 12 MR. PRITZKER: Objection.  
 13 THE COURT: She's testifying only to her  
 14 understanding.  
 15 A That's what I understood during the conference call,  
 16 yes.  
 17 (By Mr. Varga)  
 18 Q And is that what you recorded in your notes?  
 19 A Yes, it is.  
 20 Q Okay. And you testified yesterday -- and I'm not going  
 21 to over it in excruciating detail -- that you received  
 22 authority from Mr. Lysaught at Zurich to make Zurich's  
 23 policy limits available to the excess insurer on or  
 24 about January 23, 2004; is that correct?

1 A No.  
 2 Q And I believe the next communication that you had with  
 3 Mr. Satriano -- I think we talked about it yesterday --  
 4 was an e-mail exchange in February 2004?  
 5 A February 13, 2004, yes.  
 6 MR. VARGA: Your Honor, just bear with me a  
 7 moment, if you would, please.  
 8 Q It is Zurich Exhibit 117. Could you please turn to  
 9 that. And if you need to move the binders, I'll be  
 10 happy to help you.  
 11 A I think I'm okay.  
 12 MR. VARGA: And for the record, I believe  
 13 this e-mail may also be marked as Plaintiffs' 30, but  
 14 you can stay on this exhibit for now.  
 15 Q Again, we reviewed this yesterday and I believe you  
 16 read it, but again on Exhibit 117.  
 17 A ZA-0756?  
 18 Q Yes. And, actually, starting on ZA-0757.  
 19 A Okay.  
 20 Q If you'd just remind the court of this exchange of e-  
 21 mails and what transpired on the 13th of February?  
 22 A Yes. On the 13th of February, Mr. Satriano had -- from  
 23 AIG had written on February 13, 2004, to Steven Penick  
 24 and myself, that he felt he had not received any formal

1 offers of tender. He said they must be in writing;  
 2 they're not to be communicated in electronic form. His  
 3 understanding is that we have not relinquished our duty  
 4 to defend in the litigation. We fully expect the  
 5 primary insured to continue and further its obligation  
 6 to defend the insured in this matter.  
 7 Q All right. And let me ask you a question just for a  
 8 moment off of this e-mail, or putting aside this e-  
 9 mail. In the January conversation that you had with  
 10 Mr. Satriano, I think you said the 23rd, did you take a  
 11 position on behalf of Zurich as to whether Zurich would  
 12 continue to defend GAF after tendering its policy  
 13 limits to AIG?  
 14 A We were told -- yes. We were continuing to defend GAF  
 15 while we were researching what our obligations would  
 16 be.  
 17 Q Okay. My question is had you -- okay.  
 18 A Had I told Mr. Satriano that? Yes. I mean we were  
 19 still paying the legal bills and we didn't call anybody  
 20 and tell them to stop doing anything.  
 21 Q All right. And in the February 13 e-mail that we just  
 22 went through, he tells you then his current  
 23 understanding is that the primary insurer has not  
 24 relinquished their duty to the defendant.

1 A Yes.  
 2 Q So in the next e-mail that you sent him, can you just  
 3 summarize your response for us?  
 4 A Starting on ZA-0756?  
 5 Q Yes, ma'am.  
 6 A I confirmed that I called in a few weeks prior and that  
 7 we were offering up our \$2 million policy limits. I  
 8 stated that in no way was Zurich North America in  
 9 relinquishing our defense obligations to the insured,  
 10 pursuant to the guidelines of the business auto policy,  
 11 told him I would be reviewing the policy so I could  
 12 send you written notification as to his request --  
 13 THE COURT: Is this what you wrote?  
 14 THE WITNESS: Oh, you want me to read. This  
 15 is what I wrote. Right. I'm sorry.  
 16 THE COURT: It's only going to clutter the  
 17 record if you characterize it differently from what was  
 18 written.  
 19 THE WITNESS: Okay. I'll just read it.  
 20 THE COURT: Referring to the one that said a  
 21 few weeks ago "I called you to advise --"  
 22 THE WITNESS: Right.  
 23 THE COURT: I read it yesterday so --  
 24 THE WITNESS: Okay.

1 THE COURT: I'll read it again now, but you  
 2 can move quickly. We're going to break at 11:30.  
 3 MR. VARGA: Okay. I'll move on, your Honor.  
 4 (By Mr. Varga)  
 5 Q As of February 13, 2004, Kathleen, had you told AIG  
 6 that Zurich was not going to continue defending GAF?  
 7 A As of February 13?  
 8 Q Yes.  
 9 A We had not told AIG that.  
 10 Q In fact, you told them the opposite, correct?  
 11 A Yes. That we're still defending him, we're offering up  
 12 our full policy limits as we had previously.  
 13 Q Thank you. And the next communication was -- I'm  
 14 sorry, the next communication you had with AIG, was  
 15 that the March 29 letter that we looked at yesterday,  
 16 Plaintiffs' 33?  
 17 A There's a Z note that I left a phone message for AIG in  
 18 between, but the next formal written -- anything in  
 19 writing was March 29 or 30. I know that I wrote the  
 20 letter on the 29th. I had a draft that stated the 29th  
 21 and then I think it went out on the 30th.  
 22 Q And in that letter -- and we went through it yesterday,  
 23 I'm not going to go through it with you. But in that  
 24 letter, you communicate that based on the policy

1 language that Zurich has made the determination that it  
 2 does not have to continue defending GAF at that point,  
 3 correct?  
 4 A Correct.  
 5 Q Is that the first time that you or anyone else at  
 6 Zurich, to your knowledge, had communicated that  
 7 Zurich's defense obligation would not continue and made  
 8 that communication to AIG?  
 9 A Yes.  
 10 Q And after that communication with AIG, what response  
 11 did you hear back from AIG and in what form?  
 12 A I received a letter from Mr. Bartell who stated he was  
 13 representing AIG, saying they were rejecting our tender  
 14 and defense obligation position.  
 15 MR. PRITZKER: Objection. I think the  
 16 witness is confused. Bartell was not representing AIG.  
 17 THE WITNESS: Oh, I'm sorry, you're right.  
 18 Bartell was representing GAF. I apologize. I received  
 19 a letter -- I'm sorry. There's a lot of people in this  
 20 case. I received a letter from AIG or their counsel  
 21 that they were rejecting our position regarding the  
 22 defense and the tender.  
 23 (By Mr. Varga)  
 24 Q And how long after your sending the March 29 letter did

1 you hear back from someone at AIG on that?

2 A I believe it was April 1 or April 2 of 2004.

3 Q Would you please turn to Zurich Exhibit 118?

4 MR. VARGA: And, your Honor, this will be

5 very quick.

6 Q Can you tell us what that e-mail is?

7 A It's an April 2 e-mail that I wrote to Mr. Bartell, who

8 is correctly GAF's attorney; Mr. Manning at -- parties

9 at GAF; Greg Deschenes, GAF; defense counsel; and Mr.

10 Corona at McCarter whatever. It's a letter I'm sending

11 out confirming that we made a business decision that we

12 would continue to defend -- provide a defense to GAF,

13 even though we felt we were not obligated to do so

14 under our policy.

15 Q And can you just tell the court why you made that

16 decision? First of all, did you personally make that

17 decision?

18 A I reviewed -- I was surprised by AIG's response, and I

19 reviewed it with coverage counsel and our claim legal

20 department. But, yes, I made the decision that we

21 would continue defending our insured.

22 Q And why did you do that? Why did you make that

23 decision?

24 A It would be very unusual to have an insured not

1 Q Kathleen, before we broke, we talked about the exchange

2 of communications between you and folks at AIG

3 regarding Zurich making its policy limits available to

4 AIG and the issue of the continuing defense obligation.

5 You recall that, right?

6 A Yes, I do.

7 Q Okay. At some point in time, though, Zurich made a

8 settlement offer or authorized a settlement offer to

9 the plaintiffs, correct?

10 A Yes, we did.

11 Q And when was that?

12 A At the end of March of 2004.

13 Q And the terms of that offer, to your knowledge, were in

14 exchange for release of claims?

15 A Correct.

16 Q Of all claims against all the personal injury

17 defendants --

18 A Right.

19 Q And that offer was for what amount of money?

20 A \$2 million.

21 Q The full limit of the Zurich policy?

22 A Yes, it was.

23 Q Now, I want to take you back in time a little bit now

24 from March 2004. Let's go back to August of 2002.

1 defended in a case of this nature, where they have an

2 insurance program, so it was a business decision that

3 we would continue our obligations to the insured.

4 Q So that disagreement between Zurich and AIG over who

5 would continue to pay the defense costs, how long did

6 that agreement or disagreement last? How many days?

7 A Three

8 MR. VARGA: Your Honor, this would be a good

9 time, I think, for the break.

10 THE COURT: Okay. How much longer do you

11 have with her?

12 MR. VARGA: I would think about 45 minutes,

13 your Honor, maybe less than that, if I can just speed

14 it up. We do have to go through, unfortunately, some

15 documents that plaintiffs have objected to and I have

16 to lay a foundation for -- there are about eight of

17 them -- so depending on how quickly that moves \*.

18 THE COURT: Okay. We'll reconvene in about

19 15 minutes.

20 (A recess was taken at 11:32 a.m. and resumed

21 at 11:50 a.m.)

22 THE COURT OFFICER: Court is back in session.

23 THE COURT: Okay. Please proceed.

24 (By Mr. Varga)

1 At some point Zurich retained coverage

2 counsel to assist in some regard with the Rhodes claim?

3 A That's correct.

4 Q Okay. And approximately when was that, to your

5 knowledge?

6 A I think it was in August 2002.

7 Q Okay. And how do you know that?

8 A It's documented in my imaging system claim file.

9 Q All right. And during the course of your review of the

10 Rhodes claim file at Zurich, did you make any efforts

11 to determine what the status of Zurich's coverage

12 position was, vis-à-vis coverage for Driver Logistics,

13 Mr. Zalewski, and Penske?

14 A Yes.

15 Q Okay. Can you describe for the court what efforts you

16 undertook at that time?

17 A Yes. There were multiple letters in the file, to and

18 from coverage counsel, to and from various entities. I

19 read the detailed Reservation of Rights letters. They

20 were regular letters asking for contractual

21 information, asking for policy information from Penske

22 and from DLS or Mr. Zalewski.

23 MR. BROWN: Your Honor, I'm going to move to

24 strike the last portion of the answer there because

1 it's based on letters and it's characterizing a few  
2 letters that defendants planned to -- tried to  
3 introduce into evidence here. But in discovery in this  
4 case there were approximately 30 similar documents,  
5 correspondence from coverage counsel dealing with these  
6 exact issues --

7 THE COURT: From to whom? From coverage  
8 counsel to whom?

9 MR. BROWN: From coverage counsel to Zurich.  
10 Back and forth. I mean, basically between coverage  
11 counsel, Crawford & Company, and Zurich Insurance  
12 Company dealing with these exact issues. Basically,  
13 what they're trying to do now is raise a reliance upon  
14 an opinion of counsel, of their coverage counsel  
15 without having produced the information -- otherwise  
16 privileged information to us.

17 Basically, they've made it an issue. They  
18 never allowed us to take discovery on it, never allowed  
19 us to take any depositions on it. They shouldn't be  
20 allowed to do it now.

21 MR. VARGA: Your Honor, if I may have a  
22 moment?

23 First of all, the documents Mr. Brown refers  
24 to are attorney-client communications. Those have not

1 been produced, because under claim of privilege, a  
2 value claim of privilege, they're not entitled to come  
3 in. The documents that we are intending to offer  
4 today, I think there are eight in total, are documents  
5 that were sent by Zurich's coverage counsel, Taylor  
6 Duane Barton & Gilman, beginning in August of 2002 and  
7 continuing all the way through August of 2003. They  
8 included Reservation of Rights letters which express  
9 Zurich's -- through coverage counsel -- Zurich's  
10 position as to coverage, vis-à-vis DLS, Zalewski and  
11 Penske, at various times. They were disclosed in  
12 discovery. Plaintiffs have had these for a couple of  
13 years. They've all been produced with the exception of  
14 one, which I'll talk about, and that was my mistake.

15 It's not a privileged letter, it's a letter  
16 that was in one of my files that should have been  
17 produced and wasn't. But we can get to that in a  
18 moment. But the point of this is that what we're  
19 offering these letters for, and this line of testimony  
20 for, is to demonstrate what Ms. Fuell understood about  
21 the state of the coverage review, or the state of  
22 Zurich's coverage position when she took over the file,  
23 and the extent and nature of any coverage issues that  
24 remained open, if any, during the course of her

1 handling of the file and how long they remained open.

2 And the reason we're offering this is a  
3 couple of reasons. Number one, plaintiffs have put in  
4 issue -- if you were to read Mr. Kiriakos's expert  
5 disclosure, he attacks us for our work on coverage  
6 issues, in the first two opinions that he holds,  
7 there's no question. They aim right at us on that. So  
8 we should be entitled, at the very least, to  
9 demonstrate to the court what efforts Zurich and its  
10 coverage counsel took to gather information,  
11 investigate coverage, evaluate coverage -- not so much  
12 evaluate and offer their opinions to us, but what we  
13 did to tell third parties what our position was and  
14 what, if any, issues remained unresolved.

15 As I said in my opening statement, the issue  
16 of whether and when liability becomes reasonably clear  
17 within the meaning of General Laws, Chapter 176D,  
18 Section 39F, includes a determination of when coverage  
19 under a liability policy becomes reasonably clear. And  
20 that is exactly the subject matter that we're directing  
21 -- or that this testimony and the documents will be  
22 directed at, and it has all been fully disclosed to  
23 plaintiffs in the past. The documents that Mr. Brown  
24 is referring to are attorney-client privilege

1 communications.

2 MR. BROWN: That is right, your Honor. And  
3 our position is that they should have waived the  
4 attorney-client privilege if they were going to raise  
5 this issue. If they're going to rely upon the opinions  
6 of counsel in this case, then they had to provide us  
7 everything that may or may not have been helpful, and  
8 withholding almost 30 documents, claiming that they are  
9 privileged and they would choose to produce a select  
10 few to us is simply unfair, not to mention the fact  
11 that, if your Honor recalls, they have raised --  
12 actually, all of the defendants raised over and over  
13 again the issue of the joint defense privilege; and  
14 that is that any communication that came from counsel  
15 and went to Zurich or other parties that Zurich was  
16 providing a defense for was within the circle, so to  
17 speak, of the joint defense privilege. And these  
18 parties, these insureds that the letters went to that  
19 they intended to offer would have also been the joint  
20 defense privilege, but they selectively waived the  
21 privilege as to certain documents, produced those to  
22 us, and withheld a number of others.

23 In fact, in the privilege log, one of the  
24 documents -- there's reference in their privilege log

1 to the joint defense privilege with respect to letters  
2 dealing with these exact issues, and that is tender and  
3 defense issues, insurance coverage for Driver Logistics  
4 and Zalewski, insurance coverage for Penske, insurance  
5 coverage for Zalewski, Penske and GAF under Zurich's  
6 policy. The fact that they've disclosed some of it and  
7 not all of it and never allowed us to conduct any  
8 additional discovery on it should not be allowed, and  
9 this whole line of questioning should not be allowed.

10 THE COURT: Okay. Mr. Varga, is your  
11 contention that these letters are not properly  
12 privileged or that they were privileged but there was a  
13 waiver of privilege as to them?

14 MR. VARGA: Which letters are you referring  
15 to, your Honor? The ones that we didn't offer?

16 THE COURT: The letters that are  
17 correspondence to other insurance companies -- I'm  
18 sorry, coverage to other additional insureds, or  
19 whatever else.

20 MR. VARGA: We've never claimed privilege as  
21 to those documents in the first place and because  
22 they're not attorney-client communications, it was  
23 letters from coverage counsel that was retained by  
24 Zurich to gather information from lawyers, some of

1 which were not defense lawyers in the case, or directly  
2 from, for example, Penske, which requested insurance  
3 policies that Penske, for example, or Driver Logistics,  
4 for example, might have held -- that might have been  
5 primary and thereby substantially affected the  
6 potential exposure of Zurich's policy as a primary  
7 policy either for GAF or for those defendants whom had  
8 tendered a defense to Zurich, DLS and Zalewski.

9 Those are what those letters show, and they  
10 were not ever claimed as being privileged, they're not  
11 part of joint defense, we never said that. The letters  
12 that Mr. Brown is referring to are different in  
13 character to the extent that they were privileged. And  
14 we have not requested -- or we have not taken that  
15 position previously. And all that we are attempting to  
16 do, since plaintiffs have attacked Zurich's  
17 investigation and its coverage-related work, we are  
18 simply attempting -- and I think in fairness should be  
19 able to demonstrate to the court what reasonable  
20 efforts Zurich took through its coverage counsel to  
21 investigate coverage issues and to obtain information  
22 from third parties that coverage counsel and Zurich  
23 needed to complete Zurich's analysis of the coverage  
24 issues. If we're not allowed to show that, your Honor,

1 it's a one-sided fight.

2 THE COURT: All right. Well, I will permit  
3 you to bring into evidence on privileged documents. I  
4 am mindful of the concern that having invoked the  
5 privilege, you are going to be limited in terms of the  
6 inferences, which are going to be permissible because  
7 you've barred evidence as to what the content are of  
8 counsel's evaluation. But I'll play it out, so I will  
9 -- to the extent that there were correspondence sent to  
10 third parties, which are plainly not privileged, I will  
11 see what that correspondence is, but I am mindful of  
12 Mr. Brown's concern. I don't think it's invoked yet.  
13 But let's proceed.

14 MR. VARGA: Thank you, your Honor.

15 \*MR. PRITZKER: Your Honor, can we have a  
16 line objection on this, just for the record?

17 THE COURT: No, because it may turn out that  
18 it may matter question by question or document by  
19 document as to what I'm going to permit. So I haven't  
20 opened the door to the equivalent of an advice of  
21 counsel defense. I have permitted them to offer into  
22 evidence correspondence that was sent to third parties  
23 essentially requesting information. You know much more  
24 as to where you think he's going, I don't. So we'll

1 take it step by step. All right.

2 MR. VARGA: May I approach?

3 THE COURT: Sure. I'm sorry, what are you  
4 planning to do? If you're going to be offering it, we  
5 don't mark it for I.D. I mean, if you're going to be  
6 seeking to offer it, we're not going to mark it twice.  
7 It's either it comes into evidence and it becomes an  
8 exhibit with a number, or it doesn't come in and we'll  
9 mark it for I.D. But I know that that's what some of  
10 the books say to do, but we cut down the middleman  
11 here, so.

12 MR. VARGA: Right. Your Honor, for the  
13 record, this is --

14 THE COURT: That will teach you to rely upon  
15 Mautet's description of how evidence should be admitted,  
16 or how Judge Young says it should be admitted. But in  
17 any event, we're the rocket docket here so --

18 MR. VARGA: I'll try to oblige as best I can,  
19 your Honor.

20 THE COURT: All right.

21 (By Mr. Varga)

22 Q Ms. Fuell, I'm showing you a document which we have  
23 marked as Exhibit 105. I don't want you to tell me the  
24 contents of it, I just want you to tell me if you could

1 identify that, please.  
 2 A Yes.  
 3 Q All right. Could you tell us who authored it and to  
 4 whom it was sent, please?  
 5 A It was authored by Edward Shoulkin and Timothy Bray at  
 6 Taylor Duane Barton, & Gilman, and it's dated March 7,  
 7 2003, addressed to Steven Leary.  
 8 Q Okay. And to your knowledge, the signatures that are  
 9 on page ZA-472, do you recognize those signatures?  
 10 A Yes, I do.  
 11 Q And whose do you recognize those to be?  
 12 A Those are coverage counsel retained by Zurich.  
 13 Q All right. And do you know who the addressee is, Mr.  
 14 Steven Leary?  
 15 A I know I'm getting a little muddled up. I'm pretty  
 16 sure that that is the attorney for DLS and Mr.  
 17 Zalewski. I'm sure it is.  
 18 Q All right. And was this a letter that Zurich received,  
 19 to your knowledge?  
 20 A Yes.  
 21 Q Was this a document that you reviewed in the course of  
 22 your examination of documents in Zurich's file when you  
 23 took over this case?  
 24 A Yes.

1 Q All right. And was that document maintained in the  
 2 ordinary course of Zurich's business in its imaging  
 3 system?  
 4 A Yes, it was.  
 5 MR. VARGA: Your Honor, we would offer this  
 6 as a full exhibit, Exhibit 105.  
 7 MR. BROWN: Objection, your Honor.  
 8 THE COURT: Is there any dispute as to  
 9 authenticity?  
 10 MR. PRITZKER: No.  
 11 THE COURT: It's not -- I mean, it's not  
 12 being offered for the truth of the matter asserted,  
 13 it's being offered simply for the fact that it was  
 14 sent. So if there's no dispute that it was sent, I'm  
 15 not clear that she's the proper person to reflect that  
 16 it was sent, but I guess there's no real dispute that  
 17 indeed they were sent.  
 18 MR. VARGA: I would also clarify, your Honor,  
 19 that we're not offering it to prove the truth of what's  
 20 asserted. We're offering it to show what Ms. Fuell  
 21 understood and what her state of mind was when she read  
 22 this document. And, you know, what position Zurich  
 23 took in the course of examination of coverage issues at  
 24 this time, that's the only purpose.

1 THE COURT: Okay. I will admit it for that  
 2 limited purpose, for Exhibit 105.  
 3 MR. BROWN: Your Honor -- I'm sorry -- if I  
 4 may, what Mr. Varga just described as classic reliance  
 5 upon the advice or the opinions of counsel.  
 6 THE COURT: Let me see it. I should review  
 7 it before it goes in.  
 8 MR. BROWN: I'd also like to point out,  
 9 because this is counsel for some of the other insureds,  
 10 this would be someone who they would have argued  
 11 previously was within the zone of the joint-defense  
 12 privilege.  
 13 THE COURT: If it's not a joint-defense  
 14 letter, it's a reservation of rights letter. It's not  
 15 written for the purpose of providing joint legal  
 16 advice, it's for the purpose of telling them what --  
 17 MR. BROWN: But that's not the position that  
 18 Zurich has been taking throughout this case, your  
 19 Honor.  
 20 MR. VARGA: Well, actually, your Honor, I  
 21 think the court is correct, that this is offered to  
 22 demonstrate the position that Zurich took vis-à-vis a  
 23 third party, as to whether there was a coverage as the  
 24 third party in this case, DLS, had requested under

1 Zurich's policy. That's all this letter is offered to  
 2 show, what position Zurich took, and it is unrelated to  
 3 joint defense. It is a reservation of rights letter.  
 4 THE COURT: It may come in as Exhibit 105.  
 5 MR. VARGA: Thank you, your Honor. And, your  
 6 Honor, we provided the court with its own copy.  
 7 THE COURT: Okay.  
 8  
 9 (Exhibit Number 105, marked; Reservation of  
 10 Rights Letter, dated March 7, 2003.)  
 11  
 12 (By Mr. Varga)  
 13 Q Ms. Fuell, again, that's a letter that you saw and you  
 14 reviewed in Zurich's file when you took over in  
 15 September 2003; is that right?  
 16 A Yes.  
 17 Q Could you just explain to the court what that letter  
 18 is?  
 19 A It's a letter -- a Reservation of Rights letter is a  
 20 letter that Zurich uses to state our position of  
 21 coverage under the policy to the parties whom we're  
 22 writing to. So it's stating to DLS's counsel that  
 23 we'll advance defense costs to DLS and Mr. Zalewski.  
 24 MR. PRITZKER: Objection. The letter speaks

1 for itself, your Honor.

2 THE COURT: The letter does speak for itself.

3 THE WITNESS: Okay.

4 THE COURT: She may describe what she

5 understands in general a Reservation of Rights letter

6 to be.

7 MR. VARGA: Well, that was my next question.

8 (By Mr. Varga)

9 Q Can you describe for us what that means, to reserve

10 rights. When an insurance company reserves its rights

11 on a liability case, what is it doing?

12 A Under the policy, we have a duty to defend a party

13 that's covered under the policy. We have a duty to

14 indemnify them. We have a duty to our insured to also

15 look for coverage under this policy and any other

16 coverage that exists. So this letter is clarifying

17 what we feel our duties are under the policy. We're

18 accepting defense, we're leaving -- we are not

19 accepting the indemnity and we're asking for coverage

20 information from other parties.

21 Q When you speak in terms of indemnity, what does that

22 mean?

23 A Indemnity would be if someone were -- if damages were

24 awarded against someone or a case settled, who would

1 THE COURT: No. Let's move on. The letter

2 speaks for itself. I'm not going to permit a back

3 door. It's a Reservation of Rights Letter; she's not a

4 legal expert. If you want a legal expert to do it,

5 have your legal expert do it. Let's move on.

6 MR. VARGA: May I ask the witness, your

7 Honor, the question whether she can tell us what the

8 basis for the Reservation of Rights was, as she

9 understood it?

10 THE COURT: Only if you want to waive your

11 attorney-client privilege.

12 MR. VARGA: All right. Well, I certainly --

13 THE COURT: Do you wish to waive the

14 attorney-client privilege and have her discuss what she

15 understands from counsel is the basis for the

16 Reservation of Rights beyond what's stated in this

17 letter?

18 MR. VARGA: No, your Honor, that's not --

19 THE COURT: All right. Let's move on.

20 MR. VARGA: All right.

21 (By Mr. Varga)

22 Q I'm going to show you, Ms. Fuell, what has been marked

23 as Exhibit 106. And, again, without asking you to tell

24 me the contents of the document, can you just tell me

1 pay for those damages, who would pay for the loss. ;

2 Q I see. So in reserving your rights -- strike that.

3 Through Exhibit 105, coverage counsel was

4 acting on behalf of Zurich and explaining to counsel

5 for Driver Logistics that Zurich was going to accept,

6 preliminarily, the defense of Driver Logistics and Mr.

7 Zalewski; is that right?

8 A Yes. We had to approve this letter.

9 Q Okay. But --

10 A But, yes, he's acting as Zurich -- on behalf of Zurich.

11 I'm sorry.

12 Q And he is also saying that we have made no final

13 determination of coverage, but we're reserving our

14 rights on the issue of indemnity. Is that what you

15 said?

16 MR. PRITZKER: Objection.

17 THE COURT: Sustained.

18 THE WITNESS: I'm sorry, could you repeat

19 that question?

20 THE COURT: I sustained the objection.

21 THE WITNESS: Oh, sorry. Sorry.

22 (By Mr. Varga)

23 Q Can you direct us to the language in this letter, just

24 very briefly --

1 again the author and recipient of that letter?

2 A It's similarly authored by Edward Shoulkin and Timothy

3 Bray with Taylor Duane Barton, & Gilman. It's an April

4 8, 2003 letter to Maryann Scheneman, litigation claims

5 examiner at Penske Truck Leasing.

6 Q And, again, you said that's written April 8, 2003?

7 A Yes.

8 Q Okay. And was this a letter that was within Zurich's

9 imaging system when you took over the file in September

10 2003?

11 A Yes.

12 Q And did this document in any way inform your

13 understanding of the coverage issues or the state of

14 coverage issues at the time you took over the file?

15 A Yes.

16 MR. VARGA: Your Honor, we would offer this

17 as a full exhibit, Exhibit 106.

18 MR. BROWN: Same objection for the record,

19 your Honor.

20 THE COURT: All right. It may come in,

21 Exhibit 106. The objection is noted but overruled.

22 MR. VARGA: Thank you, your Honor.

23

24

1 (Exhibit Number 106, marked; Reservation of  
2 Rights Letter.)  
3  
4 (By Mr. Varga)  
5 Q Ms. Fuell, would you just tell us, is this a  
6 Reservation of Rights Letter sent to Penske by coverage  
7 counsel?  
8 A Yes, it is.  
9 Q In that letter, counsel is expressing Zurich's position  
10 with respect to coverage for Penske?  
11 A Yes.  
12 Q But, similarly, with the DLS letter that we just looked  
13 at, Exhibit 105, is Zurich, through counsel, reserving  
14 Zurich's rights with respect to the issue of whether  
15 Penske would be indemnified?  
16 A There's -- Penske was being indemnified. I think it's  
17 reserving the rights as to how other insurance would  
18 get -- I'm sorry. I'm trying to be careful of not know  
19 what I can say and not say about the letter. I  
20 apologize.  
21 Q Well, the letter is in evidence so you can testify  
22 about its contents now.  
23 A Okay.  
24 Q And my question for you is, does this letter, like the

1 and to Mr. Zalewski independently that might provide  
2 primary coverage, not just to them, but also possibly  
3 to GAF and that coverage counsel is looking to obtain  
4 such policies so that counsel, as Zurich's coverage  
5 counsel, can make that determination as to what is  
6 primary and whether Zurich's policy is primary. That's  
7 the reason we're offering the letter.  
8 THE COURT: So basically in each of them  
9 they're asking to advise us of what other policies  
10 there may be?  
11 MR. VARGA: That's correct, Judge. That's  
12 essentially the purpose of --  
13 THE COURT: All right, we can save some time  
14 then, go ahead.  
15 MR. VARGA: Thank you.  
16 (By Mr. Varga)  
17 Q Ms. Fuell, when you took control of the file, did you  
18 have an understanding as to whether the question of  
19 whether Zurich's policy was going to be primary  
20 insurance for DLS and Zalewski had been resolved?  
21 A It did not appear that it had been resolved when I took  
22 over the file.  
23 Q All right and what about the same question with respect  
24 to Penske --

1 last letter, express Zurich's reservation of rights  
2 with respect to the question of whether it ultimately  
3 would pay for any expenses or loss or liability that  
4 Penske might get level against it in this litigation?  
5 MR. PRITZKER: Objection.  
6 THE COURT: All right. It's sustained.  
7 Let's go to these letters. It says what it says. I  
8 understand 105 to say it appears that DLS and GAF are  
9 primary insureds under the policy. But there's a  
10 possibility of other policies that may cover it so  
11 please send us other copies. It's not denying  
12 coverage. It's a reservation of rights --  
13 MR. VARGA: That's correct. I'm not --  
14 THE COURT: It certainly is not saying that  
15 we don't think you are a primary -- you are a primary  
16 insured.  
17 MR. VARGA: That's correct, your Honor.  
18 THE COURT: Are you contending that this is  
19 questioning whether or not they are indeed primary  
20 insureds under the policy?  
21 MR. VARGA: With respect to DLS, your Honor,  
22 with Exhibit 105, yes, there is a question expressed in  
23 that letter as to whether there is other available  
24 insurance that might be available to DLS independently

1 THE COURT: I'm sorry. How do I -- have you  
2 not opened the door to -- how would she not know it was  
3 resolved? Are you saying that she spoke to them and it  
4 was not resolved? Isn't that a waiver of privilege?  
5 MR. VARGA: Your Honor, I'm asking -- perhaps  
6 I can preface the question by saying, based on your  
7 review of these documents in the claim file did you  
8 have the understanding, when you took over the file,  
9 that these issues were -- the issue of primary  
10 insurance was resolved? That's my question. Based on  
11 the documents that --  
12 THE COURT: Based on her understanding -- I  
13 mean, is there any document in the file that says this  
14 matter has been resolved?  
15 MR. VARGA: No, there isn't.  
16 THE COURT: I'm not asking you. I'm asking  
17 is that what your question is. In which file?  
18 MR. VARGA: I guess I'm asking, if based on  
19 the documents that she has reviewed here and when she  
20 took over the file, did she have any understanding that  
21 those issues we still open issues?  
22 THE COURT: I'm not going to allow that,  
23 because she retained -- on behalf Zurich, she retained  
24 a law firm. If the matter is not resolved by the law

1 firm, then that would be a privileged attorney-client  
2 communication. But the mere fact that there is not a  
3 document in the file does not permit me to infer that  
4 the matter has not been resolved. So I'm not going to  
5 make the inference that the matter was not resolved  
6 simply because there is not an unprivileged letter  
7 which so reflects. So all I know is that they asked  
8 for documents which they thought were necessary to  
9 resolve it and they asked for it in March or April. If  
10 you want to indicate that there was communications of  
11 counsel that indicated that there were still legal  
12 issues which as yet were unresolved, then you can waive  
13 the attorney-client privilege and present that. But I  
14 don't see how I can -- are you asking me to find that  
15 there were legal issues with regard to coverage that  
16 were as yet unresolved and therefore they did not have  
17 an obligation to make an offer?

18 MR. VARGA: I think, your Honor, what I'm  
19 simply attempting to point out is that when Ms. Fuell  
20 reviewed these letters she understood that this  
21 question of other insurance with respect to Penske and  
22 DLS and Zalewski, as of the issuance of those  
23 reservation of rights letters, that Zurich left open  
24 that question through the letters from its coverage

1 and Zalewski in Exhibit 105 was withdrawn?  
2 A No.  
3 Q Did you, in Zurich's file, did you ever have a copy of  
4 any insurance policies that were issued to either  
5 Driver Logistics Services, Mr. Zalewski or to Penske  
6 that might have been available as insurance for them  
7 for the Rhodes action?  
8 A No.  
9 Q Ms. Fuell, I want to now go forward again back to 2004,  
10 after the exchange of communications with AIG that you  
11 had, and we talked about a little while ago. After the  
12 point in time that you sent the April 2 e-mail that we  
13 looked at a little while ago explaining that Zurich had  
14 made a business decision to continue to defend GAF or  
15 pay for the defense of GAF, did you ever have any role  
16 in any -- or any input into any settlement  
17 communications that AIG may have, or its people may  
18 have engaged with the plaintiffs or their counsel?  
19 A No, I didn't.  
20 Q Were you aware that there was a March 2004 meeting  
21 involving GAF -- representatives of GAF,  
22 representatives of AIG, in March 2004?  
23 A I wasn't aware of that in March of 2004.  
24 Q Were you invited to that meeting?

1 counsel to those parties. That's all I'm trying to  
2 establish.

3 THE COURT: Okay, so as of the time, which I  
4 think is before she even got there, she hadn't even  
5 taken over the file until September of '03, so when she  
6 looked at the file she saw that both -- that in March  
7 and April there was a Reservation of Rights letter in  
8 which they asked for policies. That's the only thing  
9 that I'm going to infer at this point unless you want  
10 to waive the attorney-client privilege. But you can't  
11 have it both ways. You can't say that there were legal  
12 issues as yet unresolved which prevented an offer to be  
13 made -- but I'm not going to open the attorneys to  
14 being deposed as to the state of their legal advice.  
15 So okay, let's move on.

16 MR. VARGA: If I may just have a minute.

17 (By Mr. Varga)

18 Q Did you, Ms. Fuell, in the course of your working on  
19 this claim, did you ever see a document in Zurich's  
20 file indicating that the reservation of rights that was  
21 issued to Penske in Exhibit 106 was ever withdrawn?  
22 A No.  
23 Q Did you ever see a document in the file indicating that  
24 the reservation of rights that had been issued to DLS

1 A No.  
2 Q You are aware now that there was a mediation in the  
3 underlying case on August 11, 2004; are you not?  
4 A Yes.  
5 Q Did you know about the mediation before it took place?  
6 Did you know that it was going to take place?  
7 A No, I didn't.  
8 Q Did anyone from Zurich attend the mediation, to your  
9 knowledge?  
10 A No.  
11 Q Did anyone from Crawford & Company attend the  
12 mediation?  
13 A No.  
14 Q During the mediation were you ever contacted by anyone  
15 affiliated with AIG or any defense lawyer or anyone  
16 regarding any offers of settlement or demands of  
17 settlement that had been made during that mediation?  
18 A No.  
19 Q Between the mediation and the trial, were you ever  
20 contacted by anyone from AIG or any defense lawyer --  
21 strike that.

22 Between the mediation and the beginning of  
23 the trial were you ever contacted by anyone from AIG on  
24 the subject of settlement offers or settlement demands

1 that had been exchanged during that time frame?  
 2 A No.  
 3 Q During the trial that took place in September of 2004,  
 4 the same question, were you ever contacted by anyone at  
 5 AIG to discuss the subject of settlement offers or  
 6 demands that had been made?  
 7 A No.  
 8 Q Did you have any input at all into any settlement  
 9 offers that were made to the plaintiffs by AIG or its  
 10 representatives at any point after March 30, 2004?  
 11 A No.  
 12 Q At what point did you learn of the judgment or the  
 13 verdict in the underlying case?  
 14 A In later September of 2004.  
 15 Q And can you tell us just what you did, if anything, on  
 16 the Rhodes case after that point in time?  
 17 A After I learned of that?  
 18 Q Yes.  
 19 A I contacted Crawford and asked what was going on, asked  
 20 what had happened throughout the trial, asked for  
 21 additional information from Crawford and defense  
 22 counsel and what AIG's position was.  
 23 Q What AIG's position was with respect to what?  
 24 A Whether they were going to satisfy the judgment,

1 Q When you made that payment -- strike that. Did Zurich  
 2 pay some money in addition to the \$2 million to the  
 3 plaintiffs?  
 4 A Yes, we paid \$322,000 for post-judgment interest.  
 5 Q Okay. And was that post-judgment interest on the \$2  
 6 million or post-judgment interest on the judgment  
 7 amount for the judgments?  
 8 A On the judgment amount.  
 9 Q And when you paid that sum did you ask for a release  
 10 from the plaintiffs?  
 11 A No, I didn't.  
 12 Q At that point in time do you know whether AIG had filed  
 13 a notice of appeal?  
 14 A I believe it was filed in late November or late  
 15 December. I didn't know that at that time.  
 16 Q Do you believe that the notice of appeal was on  
 17 file at the time that you paid the money?  
 18 A Yes. I do believe that, yes.  
 19 Q And can you explain for us why Zurich -- strike  
 20 that.  
 21 Were you involved in making the  
 22 decision to pay the policy limits plus some  
 23 post-judgment interest to the clients?  
 24 A Yes, I was.

1 whether they were going to appeal the judgment, what  
 2 Zurich's obligations might be.  
 3 Q Okay. Did anyone ever contact you from AIG or an  
 4 employee of AIG contact you to discuss the issue of an  
 5 appeal of the Rhodes case, the underlying judgment?  
 6 A No.  
 7 Q You're aware an appeal was taken?  
 8 A Yes.  
 9 Q Did you offer any input at all into the decision as to  
 10 whether an appeal should be taken?  
 11 MR. ZELLE: Objection.  
 12 THE COURT: Overruled.  
 13 MR. ZELLE: The understanding of what is  
 14 meant by "appeal" as opposed to a notice of appeal, I  
 15 think there is some clarification required.  
 16 THE COURT: Did you have any input as to  
 17 whether a notice of appeal should be filed?  
 18 THE WITNESS: No.  
 19 (By Mr. Varga)  
 20 Q Again, at some point did Zurich pay its \$2 million  
 21 policy limit to the plaintiffs directly?  
 22 A Yes, we did.  
 23 Q At what point in time was that?  
 24 A December of 2004.

1 Q Okay. Can you tell me why you made that  
 2 decision at that time, despite that there was an  
 3 appeal that had been taken?  
 4 A We knew that we weren't obligated to pay it, but  
 5 we thought it would have benefits for a lot of  
 6 reasons. We thought it would put money in the  
 7 hands of Mrs. Rhodes. We thought it would  
 8 benefit GAF to stop post-judgment interest from  
 9 accruing and satisfy at least their obligation  
 10 for Zurich's portion of the judgment. And we  
 11 were told that if we offered the money, plus the  
 12 interest, that it was likely Mr. Pritzker would  
 13 not pursue an action against us for the 93A.  
 14 THE COURT: It was told to you by whom?  
 15 THE WITNESS: I believe it was told to  
 16 me by coverage counsel.  
 17 MR. VARGA: Well, your Honor, if I can  
 18 clarify, if I can clarify that with a question?  
 19 (By Mr. Varga:)  
 20 Q Did you have an understanding as to whether Mr.  
 21 Pritzker had said anything to coverage counsel  
 22 to that effect?  
 23 MR. PRITZKER: Objection.  
 24 THE COURT: Sustained.

1 (By Mr. Varga:)

2 Q Did you know -- strike that.

3 MR. VARGA: Your Honor, I want to

4 present two letters to the witness. They are

5 objected to, so I'll lay a foundation and I want

6 to give the court copies as well.

7 THE COURT: That's fine.

8 (By Mr. Varga:)

9 Q Ms. Fuell, I'm showing you what we have marked

10 as Exhibits 108 and 109. And again without

11 asking you about the substance of these

12 documents, I would just ask you to tell me with

13 respect to Exhibit 108, first of all, can you

14 tell me who that letter was sent to and who it

15 was sent from?

16 MR. BROWN: Your Honor, if might

17 object. Because these are objected-to, I don't

18 think they should be referred to as exhibits yet

19 with exhibit numbers.

20 THE COURT: As exhibits for I.D.. They

21 are effectively for I.D. But I know that.

22 (By Mr. Varga:)

23 Q Referring you to Exhibit 109 for identification,

24 Ms. Fuell, could you take a look at that,

1 please, and just let us know who the author is

2 and who the recipients are and what the date is

3 please?

4 A The author, the recipients, and the date?

5 Q Yes, please.

6 A Yes. The author of the letter is Timothy Bray

7 from Taylor Duane Barton and Gilman. It's dated

8 May 29, 2003, and it's addressed to Lawrence

9 Boyle at Morrison Mahoney & Miller.

10 Q Can I ask you to do the same thing for the

11 Exhibit 109 for identification please?

12 A Yes. It is signed by Timothy Bray at Taylor

13 Duane, it's dated May 29, 2003, and it's

14 addressed to Timothy Corrigan of Corrigan,

15 Johnson and Tutor.

16 Q Okay. And can you tell us whether both of these

17 documents were in Zurich's imaging system at the

18 time that you took over the Rhodes case in

19 September of 2003?

20 A Yes, they were.

21 Q And they were maintained in the regular course

22 of business at Zurich?

23 A Yes, they were.

24 MR. VARGA: Your Honor, we would offer

1 these as full exhibits, 108 and 109. Again,

2 these are similar to what we had offered before

3 just to show that a request had been made.

4 MR. BROWN: Your Honor, these are

5 letters that are actually sent to counsel, hired

6 and paid by Zurich, to represent the interests

7 of DLS and Carlo Zalewski. These are actually

8 communications between two separate law firms

9 paid and hired by Zurich. These are exactly the

10 types of communications that have been withheld

11 throughout this litigation as

12 attorney-client privilege under the

13 joint-defense doctrine. Also I believe some of

14 these -- not these specifically, but similar

15 documents have been held withheld as

16 constituting work product.

17 MR. VARGA: Your Honor, these, if I

18 may, these are not joint-defense documents, as

19 the court can tell from looking at them.

20 They're not offered for the truth. Again,

21 they're relevant to demonstrate the

22 investigation that was undertaken. These are

23 shortly after the Reservation of Rights letters

24 were sent out, as the court is aware.

1 MR. BROWN: Your Honor, they're another

2 letter, a similar letter, The recipients are

3 not attorneys for Mr. Zalewski and DLS or

4 Penske, but they are members of the joint-

5 defense circle, they've argued throughout this

6 case, and on the privilege log they simply refer

7 to these things as "Letter re: insurance

8 coverage".

9 These are letters re: insurance

10 coverage. And we haven't been allowed to test

11 this, even though we had tried for over a year

12 now since your Honor's decision coming down that

13 they would have to produce a number of documents

14 from the file, yet they continue to withhold

15 these attorney-client communications and joint-

16 defense documents.

17 We submit that what they're attempting

18 to introduce now are similar to the exact same

19 documents that they've withheld.

20 MR. VARGA: Your Honor --

21 THE COURT: Okay. I will admit them as

22 Exhibit Number 108 and 109. They are similar

23 enough to 105 and 106 that they will apply to

24 the same fashion.

1 MR. VARGA: Thank you, your Honor. And  
2 at this point --

3 THE COURT: In terms of Mr. Brown's  
4 statement as to them being paid, that's  
5 appropriate for redirect.

6  
7 (Exhibit Number 108, marked; letter  
8 from Timothy Bray to Lawrence Boyle, dated  
9 5/29/03.)

10  
11 (Exhibit Number 109, marked; letter  
12 from Timothy Bray to Timothy Corrigan, dated  
13 5/29/03.)

14  
15 MR. VARGA: Your Honor, I have just one  
16 final line of questioning and then I'll be done.  
17 And I apologize if I took longer than the 45  
18 minutes I mentioned to the court earlier.

19 (By Mr. Varga)

20 Q Exhibit 27, please, in Volume 1 of plaintiffs'  
21 exhibits.

22 THE COURT: Did you say 127?

23 MR. VARGA: Sorry, your Honor, 27.

24 THE COURT: Twenty-seven.

1 A Yes.

2 (By Mr. Varga)

3 Q Have you seen this before?

4 A Before today, yes, I have seen this before.

5 Q This is a letter which -- it's from Morris Mahoney &  
6 Miller enclosing some correspondence that was  
7 apparently returned to Morris & Mahoney's office. It's  
8 dated February 2, 2004, and this is one of the  
9 plaintiffs' exhibits. It attaches a January 20, 2004,  
10 letter; it appears from Zurich North America claims  
11 office. Can you tell us where that claims office is,  
12 if you can tell from that, from the second page?

13 A If you look at ZA-1166, it's from our Boston,  
14 Massachusetts office, claim office.

15 Q What is the Boston, Massachusetts office of Zurich?  
16 What are the functions in that office, if you know?

17 A It's one of several of the field offices we talked  
18 about yesterday that handled bundled claims and provide  
19 the claim handling service for our insureds under the  
20 bundled program.

21 Q Does the Boston field office in any way handle or  
22 oversee claims that are administered by third-party  
23 administrators?

24 A No.

1 Q Again, those claims are handled just in the liability  
2 TPA claims unit that you're part of?

3 A Yes, they are.

4 Q Have you, in your experience at Zurich, interacted with  
5 field offices on occasion?

6 A Yes.

7 Q As part of the work that you do?

8 A Yes.

9 Q Do you have knowledge as to how the field offices  
10 handle correspondence that may be sent to them on  
11 claims that are handled by TPAs?

12 A When they get a piece of mail, they try to identify a  
13 claim number or something in the system that would give  
14 them any indication of it. They would look up the  
15 insured on the system and similar to what Crawford had,  
16 we have claim service instructions for individual  
17 insureds; and under GAF Building Materials, it would  
18 have identified them as an account whose claims  
19 services were handled by a TPA rather than branch  
20 claims.

21 Q Okay. Based on your understanding that you just  
22 explained of the way that the branch office handles  
23 mail that relates to TPA administered claims, do you  
24 have an understanding as to why this piece of

1 correspondence was returned back to Morris & Mahoney  
2 from the Boston field office?

3 A I think they would have looked up GAF in the system and  
4 seen that their claims are handled by Crawford, so they  
5 were advising Morris & Mahoney that they think it was  
6 misdirected to the Boston claim office.

7 Q In your experience working in TPA liability claims, if  
8 you ever had received a piece of correspondence  
9 relating to a claim that is administered by a TPA, is  
10 it ever your practice to return that to the sender?

11 MR. PRITZKER: Objection.

12 THE COURT: I'll allow it.

13 A To return it to the TPA?

14 (By Mr. Varga)

15 Q Yes.

16 A Yes.

17 Q But what about to the sender, the person who sent it to  
18 you?

19 A To the sender, yes. If it was an attorney I would want  
20 to alert the attorney that they may have sent the wrong  
21 piece of mail or they may have the addressee wrong.

22 Q I'm sorry, I perhaps am not making my question clear.  
23 On a claim that you oversee, just a typical claim that  
24 you oversee that is administered by a TPA, if you ever

1 receive a piece of correspondence from some party  
 2 regarding that claim, is it your practice ever to  
 3 return it to the sender?  
 4 A No.  
 5 Q Thank you.  
 6 MR. VARGA: No further questions, your Honor.  
 7 THE COURT: All right. Mr. Zelle.  
 8 MR. ZELLE: Thank you, your Honor.

9 CROSS-EXAMINATION BY MR. ZELLE:

10 Q Ms. Fuell, in connection with the Rhodes case, was it  
 11 Zurich's responsibility to work with Crawford and GAF  
 12 and defense counsel to develop the information that  
 13 would be needed to assess the exposure?  
 14 A It was GAF's -- I'm sorry. It was Crawford's  
 15 responsibility as the claim handler. We may all have  
 16 collaborated together, but Crawford was the claim  
 17 handler.  
 18 Q And you worked with Crawford?  
 19 A Yes.  
 20 Q And once you had sufficient information to begin your  
 21 assessment of the claim for purposes of determining  
 22 settlement authority, at that point you perceived the  
 23 likelihood that the authority you would request would  
 24 be the full policy limit; isn't that right?

1 and we all got together and talked about the case, yes.  
 2 Q When did you do that?  
 3 A In early October of 2003.  
 4 Q Okay. At that point, in your mind, had the case  
 5 reached a level of maturity that the details that you  
 6 had developed should be communicated to the excess  
 7 carrier?  
 8 A The details that I had developed --  
 9 Q You personally.  
 10 A -- via the expert, via the defense attorney report?  
 11 That's what I developed --  
 12 Q Yes, I understand that.  
 13 A Yes.  
 14 Q So --  
 15 A So at what time they were being -- Crawford? They were  
 16 being advised of it, so I'm not following your  
 17 question.  
 18 Q Crawford provided information, to your knowledge, you  
 19 believe because -- strike that.  
 20 You saw that AIGTS was copied on Crawford's  
 21 reports, right?  
 22 A Right.  
 23 Q Based on that you assumed that AIG was getting that  
 24 information, right?

1 A Once I had reviewed the demand package and the other  
 2 information, is that what you're saying?  
 3 Q Well, let me ask it this way, you received the demand  
 4 package in September; is that right?  
 5 A Correct.  
 6 Q Of 2003?  
 7 A Of 2003.  
 8 Q Okay. You began looking at that material and at some  
 9 point thereafter you determined that it would be a good  
 10 idea to advise the excess carrier, AIG, of the status,  
 11 right?  
 12 A No, that's not correct. AIG was already on notice of  
 13 the claim.  
 14 Q Okay. When was it that you first determined that AIG  
 15 should be provided with some of the information that  
 16 you had developed, you personally; when did you make  
 17 that determination?  
 18 A AIG was already being advised of the information we had  
 19 also received, so I didn't form an valuation to send  
 20 them information because they were already receiving  
 21 it.  
 22 Q Okay. At any point did you make a decision that AIG  
 23 should be contacted?  
 24 A I made a decision that we should have a conference call

1 A Yes.  
 2 Q You don't know that, but you assumed that, right?  
 3 A It was verified in Crawford reports that they were  
 4 communicating with AIG.  
 5 Q You assumed that it was getting to AIG, right?  
 6 THE COURT: She's already testified that she  
 7 saw that it was written that they were getting them, so  
 8 she understood that they were getting them. I don't  
 9 think she went to AIG and did an investigation on her  
 10 own. So you may proceed.  
 11 Am I correct in that, by the way?  
 12 THE WITNESS: You are correct.  
 13 (By Mr. Zelle)  
 14 Q I'm not asking you at all about any information  
 15 communicated by Crawford. I'm asking you about  
 16 communications from Zurich to AIG. My question is,  
 17 when did Zurich first communicate any information to  
 18 AIG?  
 19 A During the November 2003 teleconference.  
 20 Q And why was it -- strike that.  
 21 You determined at some point prior to that  
 22 teleconference that you had sufficient information to  
 23 recommend increasing the reserve authority to \$2  
 24 million, right?

1 A Yes.

2 Q And you communicated that to AIG?

3 A In the November 19th teleconference, yes.

4 Q Explain to the court why that was the appropriate time  
5 for Zurich to get AIG involved.

6 A I got everyone involved, the insured, AIG and defense  
7 counsel, so that we could respond to the demand package  
8 and formulate a strategy on how to proceed with the  
9 case to try to settle the case.

10 Q Okay. Let's forget about everybody else. I'm just  
11 focusing on communications from Zurich to AIG, and I'd  
12 like you to explain why November 2003 was, in your  
13 view, the appropriate time to get AIG involved?

14 A Because I felt we had the analysis that our policy  
15 limits were likely exposed.

16 Q And in the standard practice, is that the time that  
17 first contact is made by the primary carrier to the  
18 excess carrier?

19 A Crawford was giving information to AIG. They were  
20 acting as the primary -- they were given the notice  
21 that was required to the excess carrier and the broker.

22 Q Okay. I'm going to try to be very precise with my  
23 terms. And when I say "primary carrier," I mean  
24 Zurich. Is that a fair use of that term?

1 obligations of insurers?

2 A I don't think I've ever specifically read those  
3 statutes.

4 Q And are you familiar with any state regulations,  
5 insurance department regulations for reserving?

6 A I know that it is good claim handling to assess what  
7 your financial obligation might be.

8 Q That's right. And I'm trying to distinguish between  
9 good claims handling practices and technical  
10 regulations of various states.

11 You are familiar with good claims handling  
12 practices relative to reserving, correct?

13 A Yes, I am.

14 Q And in your view, were those good claims handling  
15 practices followed in connection with this case?

16 A Yes.

17 Q Is it a part of those good claims handling practices  
18 that a reserve is not established until you have, to  
19 borrow your term, verifiable information?

20 A Yes.

21 Q Going back now to the other issue, that is, insurance  
22 department regulations. Do you have any familiarity  
23 with any insurance department's regulations regarding  
24 reserving?

1 A Okay.

2 Q So if I say "primary carrier," I'm not talking about a  
3 TPA. Is that fair?

4 A So Zurich only.

5 Q So my question is, is it typical in your experience  
6 that the first contact from the primary insurer is made  
7 to the excess insurer when you have obtained the  
8 information that the primary carrier needs to verify  
9 that the full limit of the primary policy is exposed?

10 A Yes.

11 Q Is it your understanding, based on your experience,  
12 that the standard practice in the insurance industry is  
13 that the excess carrier relies upon the primary carrier  
14 and defense counsel and in the insured to develop the  
15 information that is needed to verify that the primary  
16 policy limit is exposed, is fully exposed?

17 A They rely on all of those parties you named, plus  
18 anyone else they may choose to review it, yes.

19 Q I'd like to direct your attention now to some testimony  
20 that you gave relative to reserves. Are you, Ms.  
21 Fuell, familiar with Zurich's reserving practices?

22 A Yes.

23 Q Are you familiar with Massachusetts Insurance  
24 Department's regulations concerning reserving

1 A I know that their regulations under -- well, I'm sorry.

2 I know that their regulations require us to have  
3 sufficient reserves to cover our potential losses.

4 Q Okay. Do you know the term "policyholder surplus"?

5 A Yes.

6 Q Okay. What does that mean?

7 A I don't know if I can define it exactly correct. Do  
8 you want me to tell you what I think it means?

9 Q Let me ask you if you can agree with the definition is  
10 that it's an amount of money set up to make sure that  
11 an insurance company has enough money to pay off  
12 claims?

13 A Correct.

14 Q And at any given time can you give the court an idea of  
15 how many claims Zurich may have?

16 A How many for the entire company?

17 Q Yeah. Are we talking hundreds of thousands?

18 A It would be a very broad guess. We're an international  
19 company.

20 Q Then don't bother.

21 A So, yes, it would be.

22 Q There are generally two aspects at Zurich for  
23 reserving. There's expense and indemnity, correct?

24 A Correct.

1 Q Can you explain to the court what the expense reserve  
2 is?  
3 A The reserve that we establish to pay for allocated  
4 expenses: legal bills, legal reports.  
5 Q Investigators would fall in that category?  
6 A Yes.  
7 Q IMEs would fall into that category?  
8 A Yes.  
9 Q For the record, that's Independent Medical  
10 Examinations.  
11 And at the very outset of the case, this case, do  
12 you believe that it was reasonable to set a reserve of  
13 \$50,000 based simply on the likelihood that there would  
14 be that amount of money incurred in expenses?  
15 A Yes.  
16 Q And would you agree that at the outset of the case it  
17 was not appropriate to set any indemnity reserve  
18 because you really couldn't verify anything.  
19 A Would I agree it would not be appropriate if --  
20 Q I'll rephrase the question. Do you believe that it was  
21 appropriate for no reserve to be set on indemnity at  
22 the time first notice was given in this case because  
23 there really wasn't any verifiable information as to  
24 what type of exposure was presented?

1 Q Let me just ask, is it the standard -- well, first of  
2 all, I'll just ask, with respect to Zurich, is it  
3 Zurich's practice to reserve only when it has a  
4 meaningful basis to assess exposure?  
5 A We may set some minimal reserve, but we develop and  
6 change our reserves and adjust it accordingly, upward  
7 or downward, once we get meaningful information.  
8 Q With respect to Zurich's efforts to sort out coverage  
9 issues, is that something that took a significant  
10 amount of time?  
11 A Yes, it is.  
12 Q Is that something on which Zurich spent a significant  
13 amount of money?  
14 A I believe so, yes.  
15 Q Zurich did not provide AIG with its conclusions  
16 concerning the various coverage issues, did it?  
17 A We provided AIG with a copy of the Crawford file in our  
18 file.  
19 Q Okay. Do you know whether included within your file  
20 that was provided to AIG there were documents  
21 reflecting Zurich's analysis, or its counsel's  
22 analysis, of the coverage issues?  
23 A I asked for -- all of my file was on an imaging system.  
24 I asked that it be printed out and sent to AIG, so I

1 A Yes.  
2 Q And is it --  
3 THE COURT: I'm sorry. By "no reserves" you mean  
4 zero?  
5 THE WITNESS: When the claim was first reported,  
6 the very first day, I wouldn't have been appropriate to  
7 set up a reserve until they gathered further  
8 information.  
9 (By Mr. Zelle)  
10 Q And once you saw -- once Crawford established that  
11 there was going to be a claim, Crawford put up \$50,000  
12 as a reserve, correct?  
13 A Yes.  
14 Q Was that, in your view, seem like a reasonable number  
15 given just the expenses that would be incurred?  
16 A Yes.  
17 Q and at that point in time, was there any information  
18 from which a meaningful determination could be made as  
19 to indemnity exposure?  
20 A No.  
21 Q And is that why it wasn't reserved?  
22 A Why?  
23 Q Why no more than \$50,000 was reserved?  
24 A Yes.

1 don't know exactly what was in it.  
2 Q That's fine. With respect to sorting out the coverage  
3 issues, was there some time during which Zurich was  
4 simply waiting for DLS and Penske to respond to the  
5 request for the other insurance policies or the  
6 insurance policies they had?  
7 A We were waiting for that information in addition to  
8 investigating.  
9 Q In fact, you waited for months to get that information.  
10 A Yes, we did.  
11 THE COURT: When did you get it?  
12 THE WITNESS: In November of 2003, we got a report  
13 from Crawford that said they had found out there was no  
14 primary insurance for DLS. I don't know that we ever  
15 got Penske's policy at all either.  
16 THE COURT: Did you ever call up the attorney for  
17 Penske and say I want it?  
18 THE WITNESS: I didn't.  
19 THE COURT: Did you ever ask anybody to do it?  
20 THE WITNESS: I was asking coverage counsel if  
21 they had received it.  
22 THE COURT: You were paying the attorney for  
23 Penske.  
24 THE WITNESS: We were paying -- yes, we were.

1 THE COURT: All right. Proceed.  
 2 (By Zelle)  
 3 Q Ms. Fuell, you testified a bit about factors you  
 4 considered in determining whether to request the policy  
 5 limit and authority for the Rhodes case; is that right?  
 6 A That's right.  
 7 Q And you've identified economic factors?  
 8 A Yes, I have.  
 9 Q And you identified non-economic factors, right?  
 10 A Yes.  
 11 Q And on your BI claim report there's a line that says  
 12 pain and suffering. Is it within that line that you  
 13 factor in all non-economic factors?  
 14 A Yes.  
 15 MR. ZELLE: Your Honor, I had made a couple of  
 16 chalks and I'd like to ask the witness about the  
 17 factors she considers in ascribing a pain and suffering  
 18 number to claim value.  
 19 THE COURT: All right. Let's begin --  
 20 MR. ZELLE: I don't have a heck of a lot of time.  
 21 I can wait.  
 22 THE COURT: It's already 1 o'clock, so I think  
 23 we've used the time we're going to use today. How much  
 24 longer do you think you're going to have with her?

1 MR. ZELLE: At least an hour, maybe two.  
 2 THE COURT: Maybe two?  
 3 MR. ZELLE: I hope not.  
 4 THE COURT: I said I had not reached the point in  
 5 which I've begun to learn less, but I've reached that  
 6 point, at least with regard to this witness, frankly,  
 7 so I'm beginning to hear things -- let's put it this  
 8 way. I can predict probably two-thirds of her answers  
 9 over the last two hours based on her previous  
 10 testimony. Be mindful of that.  
 11 We'll see everybody back at 9 o'clock. Part of  
 12 the theory is you'll have plenty of time on closing to  
 13 make your points. What our timetable? We had a two-  
 14 week timetable. What's your timetable now?  
 15 MR. PRITZKER: I have to say, your Honor, I  
 16 actually looked at it during the break and it looks  
 17 like it's two days off, not one day off.  
 18 THE COURT: Already?  
 19 MR. PRITZKER: Yes.  
 20 THE COURT: It's only the fourth day.  
 21 MR. PRITZKER: I understand that. But based upon  
 22 the time within which we've taken Ms. Fuell, which was  
 23 totally unanticipated. Well, I shouldn't say totally  
 24 because part of is it mine.

1 THE COURT: It was yours.  
 2 MR. PRITZKER: Yes. But given what now Mr. Zelle  
 3 is saying and while my cross-examination right now, I'm  
 4 afraid to tell you what it is, but it's short, it could  
 5 be as much as two, but it's certainly one day off.  
 6 Your Honor, I do have a logistical problem,  
 7 however, that I wish to address, which is Harold  
 8 Rhodes' brother, Steven Rhodes, the Chief Judge of the  
 9 Michigan Bankruptcy Court. We had scheduled him for  
 10 tomorrow and he is already on a plane flying here to  
 11 testify tomorrow, and I would hope that we could break  
 12 with Ms. Fuel to get him on and off on a relatively  
 13 limited examination.  
 14 THE COURT: What is he testifying about?  
 15 MR. PRITZKER: His observations of his brother's  
 16 and Marcia Rhodes' emotional distress during the  
 17 litigation process.  
 18 MR. MASELEK: If I may, your Honor, I believe it's  
 19 not just his observations, but they're by telephone.  
 20 THE COURT: I'm sorry?  
 21 MR. MASELEK: It's my understanding that the bulk,  
 22 some of them at least, are based upon conversations  
 23 that he may have had with Mr. Rhodes. We don't believe  
 24 he should be permitted to testify as to any opinions

1 that Judge Rhodes formed of his brother's state of mind  
 2 based upon statements that his brother made to him by  
 3 telephone.  
 4 MR. PRITZKER: These are not opinions, your Honor;  
 5 they're observations.  
 6 THE COURT: Observations with his eyes or with his  
 7 ears?  
 8 MR. PRITZKER: Both.  
 9 THE COURT: Are there some that are with his eyes?  
 10 MR. PRITZKER: Yes, very definitely.  
 11 THE COURT: How long do you think he'll be?  
 12 MR. PRITZKER: I figure that my direct examination  
 13 is a half-hour or less.  
 14 MR. ZELLE: Is this before we complete Ms. Fuell  
 15 or in the middle?  
 16 MR. PRITZKER: The difficulty is that Judge Rhodes  
 17 has arranged his schedule, his court schedule, around  
 18 this appearance.  
 19 THE COURT: When's his flight back? Is he staying  
 20 the weekend?  
 21 MR. PRITZKER: During the weekend, yes.  
 22 THE COURT: Whether we start him at 11 or start  
 23 him at 9, I don't much care, but he'll be off by  
 24 Friday. It makes more sense, in order to be sure he's

1 off by Friday, to start him first thing and then pick  
2 up at 10. I interrupted the testimony to see the  
3 video, so I can interrupt it again to hear Judge  
4 Rhodes' testimony. Let's make it short, because you  
5 said Ms. Fuell is here for the week, but I trust she's  
6 going home.

7 MR. VARGA: She does have to go home on Friday,  
8 your Honor, and she's been patient with the schedule as  
9 well.

10 THE COURT: Let's work to get -- I think we should  
11 be able to get both Judge Rhodes and Ms. Fuell on a  
12 plane Friday night, her Friday night and Judge Rhodes  
13 on Sunday. So you'll have basically four hours. If  
14 you use it wisely, I expect we'll be able to accomplish  
15 both. We want to get her back to Chicago for the  
16 weekend.

17 All right. We'll see you at 9 tomorrow.  
18 (Hearing adjourned at 1:05 p.m.)  
19  
20  
21

C E R T I F I C A T E

I, Paula Pietrella and Faye LeRoux, Court Reporters, do hereby certify that the foregoing transcript, Pages 1 through 153, is a complete, true and accurate transcription of the above-referenced case.

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Paula Pietrella

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Faye LeRoux

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT SUCV2005-1360

MARCIA RHODES, HAROLD RHODES, INDIVIDUALLY, HAROLD RHODES, ON BEHALF OF HIS MINOR CHILD AND NEXT FRIEND, REBECCA RHODES, Plaintiffs, VS. AIG DOMESTIC CLAIMS, INC. f/k/a AIG TECHNICAL SERVICES, INC., NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., and ZURICH AMERICAN INSURANCE COMPANY, Defendants,

JURY-WAIVED TRIAL - DAY 5

BEFORE: GANTS, J. BOSTON, MASSACHUSETTS FEBRUARY 9, 2007

PAULA PIETRELLA FAYE LEROUX

APPEARANCES

BROWN RUDNICK M. Frederick Pritzker Daniel J. Brown Margaret M. Pinkham Attorneys At Law One Financial Center Boston, MA 02111 FOR: The Plaintiffs Marcia Rhodes, et al. ROBINSON & COLE, LLP Gregory P. Varga Elizabeth C. Sackett Stephen Goldman Attorneys At Law 1 Boston Place Boston, MA 02108 FOR: The Defendant Zurich American Insurance Company ANTHONY R. ZELLE BRIAN McDONOUGH ROBERT MASELEK Attorneys At Law 4 Longfellow Place, 35th Floor Boston, MA 02114 FOR: The Defendants AIG Domestic Claims and National Union Fire Insurance Company THE McCORMACK FIRM, LLC Mark E. Cohen 1 International Place Boston, MA 02110 FOR: The Defendants AIG Domestic Claims and National Union Fire Insurance Company

INDEX

Table with columns: WITNESS, DIRECT, CROSS, REDIRECT, RECROSS. Includes entries for The Honorable Steven Rhodes, Kathleen Fuell (Resumed), Rebecca Rhodes, and Peter Hermes.

EXHIBITS

Table with columns: NO., DESCRIPTION, PAGE. Includes entry for B Mediation Agreement on page 171.

P R O C E E D I N G S

(In court at 9:15 a.m.)

THE COURT OFFICER: This Honorable Court is now open, you may be seated.

THE COURT: Good morning. Sorry about the delay. My wife's car is in the shop so I just got in. Orders of the court do not prevail when one is at home.

All right. So why don't we -- we're going to be hearing from Judge Rhodes, I gather?

MR. PRITZKER: We are.

THE COURT: Okay.

MR. PRITZKER: I would like to call Judge Rhodes as my first witness.

MR. MASELEK: Your Honor, we would like raise an objection to Judge Rhodes' testimony. I know I raised it at the end of the session yesterday, but we would like to renew the objection.

THE COURT: Okay.

MR. MASELEK: And the additional fact that I had not brought up yesterday is that Mr. Rhodes did serve as an attorney to the Rhodes family in the underlying action. It's our position that any impressions that he had from, not conversations, but observations which we understand that his testimony

would be limited to today, are obviously in the penumbra of that representation and would constitute his mental thoughts and impressions and work product.

THE COURT: Mr. Pritzker, do you intend to ask him anything to do with his representation of Mr. Rhodes?

MR. PRITZKER: Absolutely nothing. He played two roles, your Honor, which counsel is very well aware of. One is as a consultant, not as an attorney but as a consultant to his brother on legal matters.

THE COURT: Now, at the time was he a judge?

MR. PRITZKER: He's a judge.

THE COURT: I know he is now. At the time was he a judge?

MR. PRITZKER: He was, but he also was his brother, and it is his brother that we are bringing here today.

MR. GOLDMAN: Actually, your Honor, in Mr. Rhodes's deposition he testified that he did act as an attorney for Harold Rhodes and that was his testimony. In fact, there was discussion about whether there was an attorney-client privilege asserted and it was

expressly waived during that deposition.

MR. MASELEK: It was not waived. There was an understanding that it was not waived, whether the deposition would continue with the understanding that although the testimony was taken at the deposition, the privilege was not waived.

MR. PRITZKER: And to be absolutely precise, your Honor, it was waived so long as counsel agreed that it was not a general waiver of the attorney-client privilege.

THE COURT: You mean it was waived as to certain questions?

MR. PRITZKER: It was waived as to all questions to Judge Rhodes about his legal involvement. But that's totally irrelevant because that's not why he's here today.

THE COURT: Well, we're going to go question by question with regard to it. There really are two issues. If there is any question that arguably would invite disclosure of attorney-client communications, the first question will be, do you waive the privilege as to that question. If the answer is no, then we'll have to ascertain whether or not it falls within the scope. But for the way it was

1 described to me yesterday, I understand the purpose is  
 2 to -- this is as to your element of damages of  
 3 emotional distress with regard to Mr. Rhodes?  
 4 MR. PRITZKER: That is correct.  
 5 THE COURT: All right. And I'll see if you  
 6 verge beyond that scope, but if you stay within that  
 7 scope, I don't foresee much of a problem with regard to  
 8 attorney-client. If we get there, if there's no  
 9 waiver, then I'll have to deal with the interesting  
 10 issue, which I've not yet addressed, is I don't know  
 11 what the code of conduct is -- the federal bankruptcy  
 12 court? -- with regard to when a judge plays the role of  
 13 an attorney with regard to him. It's an interesting  
 14 issue, one which I haven't had the pleasure of dealing  
 15 with and hopefully will not have the pleasure of  
 16 dealing with today; but if I need to, I will.  
 17 So in any event, why don't we swear Judge  
 18 Rhodes and we'll proceed from there.  
 19 THE HONORABLE STEVEN RHODES, Sworn.  
 20 DIRECT EXAMINATION BY MR. PRITZKER:  
 21 THE COURT: Good morning, sir. Would you  
 22 please state your full name and spell your last name  
 23 for the court report?  
 24 THE WITNESS: Steven Rhodes, R-h-o-d-e-s.

1 A Yes. I was a law clerk for United States District  
 2 Judge John Feikens for one year following my graduation  
 3 from law school. After that I was an Assistant United  
 4 States Attorney in the Eastern District of Michigan for  
 5 almost four years. I was in private practice for four  
 6 years. In 1981 I was appointed as United States  
 7 Magistrate, served in that capacity for three and a  
 8 half years and then in March of 1985 was appointed to  
 9 my present position.  
 10 Q You are the brother of one of the plaintiffs, Harold  
 11 Rhodes?  
 12 A I am.  
 13 Q Older or younger brother?  
 14 A I am his older brother.  
 15 Q And, obviously, you're familiar and aware of the  
 16 automobile accident which his wife Marcia was in in  
 17 January of 2002?  
 18 A I am.  
 19 Q Did you have occasion from that time forward to both  
 20 meet, converse with your brother about matters  
 21 concerning that accident?  
 22 A I did.  
 23 Q Now, from time to time your brother would ask for your  
 24 advice on legal matters?

1 THE COURT: Steven, is it p-h or v?  
 2 THE WITNESS: V.  
 3 THE COURT: Okay. Thank you. You may  
 4 proceed.  
 5 Q Where do you live, Judge Rhodes?  
 6 A Ann Arbor, Michigan.  
 7 Q And what is your occupation?  
 8 A I'm a United States Bankruptcy Judge for the Eastern  
 9 District of Michigan.  
 10 Q Are you the Chief Judge?  
 11 A I am.  
 12 Q How long have you served in that capacity?  
 13 A I have been Chief Judge for almost five years and a  
 14 United States Bankruptcy Judge for almost 22 years.  
 15 Q When did you graduate from college?  
 16 A 1970.  
 17 Q Where?  
 18 A Purdue University.  
 19 Q Where did you go thereafter?  
 20 A To the University of Michigan Law School.  
 21 Q You graduated when?  
 22 A In December of 1972.  
 23 Q Can you track very briefly your legal history or your  
 24 legal work history?

1 A He would ask me questions of law and procedure, yes.  
 2 Q You don't want to talk about those, okay? We're here  
 3 today to only talk about your observations of your  
 4 brother's emotional state as you observed it from the  
 5 time of the accident through 2005. Do you understand  
 6 that?  
 7 A Yes.  
 8 Q Can you tell me the first contact you had with your  
 9 brother after January 9, 2002?  
 10 A I made a trip here to Boston very shortly after the  
 11 accident to be with him and his wife. I was in daily  
 12 or constant contact with him from the time of the  
 13 accident until then.  
 14 Q Is it fair to say that you were in contact with him  
 15 both telephonically and in person?  
 16 A Yes, throughout 2002, '3, '4, '5, and through today.  
 17 Q Can you tell me whether or not you observed from your  
 18 interaction with Harold Rhodes a change in his  
 19 emotional state directly following the accident?  
 20 MR. MASELEK: Objection.  
 21 MR. GOLDMAN: Objection, your Honor. First,  
 22 there are several bases for the objection.  
 23 First of all, it's not where there's a  
 24 foundation that it's anything other than over the

1 phone, which is all verbal and not based on firsthand  
2 knowledge.

3 Second of all, the question is leading. And  
4 in addition to being leading, it's not clear that it's  
5 based on anything other than hearsay based on what Mr.  
6 Harold Rhodes said.

7 THE COURT: And your objection?

8 MR. MASELEK: Same objection.

9 THE COURT: All right.

10 MR. PRITZKER: May I be heard, your Honor.

11 MR. ZELLE: Can I add a point, your Honor,  
12 from the defense?

13 I think we're going to have to cross this  
14 bridge sooner or later. How is Steven Rhodes going to  
15 distinguish between the emotional distress due to the  
16 accident and emotional distress that is allegedly due  
17 to the conduct that's the subject of this case?

18 THE COURT: That goes to weight, not to  
19 admissibility. That's obviously inherent. That's why  
20 the question of whether or not there was a change in  
21 Mr. Rhodes' emotional state after the accident is not  
22 exactly an earth-shattering one, in my mind, given the  
23 nature of the accident.

24 MR. PRITZKER: Nor do I intend to go into it,

1 gather you spoke to him by phone on all the other days?

2 THE WITNESS: Every day.

3 THE COURT: There was not a day you missed?

4 THE WITNESS: Hardly. If I was sick or  
5 something, but it was every day.

6 THE COURT: Okay.

7 MR. PRITZKER: Your Honor, I would like to  
8 respond, if I can, because it's going to come up  
9 immediately to counsel's objection as to telephonic  
10 communication and his observations from that. I  
11 believe, your Honor, that utterances of emotional state  
12 are an exception to the hearsay rule. I can cite a lot  
13 of cases --

14 THE COURT: You're not offering them for the  
15 truth of the matter asserted.

16 MR. PRITZKER: Exactly.

17 THE COURT: You're offering them for state of  
18 mind, so it's not actually an exception to the hearsay  
19 rule, it doesn't fall within the hearsay rule because  
20 it's not being offered for the truth.

21 We'll have to go question by question. I  
22 understand the various issues involved, but we'll still  
23 proceed with the questioning. I will allow him to  
24 state his observations as to tone of voice and as to

1 except that he observed it.

2 THE COURT: Right. I mean, obviously, you  
3 inherently have to distinguish between what was  
4 inherent in the accident, which had nothing to do with  
5 the insurance company's conduct, versus what it had to  
6 do with that. But that goes to weight, not to  
7 admissibility.

8 Just to be clear, you spoke to him by  
9 telephone on the day of the accident?

10 THE WITNESS: I did.

11 THE COURT: And every day thereafter until  
12 you came?

13 THE WITNESS: Yes.

14 THE COURT: And then how long were you here?

15 THE WITNESS: I think it was about three or  
16 four days.

17 THE COURT: All right. And then how often  
18 would you come back to Boston?

19 THE WITNESS: My next trip to Boston was  
20 later in 2002, in the fall or winter, but I did see  
21 Harold at my daughter's wedding, in June of 2002, in  
22 Ann Arbor.

23 THE COURT: Okay. Why don't you proceed from  
24 there and I'll note when he saw him in person. And I

1 other matters that a brother would know from his  
2 brother. Obviously, you'll have to sort out how much  
3 of it derived from the hardships involved in his wife's  
4 condition versus financial issues that you contend were  
5 caused by the insurance company's conduct. That's your  
6 burden.

7 MR. PRITZKER: And I intend to pursue that.

8 MR. GOLDMAN: Your Honor, my objection,  
9 though, in a sense is that the use of the word  
10 "observation," I think it needs to be pinned down to  
11 whether it's personal or visual observations or --

12 THE COURT: I think that's fair, but we've  
13 just established, at least with regard to 2002, that he  
14 saw him three or four days shortly after the accident  
15 and then saw him at his daughter's wedding in June and  
16 then came back in the fall for a few days.

17 MR. GOLDMAN: No, I understand that, your  
18 Honor. If the question is confined to what he saw  
19 during those interactive visits, personal visits, then  
20 we have no objection to that part of it. But if it's  
21 broader than that, then we do. The problem is the way  
22 the question is worded.

23 THE DEFENDANT: Okay. Well, I'm going to  
24 overrule it. I'm going to permit him to testify to

1 telephonic, is what he heard in terms of his not  
 2 necessarily observations with his eyes but with his  
 3 ears, or to the extent that they bear on the state of  
 4 mind of Mr. Harold Rhodes. So why don't you proceed.  
 5 (By Mr. Pritzker)  
 6 Q And my question to you, Mr. Rhodes, was after the  
 7 accident did you have an opportunity to observe, either  
 8 telephonically or in person, that Mr. Rhodes' prior  
 9 emotional state had changed?  
 10 A Yes.  
 11 THE COURT: I'm sorry. Prior to the accident  
 12 you mean?  
 13 (By Mr. Pritzker)  
 14 Q Prior to the accident.  
 15 A Yes.  
 16 Q And you observed that immediately after the accident  
 17 happened?  
 18 MR. GOLDMAN: Objection.  
 19 THE COURT: Overruled. You may answer.  
 20 A Well, of course, immediately upon the accident he was  
 21 extremely upset. It was not clear at that time what  
 22 his wife's condition was, and he was suffering from  
 23 extreme emotional distress in the several days and  
 24 weeks following the accident.

1 A In my conversations with him on the phone, it was clear  
 2 to me that as the days and weeks and months went on  
 3 following the accident, and as Marcia's condition and  
 4 her care stabilized, Harold was feeling less distress  
 5 and less anxiety and feeling more comfortable about  
 6 Marcia's situation and their future together, and he  
 7 felt comfortable enough to make the trip to Ann Arbor  
 8 for the wedding in June.  
 9 MR. MASELEK: Move to strike, your Honor.  
 10 THE COURT: Overruled.  
 11 (By Mr. Pritzker)  
 12 Q Now, did you continue to have contact with your brother  
 13 Harold for the rest of 2002?  
 14 A Yes.  
 15 Q And did you observe anything about your brother's  
 16 emotional state between the time you saw him in June  
 17 and the next time you saw him in 2002?  
 18 A Yes.  
 19 Q What was that?  
 20 MR. GOLDMAN: Objection.  
 21 THE COURT: I'll allow it. You may answer.  
 22 I'm sorry. This is June until when?  
 23 MR. PRITZKER: Well, the question was  
 24 throughout the end of 2002.

1 (By Mr. Pritzker)  
 2 Q Did you also observe that from your conversations with  
 3 Mr. Rhodes, with Harold Rhodes?  
 4 MR. GOLDMAN: Objection.  
 5 MR. PRITZKER: Let me --  
 6 THE COURT: Rephrase the question.  
 7 MR. PRITZKER: Let me rephrase it, your  
 8 Honor.  
 9 (By Mr. Pritzker)  
 10 Q What did you observe about your brother's emotional  
 11 state from your conversations after you left the Boston  
 12 area the first time --  
 13 MR. GOLDMAN: Objection.  
 14 THE COURT: Let him finish the question.  
 15 MR. PRITZKER: I'll start again.  
 16 (By Mr. Pritzker)  
 17 Q What did you observe about the emotional state of your  
 18 brother, Harold Rhodes, from conversations that you had  
 19 from the time you left Boston the first time until the  
 20 time you saw him again?  
 21 MR. GOLDMAN: Objection.  
 22 THE COURT: In June?  
 23 MR. PRITZKER: In June.  
 24 THE COURT: Overruled. I'll allow it.

1 THE COURT: Did you see him again in person?  
 2 THE WITNESS: Yes, I did.  
 3 THE COURT: And that was in the fall?  
 4 THE WITNESS: Either the fall or early  
 5 winter. I think it was November of 2002.  
 6 THE COURT: And how long were you here for  
 7 then?  
 8 THE WITNESS: Again, it would have been a  
 9 long weekend.  
 10 THE COURT: You may describe what you  
 11 observed of his emotional state between the wedding of  
 12 your daughter and the time you returned to the  
 13 Massachusetts area.  
 14 A During this time, he was pleased that he had retained  
 15 counsel and that a suit was being filed. He was  
 16 expecting a settlement offer shortly after --  
 17 MR. GOLDMAN: Objection.  
 18 A -- the driver, Mr. Zalewski --  
 19 THE COURT: Why don't you finish your answer  
 20 , then I'll rule.  
 21 A admitted responsibility for the accident, because that,  
 22 in his mind, established liability, and was expressing  
 23 great frustration that there was no movement in that  
 24 direction at that time. And that was in the fall, I

1 think, perhaps, November of 2002.  
 2 THE COURT: Okay. Mr. Pritzker, how is that  
 3 not hearsay?  
 4 MR. PRITZKER: What I had asked is for his  
 5 emotional state.  
 6 THE COURT: Right. But what's he told you  
 7 was --  
 8 MR. PRITZKER: What he told me went beyond  
 9 that, so I'm --  
 10 THE COURT: So I'm going to strike that  
 11 answer.  
 12 (By Mr. Pritzker)  
 13 Q Let's go back again. Would you --  
 14 THE COURT: I assume Harold Rhodes is  
 15 testifying.  
 16 MR. PRITZKER: Yes, he definitely is going  
 17 to testify.  
 18 (By Mr. Pritzker)  
 19 Q Would you describe how you observed Harold's emotional  
 20 state between the time of your daughter's wedding in  
 21 Ann Arbor, Michigan, and the time in November, whenever  
 22 it was, that Zalewski admitted to facts sufficient to  
 23 warrant a finding of guilty on driving to endanger in  
 24 the fall of --

1 developed a routine of spending a week together in  
 2 Florida playing golf in the wintertime, and we did that  
 3 in January 2003.  
 4 Q And Harold felt up to doing that?  
 5 A Yes.  
 6 Q Were you able to observe his emotional state as of the  
 7 time that you spent that time with him in Florida?  
 8 A Yes.  
 9 Q What was it?  
 10 A At this time I observed increasing frustration on his  
 11 part and distress from the loss of --  
 12 Q How did he manifest the loss?  
 13 A He manifested it through constant and persistent  
 14 questioning about the legal process and why it was  
 15 taking so long, and there was frustration in his voice  
 16 and in his demeanor.  
 17 MR. GOLDMAN: Move to strike, your Honor,  
 18 the part about the questioning and the substance of the  
 19 discussion.  
 20 THE COURT: Overruled. I think that goes  
 21 to state of mind and not to substance, so I will deny  
 22 the motion to strike. You may proceed.  
 23 (By Mr. Pritzker)  
 24 Q At sometime did you become aware of the fact that your

1 MR. GOLDMAN: Objection.  
 2 THE COURT: Obviously I'm prepared to  
 3 strike it if it goes beyond the scope of the emotional  
 4 state.  
 5 MR. MASELEK: It's also leading, your  
 6 Honor.  
 7 THE COURT: Overruled.  
 8 A In that time frame, his emotional state as I observed  
 9 it was one of hopeful expectation.  
 10 (By Mr. Pritzker)  
 11 Q Now, directing your attention to after or around your  
 12 next visit, which was when?  
 13 A We spent time together in Orlando, Florida, I believe  
 14 in January of 2003, and that was the first of five  
 15 opportunities I had to spend with Harold in 2003.  
 16 THE COURT: Was that with or without  
 17 Marcia?  
 18 THE WITNESS: I'm sorry, sir?  
 19 THE COURT: Was that with or without  
 20 Marcia?  
 21 THE WITNESS: Without.  
 22 (By Mr. Pritzker)  
 23 Q What was the occasion?  
 24 A My brother Harold and my brother Mike and I had

1 brother Harold was involved in the process of  
 2 responding to discovery in the underlying action?  
 3 A Yes.  
 4 Q And did you have occasion to speak with him about  
 5 that?  
 6 A Yes.  
 7 Q And did you have occasion to observe his emotional  
 8 state around that time?  
 9 A Yes.  
 10 Q What was it?  
 11 MR. GOLDMAN: Objection.  
 12 THE COURT: I'm trying to get a sense of  
 13 what timeframe we're talking about, so if you narrow  
 14 the timeframe I'll allow the answer, but I need to know  
 15 the timeframe.  
 16 (By Mr. Pritzker)  
 17 Q Do you remember the timeframe?  
 18 A I believe it was through the middle of 2003 and  
 19 perhaps beyond that as far as his answers to  
 20 interrogatories, for example, were concerned.  
 21 Q And what did you observe?  
 22 MR. GOLDMAN: Same objection.  
 23 THE COURT: Overruled. I'm sorry, this is  
 24 by telephone now?

1 THE WITNESS: Well, it would have been by  
2 telephone and I did come to Boston four times during  
3 2003 and spent time with him and observed him during  
4 those visits as well.

5 THE COURT: Those are all weekends or long  
6 weekends?

7 THE WITNESS: Yes, yes, sir.

8 THE COURT: Okay.

9 A What I observed was increasing frustration about the  
10 process. In addition I began to observe anxiety and  
11 distress and frustration about what he perceived of as  
12 an invasion of his privacy that was inherent in the  
13 discovery process. He did not understand why it was  
14 all necessary in light of the circumstances of the  
15 case.

16 MR. GOLDMAN: Objection. Move to strike  
17 the last part.

18 THE COURT: Overruled.

19 (By Mr. Pritzker)

20 Q How did he manifest the frustration that you just  
21 described?

22 A His tone in speaking about the case was a frustrated,  
23 anxious tone; many, many questions about the necessity  
24 of it; and he was never satisfied with any answer that

1 THE COURT: I'm sorry, before and after the  
2 video was taken?

3 MR. PRITZKER: Yes.

4 A I would say more after. I don't think he knew so much  
5 before what it was going to involve.

6 (By Mr. Pritzker)

7 Q Were you aware of the fact that Marcia was interviewed  
8 by a life-care planner for the defendants?

9 A And can you tell me whether or not during that time  
10 period Harold either expressed or you observed his  
11 emotional state relating to that activity.

12 A Yes, I did have an opportunity to observe his  
13 emotional state surrounding that activity.

14 Q And what was it?

15 A Again, it was great frustration, lack of understanding  
16 of its necessity, lack of confidence, The ability of  
17 that person to get it right was also a major theme of  
18 our discussions.

19 MR. MASELEK: Move to strike the last  
20 portion your Honor.

21 THE COURT: I will strike the last  
22 sentence.

23 (By Mr. Pritzker)

24 Q Did you become aware of the negotiation process as the

1 I could provide. As much comfort as I could try to  
2 give and as much patience as I would try to counsel was  
3 not helpful or fruitful.

4 Q During this period of time, how often did you speak  
5 with him?

6 A Daily, and sometimes more than once a day.

7 Q How long did he bring up the subjects you just  
8 described?

9 MR. MASELEK: Objection.

10 THE COURT: Overruled.

11 (By Mr. Pritzker)

12 A Every time. It was the focus of our relationship  
13 through this time period.

14 Q Do you remember that at some point his wife Marcia and  
15 Carol participated in the production of a "Day in the  
16 Life" video?

17 A I do recall that very distinctly.

18 Q And what makes you recall that so distinctly?

19 A Well, in terms of Harold's emotional state, it was  
20 probably the low point of the entire process. He was  
21 extremely - -he expressed extreme distress and upset at  
22 the invasion of privacy that was a part of that video  
23 filming process.

24 Q Did he express that both before and after?

1 case moved along?

2 A Yes.

3 Q And were you aware of the fact that there was a  
4 mediation in August 2004?

5 A I was.

6 Q Were you aware of it before it happened?

7 A Yes.

8 Q Were you aware of it during the process of it  
9 happening?

10 A Yes.

11 Q Were you aware of it after?

12 A Yes.

13 Q And can you tell me what you observed about Harold's  
14 emotional state directly before, during and directly  
15 after the mediation.

16 MR. MASELEK: Objection, your Honor.

17 A Before --

18 THE COURT: Sustained. It's three  
19 questions. Why don't you split them up and do directly  
20 before and then do during and then we'll do after.

21 (By Mr. Pritzker)

22 Q Would you please describe Harold's emotional state  
23 directly before the mediation.

24 A Before the mediation, Harold had great expectation

1 that the mediation would be fruitful in resolving the  
2 litigation. He felt --it was clear that his  
3 expectations were based on the parties coming together  
4 to finally discuss the matter.

5 Q Can you tell --

6 MR. GOLDMAN: If we could move to strike  
7 that last answer, your Honor.

8 THE COURT: Denied.

9 (By Mr. Pritzker)

10 Q Can you tell me what you observed about Harold's  
11 emotional state during the mediation.

12 A We had a telephone conversation during the mediation  
13 and --

14 MR. MASELEK: Objection, your Honor.

15 A -- during that conversation --

16 THE COURT: I'm sorry, there's an  
17 objection.

18 MR. MASELEK: After the objection he went  
19 on to indicate it was based on a telephone conversation  
20 anyway, which I think is one problem.

21 THE COURT: I've already ruled that. That  
22 goes to weight and to admissibility.

23 MR. MASELEK: And your Honor, it also  
24 occurred during the mediation itself and there was a

1 A Yes.

2 Q And would you tell me what you observed of Harold's  
3 emotional state directly after the mediation?

4 A It was the same frustration and despair that I  
5 observed in our conversation during the mediation?

6 Q And again, how did it manifest itself?

7 A In his tone of voice, it was depressed, it was  
8 anxious, and he was frustrated.

9 Q Did you have conversations with Harold about his  
10 financial condition prior to this?

11 A Yes.

12 Q And did you observe any emotional issues with Harold  
13 surrounding his financial issues?

14 THE COURT: I'm sorry, when? I need a  
15 timeframe.

16 MR. PRITZKER: Around the same time of the  
17 mediation.

18 A The financial issue was the primary source of his  
19 frustration at that time. He was deeply concerned that  
20 he would run out of money before getting a settlement  
21 and that this would impair Marcia's recovery and render  
22 him unable to care for her properly as he felt an  
23 obligation to.

24 MR. GOLDMAN: Move to strike, your Honor.

1 mediation agreement.

2 THE COURT: I expect he's not going to  
3 elicit the statements made by the mediator during the  
4 course of it, so.

5 MR. MASELEK: I believe the agreement  
6 indicates that it applies to the whole process.

7 THE COURT: I don't think it bars anybody  
8 from expressing frustration or discussing one's sense  
9 of it after the facts. I'll hear what he has to say,  
10 but if he begins to go into matters which are properly  
11 within the mediation privilege, I will stop him or  
12 strike it, but I don't expect he will.

13 A In my telephone conversation with Harold, which  
14 occurred during the mediation, I once again observed  
15 great frustration. He was extremely emotional at that  
16 time. The tone of his voice and the despair were quite  
17 evident to me.

18 (By Mr. Pritzker)

19 Q What did he tell you?

20 MR. MASELEK: Objection, your Honor.

21 THE COURT: That probably is more  
22 dangerous. Why don't you move on.

23 (By Mr. Pritzker)

24 Q Did you have an opportunity to talk to him directly?

1 THE COURT: Denied, but I will take it only  
2 as to his state of mind.

3 (By Mr. Pritzker)

4 Q Did you learn at some point that the insurers were  
5 requesting independent medical exam of Marcia?

6 A Yes.

7 MR. GOLDMAN: Objection, your Honor. There  
8 is no evidence nor did it happen that Zurich ever  
9 requested a --

10 MR. PRITZKER: I apologize. I misspoke and  
11 I'll withdraw the question.

12 (By Mr. Pritzker)

13 Q Did it come to your attention at some point that AIG  
14 through its defense counsel was requesting an  
15 independent medical exam of Marcia?

16 MR. MASELEK: Objection. Hearsay.

17 THE COURT: It's a yes or a no.

18 A Well, I can't answer it yes or no. I knew that there  
19 was a medical exam being requested.

20 MR. MASELEK: Objection, your Honor.

21 A I didn't know that it was AIG.

22 Q That would have been my next question.

23 A Sorry.

24 Q Did you have an opportunity to speak to Harold about

1 that?  
 2 A Yes.  
 3 Q And did you have an opportunity more than once to  
 4 speak to Harold about that?  
 5 A Yes, many times.  
 6 Q If you had to guess, how many times --  
 7 THE COURT: He's not allowed to guess.  
 8 MR. MASELEK: Objection.  
 9 THE COURT: I think he knows that, too.  
 10 THE WITNESS: I do.  
 11 (By Mr. Pritzker)  
 12 Q How many times had Harold brought up the subject of  
 13 Marcia's independent medical exam? What was your best  
 14 estimate?  
 15 A Four or five before and an equal number after.  
 16 THE COURT: I'm sorry, before and after  
 17 what?  
 18 THE WITNESS: The medical exam.  
 19 (By Mr. Pritzker)  
 20 Q And what did you observe about Harold's emotional  
 21 state as it related to that?  
 22 A Again, great frustration and anxiety. He was  
 23 expressing great concern about this invasion of  
 24 Marcia's privacy, and this was extremely frustrating to

1 Q And is that what you were referring to as to the  
 2 change of Harold's emotional state?  
 3 A Yes.  
 4 Q Now, at some point you learned about the jury verdict?  
 5 A Yes.  
 6 Q How soon after it occurred?  
 7 A Harold called me I think almost right away.  
 8 Q The same day?  
 9 A Yes, certainly the same day.  
 10 Q And at some point did you learn that the defendants  
 11 had filed motions for remittitur or motions to  
 12 reconsider or for remittiturs?  
 13 A Well, Harold didn't use that phraseology, but he did  
 14 tell me that the judge was being requested to review  
 15 the verdict.  
 16 MR. MASELEK: Objection. Move to strike.  
 17 THE COURT: Overruled.  
 18 (By Mr. Pritzker)  
 19 Q And did you learn about the same time that the  
 20 defendants had filed a notice of appeal?  
 21 A Yes.  
 22 Q And were you able to discern Harold's emotional state  
 23 surrounding those events?  
 24 A Yes.

1 him and he did not understand why it was necessary  
 2 given the volume of medical records that had been  
 3 produced by the treating medical care providers.  
 4 MR. MASELEK: Move to strike the last  
 5 portion, your Honor.  
 6 MR. GOLDMAN: Join in that, your Honor.  
 7 THE COURT: Overruled.  
 8 (By Mr. Pritzker)  
 9 Q Did you come to Boston or Massachusetts for any part  
 10 of the trial?  
 11 A Yes.  
 12 Q And during your visit on that occasion did you have an  
 13 opportunity to observe Harold?  
 14 A Yes.  
 15 Q What did you observe?  
 16 A I was here on the first day of the trial when the jury  
 17 was being selected. Harold was expressing some  
 18 reserved expectation that the beginning of the trial  
 19 might result in some further settlement negotiations,  
 20 and when it was clear that that was not happening  
 21 again, he was extremely frustrated and upset.  
 22 Q Were you aware of the offer that had been made post-  
 23 settlement directly prior to the start of the trial?  
 24 A I was.

1 Q What was it?  
 2 A In my telephone conversations with him I observed,  
 3 once again, great frustration. That frustration was  
 4 based on his inability to understand why there would be  
 5 any appeal at all.  
 6 Q And did that change at any period of time?  
 7 A Yes.  
 8 Q When?  
 9 A As -- well, there were two changes. The first was  
 10 there was a settlement, I think with Zurich, and he was  
 11 obviously pleased about that, but at the same time  
 12 didn't understand why AIG wouldn't settle at the same  
 13 time. My recollection is that it took a long time  
 14 after the Zurich's settlement for AIG to settle and he  
 15 was extremely frustrated by that.  
 16 Q Aside from being frustrated, did he express to you  
 17 anything in particular as it related to AIG?  
 18 A Yes. And he was frustrated and concerned that AIG was  
 19 not dealing with him in good faith.  
 20 MR. MASELEK: Move to strike, your Honor.  
 21 THE COURT: Sustained.  
 22 (By Mr. Pritzker)  
 23 Q During the trial did you talk to -- directly before  
 24 the trial did you talk to Harold about his feelings of

1           subjected Marcia and Rebecca to the trial process?  
 2           MR. MASELEK: Objection.  
 3 A       Yes, we did have conversation with him.  
 4           THE COURT: Overruled as to the answer yes.  
 5 (By Mr. Pritzker)  
 6 Q       What were they?  
 7           MR. MASELEK: Objection.  
 8           THE COURT: How is he in a better position  
 9       to describe that than Mr. Rhodes himself?  
 10          MR. PRITZKER: I'm in a better position,  
 11       your Honor, but in an independent position, and it's  
 12       admissible.  
 13          THE COURT: He may describe the tone of voice  
 14       of Mr. Rhodes and other things that he did observe as  
 15       to his emotional condition when he discussed it, but  
 16       not the content of what he said.  
 17 (By Mr. Pritzker)  
 18 Q       Do you understand that , Mr. Rhodes?  
 19 A       Yes.  
 20 Q       Would you answer the question?  
 21 A       He was frustrated and anxious about the trial process  
 22       and especially Marcia and Rebecca's testimony. He  
 23       expressed --  
 24          MR. MASELEK: Objection, your Honor.

1 Q       And they continue to be upsetting to him throughout --  
 2       up until today; isn't that right?  
 3 A       Yes.  
 4 Q       At no point did your brother -- you know, everything's  
 5       as good as it was before the accident.  
 6 A       No, of course not.  
 7 Q       And in fact, Mrs. Rhodes continues in a terrible state  
 8       even today as a result of this terrible accident; isn't  
 9       that right?  
 10 A       She's paralyzed.  
 11 Q       All right. And your brother needs to continue to help  
 12       take care of her, right?  
 13 A       Provide for her care.  
 14 Q       And that's upsetting to him, isn't it?  
 15 A       I'm sure he would prefer it otherwise.  
 16 Q       Now, while you were speaking with your -- and in  
 17       addition to talking with your brother, being a good  
 18       brother, you also acted as his lawyer throughout the  
 19       lawsuit, didn't you?  
 20 A       I'll tell you what I did and you can tell me if that's  
 21       acting as his lawyer.  
 22 Q       Well, why don't you tell me whether you acted as his  
 23       lawyer.  
 24          MR. PRITZKER: Objection.

1           THE COURT: Just what you observed.  
 2 A       I observed sorrow on his part, that it was necessary  
 3       for them to go through that.  
 4 (By Mr. Pritzker)  
 5 Q       In your observations of your brother since the last  
 6       payments were made, have you observed changes in his  
 7       emotional state?  
 8 A       Yes.  
 9 Q       In what manner?  
 10 A       He is happy again. The frustration and anxiety has  
 11       abated, and he's -- his emotional state is improved and  
 12       recovered.  
 13 Q       As to his emotional state -- strike that.  
 14           I have no further questions, your Honor.  
 15          THE COURT: Okay. Ms. Sackett or Mr. Varga,  
 16       on behalf of Zurich, or Mr. Goldman?  
 17          MR. GOLDMAN: Yes.  
 18 CROSS-EXAMINATION BY MR. GOLDMAN:  
 19 Q       Judge Rhodes, you said you spoke with your brother on  
 20       almost a daily basis; is that right?  
 21 A       Yes, sir.  
 22 Q       And I gather this accident and the horrific injuries  
 23       that Mrs. Rhodes sustained were upsetting to him?  
 24 A       Yes.

1           THE COURT: Sustained. It is a more  
 2       complicated question when it's a judge who's doing it.  
 3       If you wish him to describe what he did, then you may  
 4       do that.  
 5 (By Mr. Goldman)  
 6 Q       Let me ask it this way, Judge Rhodes. Did you provide  
 7       legal advice to your brother?  
 8 A       In the sense of discussing legal issues and talking  
 9       about legal procedure, yes.  
 10 Q       And in fact, in your deposition you were asked: How  
 11       did you serve as an attorney? And you answered: I  
 12       provided legal advice to Harold. Isn't that right?  
 13 A       Yes.  
 14 Q       So I assume that these daily discussions involved not  
 15       just issues of personal stress and concerns, but also  
 16       many of them concerned discussing the legal issues and  
 17       the status of the litigation and what was happening,  
 18       right?  
 19 A       Yes. He would periodically ask me questions of  
 20       procedure and law.  
 21 Q       Now, you in fact, though, were never aware that a \$2  
 22       million offer had been made until sometime after the  
 23       medication; isn't that correct?  
 24 A       I believe I became aware of that at the time of the

1 mediation.

2 Q And the mediation was in August of 2004, right?

3 A Yes.

4 Q Now, no one from the defendants, to your knowledge,

5 ever required your brother and his wife to do a "Day In

6 The Life" video, did they?

7 A I don't know.

8 Q And in fact, you continually, through this litigation

9 process, urged your brother to be patient; isn't that

10 correct?

11 A I did.

12 Q And in fact, one of the things you told your brother

13 was that you really can't expect a settlement offer

14 until we present the damages and the documentation of

15 what's happened; isn't that right?

16 A I probably didn't use those words, but that would have

17 been the thought that I expressed, yes.

18 Q And in fact, you thought that the settlement offer

19 ought to made someplace in the middle, not right at the

20 beginning and not at the end of the litigation; isn't

21 that right?

22 A Yes.

23 Q Now, you're aware, are you not, that no settlement, no

24 damage information was provided at all until the

1 production is a normal part of the litigation

2 process; is that right?

3 A It is.

4 Q Now, just a few other questions. You testified

5 about your brother's state of mind as you

6 understood it during the days before, during and

7 after the trial, but it's true, is it not, that

8 your brother had no worries about trying the

9 case?

10 A No worries about the outcome of the case.

11 Q In fact, in your deposition you testified that

12 he didn't like that he had to go to trial, he

13 felt the case should have been settled before

14 trial. and he had no worries about trying the

15 case; isn't that right?

16 A I don't recall that specific language, but if

17 you're reading from the transcript, I will

18 accept it.

19 Q Let me just ask you this. Do you remember being

20 asked this question and giving this answer:

21 Question: Did Harold ever share with

22 you any concerns or worries he had about going

23 to trial?

24 Answer: No. He didn't like that he

1 interrogatories were entered in April of 2003; is that

2 correct?

3 A Okay. If you're asking me when the interrogatories

4 were answered, I don't know that, and I don't know when

5 this information that you're referring to was made

6 available.

7 Q Okay. But one of the things you described that your

8 brother is particularly upset about was having to come

9 up with all the information about the injuries and how

10 this had impacted his life and his wife's life,

11 correct?

12 A He was upset at the detail and how much time it took

13 him to respond to the interrogatories, if that's what

14 you're referring to.

15 Q Correct. That's what I was referring to.

16 Now, you as a practicing lawyer, before you

17 became a judge and then as a federal magistrate and

18 then as a bankruptcy judge, are experienced with the

19 litigation process; is that fair to say?

20 A Yes.

21 Q Very experienced?

22 A Yes.

23 Q More experienced than most, right? And

24 answering interrogatories or requests for

1 had to go to trial. He felt that the case

2 should have settled before trial, but no worries

3 about trying the case.

4 Do you remember being asked that

5 question and giving that answer?

6 A I do not.

7 MR. GOLDMAN: Your Honor, I have a

8 marked copy, but I'd like to offer that page --

9 or that question and answer from the transcript.

10 THE COURT: I've heard it. We're not

11 going to be admitting each page of a deposition

12 in which you think you score a point or

13 plaintiff thinks they score a point. So, I'm

14 listening, taking careful notes and I know that

15 you are ordering daily transcripts, so it's

16 going to be in all kinds of places.

17 MR. GOLDMAN: I have no further

18 questions.

19 THE COURT: All right, anybody from AIG

20 or National Union.

21 CROSS-EXAMINATION BY MR. MASELEK:

22 Q Good morning, Mr. Rhodes. My name is Robert

23 Maselek. We met earlier in Detroit. I just

24 have a few follow-up questions for you.

1 Other than anything that Harold Rhodes  
2 told you, do you have any basis to attribute any  
3 of this emotional distress that you observed to  
4 anything that AIG Domestic Claims or Technical  
5 Services did?  
6 A Absolutely.  
7 Q You do have a basis other than from what Mr.  
8 Rhodes told you?  
9 A Yes.  
10 Q Did you have any conversations with anybody from  
11 AIG Technical Services?  
12 A No.  
13 Q Did you have any conversations with anybody from  
14 National Union?  
15 A No.  
16 Q Are you aware that at the time the "Day in the  
17 Life" video was prepared, that Mr. Rhodes'  
18 counsel had not presented a settlement demand to  
19 the carriers?  
20 A I do not recall the exact sequence of that.  
21 Q Okay.  
22 MR. MASELEK: Do we have Exhibit 10  
23 available to show the witness?  
24 THE COURT: You may borrow mine.

1 Q Okay. Are you aware that at the time of the  
2 mediation that you testified about earlier, the  
3 Rhodes family received a settlement of \$550,000  
4 from another defendant involved in the case?  
5 A Yes.  
6 Q Fair to say that at least that would have  
7 lessened Mr. Rhodes' financial worries?  
8 MR. PRITZKER: Objection.  
9 THE COURT: He may testify to what he  
10 observed of his brother's reaction to that.  
11 A He was happy and pleased to have it, but he  
12 expressed that -- I observed that he was still  
13 in great emotional distress about his financial  
14 circumstances.  
15 Q Are you aware that during the course of the  
16 trial the Rhodes received a settlement offer of  
17 \$6 million?  
18 A Yes.  
19 Q And that that offer was rejected?  
20 A Yes.  
21 Q Okay. And are you aware that that offer was  
22 rejected because the Rhodes believed that the  
23 trial went in as best as it possibility could?  
24 MR. PRITZKER: Objection.

1 (By Mr. Maselek)  
2 Q Mr. Rhodes I'd ask you to take a look at Exhibit  
3 10, if you would please?  
4 A Yes, sir  
5 Q I call your attention to the date of the letter?  
6 A August 13, 2003.  
7 Q Have you seen that document before?  
8 A I do not recall seeing this document.  
9 Q Okay. If you take a moment to review the  
10 document -- please take a moment to review the  
11 document. Does that appear to be a settlement  
12 demand?  
13 MR. PRITZKER: Objection. We will  
14 stipulate that it's a settlement demand.  
15 THE COURT: I think we all know it is,  
16 so let's move on.  
17 (By Mr. Maselek)  
18 Q Other than Exhibit 10, are you aware of any  
19 settlement demands Mr. Rhodes' counsel made  
20 prior to Exhibit 10?  
21 A Well, as I say, I don't recall the timing of  
22 settlement demands. I know that settlement  
23 demands were made, but the timing of it is vague  
24 to me at this point.

1 THE COURT: If he's brother expressed  
2 that to him, he may answer.  
3 A Yes.  
4 MR. MASELEK: That's all I have, your  
5 Honor.  
6 THE COURT: Any further questions?  
7 MR. PRITZKER: Yes, your Honor.  
8 THE COURT: Within the scope of the  
9 cross.  
10 MR. PRITZKER: Yes.  
11 REDIRECT EXAMINATION BY MR. PRITZKER  
12 Q On that \$6 million settlement, Judge Rhodes, are  
13 you aware that that was on the last day of trial?  
14 A Yes.  
15 Q After all the evidence was in?  
16 A Yes.  
17 Q And did your brother also express not only his  
18 pleasure with the way the case had gone in, but  
19 the factor of interest?  
20 A Yes.  
21 Q And what was that conversation?  
22 MR. VARGA: Objection.  
23 THE COURT: Sustained.  
24 (By Mr. Pritzker)

1 Q Did you know that the factor of interest played a  
2 part in your brother's decision not to accept the  
3 \$6 million?  
4 A Yes.  
5 MR. PRITZKER: I have no further  
6 questions, your Honor.  
7 THE COURT: Any further questions of  
8 counsel?  
9 MR. VARGA: Not for me, your Honor.  
10 THE COURT: All right. Thank you, Judge  
11 Rhodes.  
12 All right. Wave Ms. Fuell back.  
13 Ms. Fuell as you know you remain under  
14 oath. Is this day four for you, Ms. Fuell?  
15 THE WITNESS: Yes.  
16 THE COURT: Did you find your flight?  
17 THE WITNESS: Yes.  
18 THE COURT: All right. We will get  
19 your on that airplane.  
20 THE WITNESS: My husband thanks you.  
21 THE COURT: Mr. Zelle, I believe.  
22 MR. ZELLE: Yes, thank you, your Honor.  
23 Are the exhibits available? Are the  
24 exhibit books there?

1 still questions as to coverage from other sources; is  
2 that right?  
3 A I was pursuing all of that simultaneously, yes.  
4 Q Now if you look at the BI report, I'd like to direct  
5 your attention to the chart on page 4?  
6 A Yes.  
7 Q As of the time you prepared that report you had a  
8 settlement demand package, Exhibit 10, correct?  
9 A Correct.  
10 Q And the settlement demand package specifies that past  
11 medical bills were \$413,997, right?  
12 A Correct.  
13 Q So that on that first line the past medical bills in  
14 each line should be \$413,000, right?  
15 A Yes, it should have been.  
16 MR. PRITZKER: What Exhibit?  
17 MR. ZELLE: I'm looking at Exhibit 19, the BI  
18 report, the chart.  
19 (By Mr. Zelle)  
20 Q And the next line says future medical bills, and the  
21 demand letter also reflected the future medical costs  
22 that were in fact claimed by the plaintiff, right?  
23 A Correct.  
24 Q And you have a life-care planner to assess those,

1 THE COURT: I don't know. They were  
2 moved to the floor because we had a mock trial  
3 here last night, but we can get them all squared  
4 away for you. I believe at the moment you were  
5 going to show a chalk, correct?  
6 MR. ZELLE: I've done a little work, I  
7 think I've pared things down, so we are going to  
8 move on directly to Exhibit 19, the BI report.  
9 THE COURT: Okay. When you get that, you  
10 can turn to Exhibit 19, Ms. Fuell.  
11 THE WITNESS: I have it, thanks.  
12 MR. ZELLE: Okay.  
13 KATHLEEN FUELL, Resumed  
14 CROSS-EXAMINATION BY MR. ZELLE, Continued.  
15 Q Ms. Fuell, was it your primary objective from the time  
16 that you reviewed the settlement demand package to  
17 pursue authority from your supervisor to make an offer  
18 of \$2 million?  
19 A It was my objective to get settlement authority and to  
20 try to bring AIG in on board so that we could work  
21 together to present a settlement offer.  
22 Q All right. And you were really focused on pursuing,  
23 obtaining the authority and getting AIG on board to get  
24 a settlement offer despite the fact that there were

1 right?  
2 A Yes.  
3 Q But you used the plaintiffs' numbers, or it was your  
4 intent for the purpose of this chart, to use the  
5 plaintiffs' numbers?  
6 A I used the numbers that I had available to me from  
7 counsel, defense counsel and -- yes, I used the demand  
8 package primarily.  
9 Q Okay. But the future medicals, those numbers, were  
10 those just the numbers that you believe came from the  
11 demand package or was that comparing their plaintiffs'  
12 demand package with what you had from defense counsel  
13 and figuring it out for yourself?  
14 A I looked at everything that I had available and figured  
15 it out for myself.  
16 Q Okay. The amount claimed for future medicals in the  
17 demand package from the plaintiffs was \$2,027,000; is  
18 that right? You can look at Exhibit 10, if you like.  
19 It's page 14 -- I'm sorry, 15.  
20 A I don't have anything in Exhibit 10.  
21 Q Let me see if I can help you. This monster is Exhibit  
22 10. Let me make a suggestion. We can take this out.  
23 A Okay That would be great.  
24 Q We won't be using this any further, so we'll put this

1 on the floor for you.  
 2 A Thank you.  
 3 Q And I don't think we're going to need this one and I'll  
 4 move this for you as well.  
 5 It's page --  
 6 A Fifteen, I think you said.  
 7 Q I think that's right.  
 8 A Yes, with the present value with 33.8 years remaining  
 9 would be 2.297 million. Does that answer -- what was  
 10 your question?  
 11 Q My question is, is what's reflected there the future  
 12 medicals, 2,027,000?  
 13 A Yes, the average present value of combined future  
 14 needs.  
 15 Q Okay.  
 16 A Yes, sorry.  
 17 Q And that was an average of maximum and minimum?  
 18 A Right.  
 19 Q Okay. And on your chart, under future medicals bills,  
 20 you have three numbers. One is the ten percent, one is  
 21 the 50 percent, one is the 10 percent, high. Wouldn't  
 22 the high be what they're claiming? Isn't that, in your  
 23 experience, what you use for the high, what the  
 24 plaintiff is claiming?

1 Exhibit 10 on page 16, there should be a line that adds  
 2 up all of the total economics, past and future. And  
 3 the total claimed by the plaintiffs is \$2,817,418,  
 4 right?  
 5 A Right.  
 6 Q Is it fair, then, that that number, that 2.8 million  
 7 should be as -- that is the number claimed by  
 8 plaintiffs, the total of past medical bills, future  
 9 medical bills, all economic losses, in that right-hand  
 10 column?  
 11 A The total damages that were being presented by Mr.  
 12 Pritzker were 2.8 million, yes.  
 13 Q Okay. And typically is that what you want to have in  
 14 the right-hand column as the highest estimated value?  
 15 A For the damages --  
 16 Q Right.  
 17 A -- the general damages, right.  
 18 Q And just to be clear, for general damages, I'm using  
 19 the term "economic damages"?  
 20 A For economic damages, correct.  
 21 Q Okay. Now, I'd like to focus your attention on the  
 22 pain and suffering column, or I guess that's a row,  
 23 having limited knowledge of Excel. In your experience  
 24 have you found that pain and suffering awards vary

1 A Yes.  
 2 Q So instead of four million, that should have been  
 3 2,027,000?  
 4 A Yes.  
 5 Q All right. And I'd like to ask you did, you factor --  
 6 you filled in this chart and you tried to obtain what  
 7 is referred on this exhibit as the estimated value of  
 8 total damage award, right?  
 9 A Right.  
 10 Q And obviously that included more than just plunking  
 11 numbers into a chart; that included thought processes  
 12 on your part, correct?  
 13 A Yes.  
 14 Q Where do you factor in economic damages such as the  
 15 renovations to the Rhodes' home or other type of  
 16 lifestyle accommodations, such as needing a handicapped  
 17 modified vehicle, that sort of thing?  
 18 A Given that the space on the spreadsheet is limited, I  
 19 factored it in in future bills.  
 20 Q Okay. So that under the future bills, you're referring  
 21 not just to medical but all future economic damages  
 22 that are being claimed?  
 23 A Yes.  
 24 Q And that number, again you can direct your attention to

1 based on the venue?  
 2 A Yes, they do.  
 3 Q And was that factored into your calculation?  
 4 A Yes, it was.  
 5 Q You've identified, beginning at the bottom of page 4  
 6 and carrying over to page 5, four cases. One is a  
 7 Rhode Island case that's identified on the bottom of  
 8 page 4 and on the top of page 5 you begin and you  
 9 identify three Massachusetts cases, right?  
 10 A Right.  
 11 Q And the Massachusetts cases reflect verdicts obtained  
 12 in Massachusetts, one of which was \$3.630 million; one  
 13 of which was \$2 million; and one of which is \$4.514  
 14 million, right?  
 15 A Yes.  
 16 Q And on the first page you identify a Rhode Island  
 17 verdict and the verdict is \$19 million, correct?  
 18 A Correct.  
 19 Q And going back up to your estimated value, that's a  
 20 heck of a lot closer, that \$17 million is a heck of a  
 21 lot closer to the Rhode Island verdict, right?  
 22 A Right.  
 23 Q Can you explain to the court what you did to compare  
 24 the venue of that Rhode Island verdict and the

1 Massachusetts venues?  
 2 MR. PRITZKER: Objection.  
 3 THE COURT: Overruled.  
 4 A I had been -- the Rhode Island verdict wasn't something  
 5 that I could find. I knew Rhode Island was close to  
 6 Massachusetts, so there were -- it was a geographically  
 7 close venue, but beyond that I was looking specifically  
 8 for Massachusetts, if I could find it.  
 9 I haven't had a lot of cases in Rhode Island  
 10 to know if it's liberal or not.  
 11 (By Mr. Zelle)  
 12 Q Okay. What did you know about Norfolk?  
 13 A About Massachusetts?  
 14 Q Norfolk County, Massachusetts.  
 15 A I know that it's outside of Boston so it's going to be  
 16 anything outside of the bigger city area. I didn't  
 17 know a lot about Norfolk, either, I'm sorry.  
 18 Q Have you ever had a case, Ms. Fuell, in which there was  
 19 an \$11 million pain and suffering award?  
 20 A That went --  
 21 Q Verdict, I'm talking about.  
 22 A No.  
 23 Q In putting together your assessment of the pain and  
 24 suffering, were you aware that in that case that

1 in the form of scarring over 10 percent of her body?  
 2 A No.  
 3 Q Were you aware that the plaintiff in that case had  
 4 sustained significant head trauma and had permanent  
 5 cognitive impairment?  
 6 A No.  
 7 Q Were you aware that the plaintiff in that case was  
 8 permanently institutionalized?  
 9 A No, I was not.  
 10 Q Were you aware in that case that the plaintiff's child  
 11 died soon after the accident?  
 12 A No, I wasn't.  
 13 Q I'd like to know, is that the type of factor that you  
 14 would consider in assessing how a jury could come back  
 15 and putting in a pain and suffering figure on your  
 16 chart?  
 17 A Yes.  
 18 Q Did you know that the defendant in that Rhode Island  
 19 case -- the defendant now -- was an intoxicated minor?  
 20 A No, I didn't.  
 21 Q Did you know that this defendant refused to take a  
 22 breath test at the scene of the accident?  
 23 A No.  
 24 Q You did know -- strike that. Did you know that it was

1 returned a \$19 million verdict, that the plaintiff was  
 2 claiming more than \$1 million in specials?  
 3 MR. PRITZKER: Objection.  
 4 THE COURT: Overruled.  
 5 A No, I wasn't.  
 6 (By Mr. Zelle)  
 7 Q I misspoke. In past medical costs, were you aware that  
 8 there was more than \$1 million in past medical costs?  
 9 A No.  
 10 Q Were you aware that in that case the plaintiff was  
 11 claiming more than \$5 million in future medical costs?  
 12 A No, I wasn't.  
 13 Q Were you aware that there was a lost wage claim of  
 14 nearly \$400,000?  
 15 A No, I wasn't.  
 16 Q Were you aware that the plaintiff in the Rhode Island  
 17 case was a tetraplegic. Do you know what that means?  
 18 A I haven't had anyone who has been --  
 19 Q That the plaintiff in that case was paralyzed from the  
 20 chest down, had no use of use of her legs, and had  
 21 limited use of her arms?  
 22 A I was not aware of that.  
 23 Q Were you aware that the plaintiff in the Rhode Island  
 24 case had third-degree burns and permanent disfigurement

1 a collision between the defendant's car and the  
 2 plaintiff's parked car?  
 3 A No, I didn't.  
 4 Q Did you know that the defendant in that Rhode Island  
 5 case was sitting in his car while the plaintiff was  
 6 being pulled out of the car by a bystander?  
 7 A No.  
 8 Q Are these factors things that you like to consider, or  
 9 that you do consider in determining pain and suffering  
 10 awards?  
 11 A Yes, they are.  
 12 Q And your knowledge of the insurance industry, is that  
 13 standard practice to consider all of the type of  
 14 factors that I've gone through with you?  
 15 A Absolutely, yes.  
 16 Q In determining the estimated value of the total damage  
 17 award in the Rhodes claim, did you consider how the  
 18 jury would view the Rhodes family?  
 19 A Yes, I would.  
 20 Q Were you aware that prior to the accident, each member  
 21 of the Rhodes family had been receiving some form of  
 22 psychological counseling?  
 23 A I knew Mrs. Rhodes had been receiving some  
 24 psychological counseling.

1 Q You didn't know whether the other --  
 2 A I did not know that.  
 3 Q Did you know that there were some marital discord  
 4 between the Rhodeses?  
 5 MR. PRITZKER: Objection, your Honor.  
 6 THE COURT: Overruled.  
 7 A No, I didn't know that.  
 8 (By Mr. Zelle)  
 9 Q Are there, in your experience, types of injuries that  
 10 historically generate higher jury verdicts or higher  
 11 settlements than paraplegic cases?  
 12 A Paraplegic is in the top end of the range; fatalities,  
 13 yes.  
 14 Q I'll ask you --  
 15 A I'm sorry, I'm not quite sure what you're asking me.  
 16 Q Again, in just your experience, do cases involving  
 17 serious burn injuries generally return verdicts in  
 18 excess of those returned in paraplegic cases?  
 19 A Yes, they would.  
 20 MR. PRITZKER: Objection.  
 21 THE COURT: Overruled.  
 22 (By Mr. Zelle)  
 23 Q Do cases involving severed limbs or amputations  
 24 generally return higher verdicts than paraplegic cases.

1 A Yes, it does.  
 2 Q In comparing a defendant's conduct, do you generally  
 3 put a higher value on a case where the defendant in an  
 4 accident called an ambulance and assisted a plaintiff  
 5 in getting out of further harm's way than a defendant  
 6 who would have fled the scene?  
 7 MR. PRITZKER: Objection.  
 8 THE COURT: Overruled.  
 9 A I would have put a higher value on the case where the  
 10 defendant fled the scene.  
 11 MR. ZELLE: I may have misspoken.  
 12 THE COURT: I know what her answer is, so  
 13 regardless of the question, I've got the answer.  
 14 MR. ZELLE: That's fine.  
 15 (By Mr. Zelle)  
 16 Q Did you factor in Mr. Rhodes pre-accident physical  
 17 condition in assessing the settlement value?  
 18 A Yes.  
 19 Q And did you factor in her pre-accident mental and  
 20 emotional condition?  
 21 A Yes, I considered that.  
 22 Q Were you aware there had been an effort to obtain  
 23 psychological records?  
 24 MR. PRITZKER: Objection.

1 MR. PRITZKER: Objection.  
 2 THE COURT: Overruled.  
 3 A Yes, they can.  
 4 (By Mr. Zelle)  
 5 Q Do quadriplegic cases generally return higher verdicts?  
 6 MR. PRITZKER: Objection.  
 7 THE COURT: Overruled.  
 8 A Than a paralysis, yes.  
 9 (By Mr. Zelle)  
 10 Q How about brain damage cases, do those generally return  
 11 high jury verdicts and generate high settlements than  
 12 paraplegic cases?  
 13 MR. PRITZKER: Objection.  
 14 THE COURT: Overruled.  
 15 A Yes, they would.  
 16 (By Mr. Zelle)  
 17 Q In determining the estimated value of the Rhodes award,  
 18 did you consider the fact that Mr. Zalewski had  
 19 expressed sympathy and sought to apologize to the  
 20 Rhodeses?  
 21 A No, I didn't know that.  
 22 Q Does the character of the defendant factor into your  
 23 assessment of the reasonable settlement value or the  
 24 assessment of a potential jury verdict?

1 THE COURT: Overruled.  
 2 A Yes.  
 3 (By Mr. Zelle)  
 4 Q And were you aware that those have not been produced?  
 5 A Yes.  
 6 MR. PRITZKER: Objection, your Honor. They  
 7 were not produced because of court orders.  
 8 MR. ZELLE: That's right.  
 9 THE COURT: My understanding is that the  
 10 plaintiff in that case said they were going to be  
 11 limited to garden-variety damages, and the court said  
 12 in that case we're not going to require disclosure of  
 13 prior psychiatric records, correct?  
 14 MR. PRITZKER: Thank you.  
 15 THE COURT: Is that right?  
 16 MR. PRITZKER: That is correct.  
 17 MR. ZELLE: That's my understanding.  
 18 (By Mr. Zelle)  
 19 Q And Ms. Fuell, you nevertheless had to perform your  
 20 obligations and put a value on this case despite the  
 21 fact that you had sought certain information; you  
 22 believed that that information was significant but you  
 23 didn't have it?  
 24 A Correct.

1 Q In undertaking your effort to establish the estimated  
2 value of the total damage award, did you consider the  
3 post-accident condition, at least as of the time you  
4 were reviewing the file, the post-accident condition of  
5 Mr. Rhodes?  
6 A Yes, I did.  
7 Q And was it your understanding at that time she hadn't  
8 yet begun rehabilitation?  
9 A I knew that she had spent a few months in a  
10 rehabilitation center and she was receiving ongoing  
11 rehabilitation.  
12 Q Let me ask you, at that time you undertook your  
13 evaluation, was it your understanding that Mrs. Rhodes  
14 had not reached an endpoint in terms of her recovery?  
15 A That was my understanding.  
16 Q And in your experience is it easier to assess value  
17 where a plaintiff has reached an endpoint in terms of  
18 their recovery?  
19 A Yes, that's my experience.  
20 Q Did you in assessing the estimated value of the total  
21 damages award, did you consider Mrs. Rhodes pre-  
22 accident level of social interaction? What I mean is,  
23 you know, that she went to flea markets, or other -- we  
24 know that she did. Were you aware of that?

1 A What information I have that's available that's  
2 exhibiting how they are dealing with it after the  
3 accident.  
4 Q Let me give you an example. There is a wide range of  
5 manners in which people deal with injuries. Some, to  
6 use a very general term, are fighters and they really  
7 fight to get as much of their life back as they can,  
8 and others are quitters and they just don't have any  
9 resolve to get out of bed. Is that something that you  
10 try to factor into your assessment?  
11 A Yes.  
12 THE COURT: How does that affect your  
13 evaluation of what the case's settlement value  
14 is worth?  
15 THE WITNESS: It gives me an idea of  
16 what they might do going forward, if they'd be  
17 able to regain some of their activities, if  
18 they'd be able to get back out into their normal  
19 activities of life.  
20 THE COURT: So a fighter has a lower  
21 settlement value than a quitter?  
22 THE WITNESS: Well, no, but it's the  
23 quality of their life after the fact that would  
24 impact that.

1 A Yes.  
2 Q That's what I mean by social interaction, her  
3 activities. Did you look at that in determining your  
4 evaluation?  
5 A Yes.  
6 Q And at that time you didn't have Mrs. Rhodes'  
7 deposition, did you?  
8 A No.  
9 Q So you really couldn't explore, or at least you didn't  
10 have the information to explore how the accident  
11 affected her in terms of social interaction?  
12 A Correct.  
13 Q Would you have liked to have the deposition?  
14 A I would have liked to have had further information of  
15 that nature.  
16 Q In assessing the estimated value of the total damage  
17 award, do you consider the plaintiffs, and where there  
18 are consortium plaintiffs, the family's resolve to get  
19 on with their lives?  
20 A Yes.  
21 Q That's a difficult factor to consider. Can you give me  
22 a sense as to what you think about?  
23 A As to their resolve to get on with their life?  
24 Q Right.

1 THE COURT: "Impact"?  
2 THE WITNESS: Whether they're a fighter  
3 or a quitter would they be able to resume their  
4 social activities, their work activities. If  
5 somebody is a fighter they might get back into  
6 that routine faster than somebody who is getting  
7 somewhat consumed.  
8 THE COURT: Would that affect your  
9 evaluation of the settlement value of the case?  
10 THE WITNESS: I would consider it.  
11 THE COURT: And how would it play? If  
12 someone's a fighter would that increase or lower  
13 a settlement value?  
14 THE WITNESS: If you have a permanent  
15 injury like this, if somebody is a fighter, I  
16 would think that it would benefit -- it would  
17 reduce the settlement value.  
18 THE COURT: And did you come to a view  
19 as to whether Mrs. Rhodes was a fighter or a  
20 quitter?  
21 THE WITNESS: No, I didn't. I couldn't  
22 tell.  
23 MR. ZELLE: I would beg the court's  
24 indulgence, but if you could give me a chance, I

1 think I could flush that out. And I think as  
2 part of the adversary process, I ought to be  
3 given a chance to bring it out.

4 THE COURT: You can bring it out, but  
5 it's me who has to decide.

6 MR. ZELLE: I understand. I'm  
7 suggesting you give me a chance.

8 THE COURT: Fine. If it didn't play  
9 out the way you wanted to, I'm sorry.

10 MR. ZELLE: No, it did, your Honor,  
11 quite to the contrary.

12 THE COURT: Well, then I've saved you  
13 some time and money. Let's proceed.

14 MR. ZELLE: All right.

15 THE COURT: Okay.

16 (By Mr. Zelle:)

17 Q My question, Ms. Fuell, is you can't really put  
18 a higher value on someone because they're a  
19 fighter or a lower value on someone because  
20 they're a quitter, because it's a difficult  
21 factor to consider and it's just something that  
22 you have to assess, and it's a very difficult  
23 factor.

24 A It's a very -- an intangible factor.

1 Q And sometimes a quitter may be more sympathetic  
2 than a fighter, right?

3 A Sometimes.

4 Q And sometimes a fighter may be more sympathetic  
5 than a quitter; in fact, get a higher award  
6 because a jury perceives that fighter as someone  
7 who is going out and getting on with his life  
8 and they return that or they translate that into  
9 a greater monetary award; isn't that right?

10 A Yes.

11 Q Did you consider in your assessment the family  
12 dynamic as to how the family, the Rhodes family,  
13 interacted before the accident and how they  
14 interacted after the accident?

15 A I looked for that information; I didn't really  
16 have a lot of that background information.

17 Q Okay. And you would have been able -- strike  
18 that. Would you have been able to do a more  
19 thorough analysis if you had the depositions of  
20 Mrs. Rhodes and Rebecca Rhodes at the time you  
21 did your assessment?

22 MR. VARGA: Objection, your Honor.

23 THE COURT: Overruled.

24 A That would have been one thing that I would have

1 looked at. It wasn't the only factor that would  
2 give me information their family dynamics.

3 (By Mr. Zelle)

4 Q What else do you look at to get a handle on  
5 family dynamics before and after the accident?

6 A I could look at the hospital records to see what  
7 any notations about the family interplay while  
8 the person was in the hospital, any court  
9 records, whether there was any history of family  
10 issues.

11 MR. PRITZKER: Your Honor, I would  
12 assert an objection. The defendant didn't put a  
13 line item in here for loss of consortium.

14 THE COURT: I mean, she didn't in this  
15 chart. Right, I understand that. I understand  
16 that.

17 I'll give you some leeway. We are  
18 going well beyond -- she's not testifying here  
19 as an expert. So I'll give you some leeway, but  
20 I think we're getting a little bit far afield.  
21 We do need to get her on that flight. So you  
22 may proceed, Mr. Zelle.

23 MR. ZELLE: Thank you, your Honor.

24 (By Mr. Zelle:)

1 Q I'll turn to the issue of, Ms. Fuell, another  
2 issue here. Under the terms of the Zurich  
3 policy, the policy provided that -- it was your  
4 understanding -- well, strike that.

5 Under the terms of the Zurich policy,  
6 if Zurich or when Zurich tenders a policy limit,  
7 do the responsibility to pay for defense costs  
8 shift to GAF?

9 A There's specific wording in the policy that -- I  
10 forget the exact wording -- that says if we make  
11 -- I don't remember the exact wording. There's  
12 a certain point in time that if we make --  
13 satisfy a judgment or tender our policy limits  
14 that those defense obligations end.

15 Q Okay. If you would direct your attention to  
16 Exhibit 61, the Bates number is BMCA80. And I  
17 just want to know if the language you're  
18 referring to is on that page, and if so, if you  
19 can point it out to the court?

20 MR. PRITZKER: What page again?

21 MR. ZELLE: It's BMCA0080.

22 A BMCA -- what was the --

23 (By Mr. Zelle:)

24 Q 0080. I can point it out.

1 MR. ZELLE: Here you go, Mr. Pritzker.  
 2 (By Mr. Zelle:)  
 3 Q It's this language right here. And you can just  
 4 read it to yourself and let us know whether  
 5 that's the language you're referring to. It's  
 6 under "Coverages," and it's in that middle  
 7 paragraph. It begins with "We may end our  
 8 duty"?  
 9 A Correct. Yes, I see it.  
 10 Q That's the language you're referring to?  
 11 A Uh-hum.  
 12 MR. ZELLE: Do you need another minute,  
 13 your Honor?  
 14 THE COURT: No, go ahead.  
 15 (By Mr. Zelle:)  
 16 Q Is it your understanding, Ms. Fuell, just based  
 17 on your experience, that before a primary  
 18 carrier tenders its policy limit or offers its  
 19 policy limits to the plaintiff, that an excess  
 20 carrier cannot extend any money offers that  
 21 include the primary's money? Let me rephrase  
 22 the question.  
 23 A Thank you.  
 24 Q Until you tender, a primary carrier tenders its

1 Q And did you tell him that you'd get back to him  
 2 on that?  
 3 A Yes, I did.  
 4 Q And you spoke with coverage counsel and in-house  
 5 counsel about that continuing defense  
 6 obligation, right?  
 7 A Yes.  
 8 Q On March 29th then Zurich wrote to AIG and set  
 9 forth Zurich's position regarding the continuing  
 10 defense obligation, right?  
 11 A That was one of the times we wrote to AIG about  
 12 -- I'm sorry, can you repeat the question again?  
 13 Q Sure. You had discussions with Mr. Satriano in  
 14 January and February, correct?  
 15 A Right.  
 16 Q And you said that I'm going to find out what the  
 17 deal is with respect to the continuing defense  
 18 obligation?  
 19 A Right. We were continuing to defend, but I was  
 20 clarifying that.  
 21 Q Okay. And then on March 29th there was a letter  
 22 from Zurich to AIG that set forth Zurich's  
 23 position regarding the continuing defense  
 24 obligation?

1 policy limit, the primary carrier and the  
 2 primary carrier loan has the exclusive control  
 3 over that money, right?  
 4 A Yes.  
 5 Q And around January 24, 2004, you told Mr.  
 6 Satriano that the Zurich policy limit was  
 7 available to AIG to offer the plaintiffs?  
 8 A Yes, I think on January 23rd.  
 9 Q Okay. And Mr. Satriano at that time or -- is  
 10 that the day that you spoke with him?  
 11 A Yes.  
 12 Q Okay. So did Mr. Satriano make it clear to you  
 13 that he couldn't accept any tender -- couldn't  
 14 accept any tender that wasn't in writing?  
 15 A He told me that he needed the tender to be in  
 16 writing.  
 17 Q Okay.  
 18 A And I told him that I was offering up our policy  
 19 limit verbally and I would --  
 20 Q Got it. And did he also make it clear to you  
 21 that he wanted to understand what Zurich's  
 22 position was relative to the continuing defense  
 23 obligation?  
 24 A Yes, he did.

1 A Yes.  
 2 MR. ZELLE: For the court's benefit and  
 3 opposing counsel, that's Exhibit 33.  
 4 THE COURT: I've read it twice.  
 5 MR. ZELLE: Yes, I'm just identifying  
 6 the exhibit.  
 7 THE COURT: Okay.  
 8 MR. ZELLE: We don't need to look at it  
 9 at this point.  
 10 (By Mr. Zelle:)  
 11 Q At that point, March 29, 2004, Zurich also  
 12 authorized defense counsel to make a limit -- to  
 13 make an offer to the plaintiffs of the policy  
 14 limit; is that right?  
 15 A I don't think it was -- it was sometime in  
 16 middle to the end of March that we gave them  
 17 that authorization. I don't recall the exact  
 18 date.  
 19 Q All right. And on March 31, 2004, defense  
 20 counsel did offer that \$2 million to the  
 21 plaintiffs, right?  
 22 A Yes.  
 23 Q And at that point the tender issue was  
 24 meaningless, right?

1 A "Meaningless" --  
 2 Q Meaningless because AIG couldn't accept the  
 3 tender at that that point it had been offered?  
 4 Once --  
 5 Let me rephrase the question.  
 6 A I don't understand the question.  
 7 Q That's fine, Ms. Fuell, it was not an easy  
 8 question.  
 9 Once the \$2 million had been offered to  
 10 the plaintiffs, AIG could not exercise any  
 11 control over offering that money?  
 12 A They couldn't go back and take it away.  
 13 Q Right.  
 14 A Right.  
 15 Q And moving onto another issue, Ms. Fuell, did  
 16 AIG request Zurich to provide it with a copy of  
 17 the materials that Zurich had obtained relative  
 18 to its analysis of other available sources of  
 19 insurance coverage, either under the Penske or  
 20 DLS policies?  
 21 A They asked for a copy of our file.  
 22 Q And did you send or ask anyone to send those  
 23 materials to AIG?  
 24 A Yes. I think I may have misspoken yesterday. I

1 send it to Mr. Satriano, because he had the  
 2 complete file.  
 3 THE COURT: When you say "complete  
 4 file", did it include Z notes?  
 5 THE WITNESS: Not the Z notes.  
 6 THE COURT: So the Z notes did not go  
 7 over?  
 8 THE WITNESS: They did not.  
 9 THE COURT: And with regard to any  
 10 coverage issues, is that part of the Zurich file  
 11 or part of the Crawford file?  
 12 THE WITNESS: They were part of the  
 13 Crawford file. Mr. McIntosh had asked Crawford  
 14 to do the assignment with coverage counsel, so  
 15 he was corresponding with both of us.  
 16 (By Mr. Zelle:)  
 17 Q I thought you had testified yesterday that with  
 18 respect to the coverage issues, that was  
 19 something that Zurich did; it wasn't Crawford.  
 20 A It was something that Zurich decided. We made  
 21 the decision --  
 22 Q I see. Okay. You don't know whether Mr. Penick  
 23 or anyone else at Crawford ever transmitted to  
 24 AIG the coverage file, do you?

1 was thinking about it, and I think I said I  
 2 asked someone Zurich to send it. But I think  
 3 when Mr. Satriano asked me for it I said the  
 4 complete file was with Crawford as the direct  
 5 claim handler. He could go to Crawford and get  
 6 a copy of the file. And Mr. Satriano said I was  
 7 the one who had the relationship with Crawford  
 8 and I could get it for them.  
 9 Q Which file are you talking about?  
 10 A The claim file.  
 11 Q Okay. I'm talking about the coverage file.  
 12 A The coverage information is in the claim file.  
 13 THE COURT: I'm sorry. Just to be  
 14 clear, you provided your Zurich claim file to  
 15 Mr. Satriano?  
 16 THE WITNESS: I thought that I did it,  
 17 because my file is just a limited oversight  
 18 file.  
 19 THE COURT: You did or did not?  
 20 THE WITNESS: I did not.  
 21 THE COURT: So what did you cause to go  
 22 to Mr. Satriano?  
 23 THE WITNESS: I called Mr. Penick at  
 24 Crawford and asked him to print out his file and

1 A No, I don't.  
 2 Q Between November 23rd -- November 23rd was the  
 3 time that you first spoke with Mr. Satriano,  
 4 right?  
 5 A November 19th.  
 6 Q Okay.  
 7 A In the teleconference?  
 8 Q Yes, was that the 19th of November?  
 9 A The November 19, 2003.  
 10 Q Okay. Between that time, November 19, 2003 and  
 11 March 29, 2004, I'd like to focus on that time  
 12 period. It was on November 19th that you  
 13 learned from Mr. Satriano that he had not  
 14 received from defense counsel or anyone else the  
 15 settlement demand package, correct?  
 16 A I know he said he had just received -- he was  
 17 reviewing information. I don't really recall  
 18 him discussing the demand package.  
 19 Q Okay. After at that conference on the 19th,  
 20 Zurich was working with Crawford and GAF and  
 21 defense counsel to get the case developed,  
 22 right?  
 23 A Zurich was working with Crawford, GAF and  
 24 defense counsel?

1 Q Right.

2 A Yes.

3 Q Okay. And Zurich is relying on defendant  
4 counsel to pursue details as to, among other  
5 things, what the future might hold for the  
6 plaintiffs, right?

7 A Defendant counsel and experts, yes.

8 Q You rely on defendant counsel to notice and take  
9 the depositions that defendant counsel deems  
10 appropriate, correct?

11 A If he deems that it's appropriate to take the  
12 deposition, I rely on him. I didn't ask if I  
13 could take a deposition.

14 Q Right. You rely on him to make the decisions as  
15 to which depositions should be taken?

16 A He would work with GAF and Crawford in making  
17 those decisions.

18 Q Okay. With respect to an independent medical  
19 examination, is that something in this case that you  
20 were relying on Crawford to work with defense counsel  
21 to obtain that?

22 A I didn't specifically ask if an IME had been requested  
23 or done.

24 Q If you could look at -- just for the sake of moving

1 Robert Manning to secure name of an independent medical  
2 examiner and approval to proceed. If claim is within  
3 branch authority, branch may select examiner and  
4 proceed within its own discretion.

5 Q So at least, based on what you've read and what you  
6 know about the Rhodes case, is it now you understanding  
7 that it was up to Crawford to obtain authorization from  
8 Manning to take an IME?

9 A Yes.

10 Q I apologize if this has been asked. Well, let me ask  
11 this. Have you explained to the court the role of a  
12 corporate risk manager?

13 A I don't think I was asked that.

14 Q Okay. Then will you please do that?

15 A In a large corporate insured such as GAF, with so many  
16 drivers, with so many exposures, they usually have  
17 somebody who specifically works on the insurance and  
18 liability and worker's compensation and property  
19 issues, because there are so many different variables  
20 that play, it can cost them a lot of money, so it's a  
21 job that's within the corporation of the insured to  
22 oversee and be aware of what losses are being claimed,  
23 what kind of payments they're making, what kind of  
24 policies they have.

1 things long more quickly, I'm just going to show you  
2 Zurich American's Exhibit Number 126.

3 A Do you need me to find that?

4 Q I'm going to show it to you, just to help move things  
5 along here.

6 A That would be great.

7 Q And if you will -- have you got that?

8 A Yes.

9 Q All right. If you look on page 6 of that exhibit --  
10 well, that again for the record, that's the Special  
11 Guidelines for Crawford's handling of GAF claims,  
12 right?

13 A It's guidelines from GAF to Crawford, yes.

14 Q Right.

15 A And on that sixth page, paragraph 12, that speaks to  
16 IMEs, correct?

17 A Yes.

18 Q Could you just read that?

19 A (Reading): Twelve IMEs. Independent Medical Exams  
20 should be considered in cases of extended disability  
21 for worker's compensation and on liability injury  
22 claims as circumstances warrant.

23 Q Does it say something there about Mr. Manning?

24 A Yes. If a claim involves a reportable file, contact

1 Q Thank you. As a claims person, where there is a  
2 corporate risk manager who has involvement in the  
3 development of claims, do you interface with that risk  
4 manager?

5 A Yes.

6 Q In this case, was it Crawford's responsibility to  
7 direct counsel to pursue medical records with  
8 subpoenas?

9 A Crawford working with GAF, yes.

10 Q Okay. And similarly, in terms of -- or specifically in  
11 this claim you were aware that there were emotional  
12 distress claims, correct?

13 A Yes.

14 Q And would you expect Crawford, in working with GAF, to  
15 subpoena records of mental health providers?

16 A Yes.

17 Q And with respect to depositions, again, is that  
18 something that you expected that Crawford and GAF would  
19 work together with defense counsel to obtain the  
20 depositions that were appropriate in this case?

21 A To decide which depositions might be necessary and to  
22 schedule them, yes.

23 Q Okay. Based on your experience, where you have an  
24 injury -- have you had other paraplegic cases?

1 A Yes.

2 Q When you have a paralegic case, is it your standard  
3 practice to look at an IME or to seek an IME? I  
4 understand in this case it was Manning and defense  
5 counsel and GAF, but your standard practice.

6 A It's one of the things we might consider doing.

7 Q Okay. Standard practice, though, paralegic cases, do  
8 you or don't you get IMEs?

9 MR. PRITZKER: Objection. Asked and  
10 answered.

11 THE COURT: If she has a standard practice,  
12 beyond what she's already said.

13 A If there's -- a life-care planner has reviewed a lot of  
14 the information, if there's anything under dispute,  
15 it's a case-by-case basis whether we get an IME or not.

16 (By Mr. Zelle)

17 Q Okay. Was there any discovery taken between -- when  
18 did you receive the demand package? In September?

19 A Mid-September 2003.

20 Q Between that time and April 1 of 2004.

21 A I know there was ongoing litigation and discovery, yes.

22 Q What discovery was taken in that time period?

23 A I couldn't tell you exactly. I wasn't receiving the  
24 discovery documents.

1 A No. Are you asking me did I know about that?

2 Q That's right.

3 A No, I didn't.

4 Q Okay. Do you have any knowledge or information  
5 concerning any resistance by Mr. Deschenes or GAF, or  
6 Zurich for that matter, to AIG's efforts to have Mr.  
7 Conroy take an active role in the defense of the Rhodes  
8 case in December of 2004?

9 A No.

10 MR. ZELLE: I don't have anything else,  
11 Judge.

12 THE COURT: All right. Any further  
13 questions?

14 MR. PRITZKER: Yes, your Honor.

15 REDIRECT BY MR. PRITZKER:

16 Q Just starting with the last one, Ms. Fuell, AIG, as you  
17 indicated, appropriately associated in new counsel  
18 because of its exposure, true?

19 A They appropriated -- that was probably -- they  
20 associated in counsel to assist them in their handling  
21 of the claim.

22 Q Because they knew that they were potentially exposed in  
23 the case once you said that Zurich was intending to  
24 tender the limits of the policy, right?

1 Q Do you know whether the plaintiffs' deposition was  
2 taken in that time period?

3 A I don't think it was.

4 Q Do you recall during the November 19 telephone  
5 conference that Mr. Satriano indicated that he had  
6 planned to retain counsel to associate into the case to  
7 work with present defense counsel?

8 A I don't remember him saying that.

9 Q All right. Do you know what that means, to associate  
10 in, for an excess carrier to associate in counsel?

11 A Yes.

12 Q Can you explain that?

13 A The excess carrier, having their own independent  
14 exposure, may hire an attorney to help them monitor the  
15 case and give an independent evaluation of how the case  
16 is proceeding.

17 Q Are you aware that in December of 2003, AIG retained  
18 the firm of Campbell & Campbell and an attorney named  
19 Bill Conroy to associate in?

20 A Yes.

21 Q Do you have any knowledge or information concerning  
22 AIG's request, made in December of 2003, to have Mr.  
23 Conroy participate in a telephone conference with Mr.  
24 Deschenes and Mr. Pritzker?

1 MR. ZELLE: Objection.

2 THE COURT: Sustained as to what AIG's state  
3 of mind was.

4 (By Mr. Pritzker)

5 Q Did Zurich ever attempt to associate in its own counsel  
6 to work with Nixon Peabody?

7 A No.

8 Q It could have, had it wanted to, right?

9 A Yes.

10 Q And it could have because the exposure of GAF was  
11 approximately \$250,000 plus some adjustment for defense  
12 counsel, true?

13 A True that we would have associated in counsel --

14 Q You could have.

15 A We could have.

16 Q If you were dissatisfied -- if Zurich were dissatisfied  
17 with what Nixon Peabody was doing, it certainly was  
18 appropriate, and in fact sometimes common, for the  
19 primary carrier, when there's a relatively large  
20 retention, to associate in its own counsel; isn't that  
21 so?

22 MR. VARGA: Objection.

23 THE COURT: Overruled.

24 A It's a consideration that we can make. Do we do it

1 commonly? No, not on -- I'm sorry. It's a  
 2 consideration and we can do it.  
 3 (By Mr. Pritzker)  
 4 Q GAF never disclaimed -- strike that.  
 5 Zurich never disclaimed coverage for GAF for  
 6 failure to notify it of its claim; isn't that so?  
 7 A We did not.  
 8 Q And so in fact, as of August of '02, when Mr. McIntosh  
 9 opens the file, there was actual notices, no matter who  
 10 gave them to him, right?  
 11 MR. VARGA: Objection.  
 12 THE COURT: I'll hear what the answer is.  
 13 A There was actual notice from whom?  
 14 (By Mr. Pritzker)  
 15 Q Zurich knew of the claim, at least by August of '02,  
 16 when Mr. McIntosh opened the claims file, did he not?  
 17 A He found out about the claim in August of 2002.  
 18 Q Now, we know from Exhibit 19 -- I'm sorry.  
 19 Exhibit 62. Would you look at Exhibit 62,  
 20 Ms. Fuell?  
 21 A Yes.  
 22 Q Now, Exhibit 62, once again, is an agreement between  
 23 GAF and Crawford; is it not?  
 24 A This is between Zurich and Crawford.

1 A He's the broker.  
 2 Q He was the broker who brokered the Zurich contracts to  
 3 GAF, right?  
 4 A Correct.  
 5 Q And Robert Manning, the Risk Manager for GAF, is  
 6 sending to Fred Hohn on the day after the Rhodes'  
 7 accident this fax; is he not?  
 8 A January 10, 2002. That's the date on the exhibit, yes.  
 9 Q And Mr. Manning is enclosing the DLS and Penske  
 10 contracts, is he not, to Mr. Willis?  
 11 A He says: Look at the enclosed agreement with DLS.  
 12 Q And what does he say at the bottom, where it starts --  
 13 the paragraph that starts "This ..."  
 14 A (Reading): This is a serious case, and, further, there  
 15 may be an issue with the brakes on the truck which  
 16 Penske has responsibility for in terms of maintenance.  
 17 Q And there's a CC there; is there not?  
 18 A Yes.  
 19 Q And it's to John Chaney at Crawford & Company?  
 20 A Yes.  
 21 Q Now if you look at Exhibit 2, GAF is writing directly  
 22 to John Chaney, right?  
 23 A Yes.  
 24 Q And John Chaney is the adjustor at Crawford & Company

1 Q I'm sorry, I keep confusing them and I apologize. This  
 2 is between Zurich and Crawford.  
 3 A Yes.  
 4 Q And the claims administrator is defined as Crawford,  
 5 right?  
 6 A I think it does -- the claim administrator -- Crawford  
 7 is the claim administrator.  
 8 Q All right. And the company that's being referred to in  
 9 Exhibit 62 is Zurich?  
 10 A Yes.  
 11 Q And on page 3 of the exhibit, Bates number 0066,  
 12 paragraph 3(a), it says that the claims administrator  
 13 shall accept and acknowledge proofs of loss for the  
 14 company; does it not?  
 15 A Yes.  
 16 Q Okay. And if we now go to Exhibit 1, that is a fax --  
 17 this is a stipulated agreement -- a stipulated exhibit,  
 18 Ms. Fuell.  
 19 A I'm sorry, I'm still trying to find the exhibit.  
 20 Q Okay. Take your time. It's Volume I.  
 21 A I think it's on the floor.  
 22 Q Let me get it for you.  
 23 Q This is a fax to Fred Hohn at Willis. You know who  
 24 that is, right?

1 who, under Exhibit 62, is authorized to receive notice  
 2 for Zurich, right?  
 3 MR. VARGA: Objection.  
 4 A No, he's not authorized to receive notice for Zurich.  
 5 (By Mr. Pritzker)  
 6 Q Is that not what we just read in Exhibit 62, page 3,  
 7 paragraph 3(i)?  
 8 A It says he's authorized to receive proofs of loss for  
 9 Zurich.  
 10 Q And that's not notice?  
 11 A No. It could be proofs of the damages. Proofs of loss  
 12 are more commonly a property rather than a liability  
 13 term.  
 14 Q But they're not always, are they, Ms. Fuell?  
 15 A No.  
 16 Q Anyway, if we look at paragraph 2, on January 29 it  
 17 says: Dear John, Please see attached letter from  
 18 Pritzker and police report.  
 19 And then what does the next paragraph say?  
 20 A (Reading): Suggest you get initial report to us and  
 21 Zurich ASAP, and if you can get reconstruction report  
 22 from expert quickly, include it, otherwise indicated as  
 23 being completed. Call if questions. Thanks, Bob.  
 24 Q Okay. Now, do you also see on Exhibit 3 that Willis

1 sends notice of the claim to AIG?  
 2 A Yes.  
 3 Q And that's in February of '02, right?  
 4 A Right.  
 5 Q And do you know whether or not AIG -- when AIG opened  
 6 its files?  
 7 A I have no idea..  
 8 Q Okay. If we now look at 66A, which is the first formal  
 9 report of Crawford, dated January 30, '02.  
 10 A Yes.  
 11 Q Under the coverage, it identifies the automobile  
 12 liability policy at issue; does it not?  
 13 A Yes.  
 14 Q And if you look at -- these pages are not Bates  
 15 stamped, but if you count in 1, 2, 3, 4, 5, on the  
 16 sixth page, under "Insurance --"  
 17 A Yes.  
 18 Q Do you see that?  
 19 A Uh-huh.  
 20 Q It says: By copy of this report, we are noticing  
 21 Zurich American Insurance Company of this significant  
 22 claim.  
 23 Did I read that accurately?  
 24 A Yes.

1 A If a claim number or some other source of information,  
 2 they can look at to try to forward it to the correct  
 3 party.  
 4 (By Mr. Pritzker)  
 5 Q What about an insurance policy number?  
 6 A They list the policy number here. They also list that  
 7 the insured is ISP. So if they looked up the policy  
 8 number, the name insured was Building Materials  
 9 Corporation.  
 10 Q Well, would you look at the bottom of the same page,  
 11 page 1.  
 12 A Mm-hum.  
 13 Q Where it specifically says that all correspondence is  
 14 to be copied to Mr. Robert Flugler, Vice President,  
 15 Risk Management, Building Materials Corporation of  
 16 America?  
 17 A Our mailroom gets thousands of pieces of mail a day.  
 18 They don't read the entire report.  
 19 Q But they do try to locate where it should go; do they  
 20 not?  
 21 A Yes.  
 22 Q Well, at least when we get to the second report,  
 23 Exhibit 66B, that is now indicated as GAF Materials,  
 24 right? It's a letter to GAF Materials.

1 Q (Reading) We further ask GAF to determine and notify  
 2 the excess carrier.  
 3 And this was sent, was it not, to GAF at the  
 4 address of the head office where you, in fact, work?  
 5 MR. VARGA: Objection.  
 6 MR. PRITZKER: You misspoke. You mean  
 7 Zurich. Once again.  
 8 Q This was sent to Zurich Insurance Company's head office  
 9 where you, in fact, work; was it not?  
 10 MR. VARGA: Objection.  
 11 THE COURT: Sustained. You say that -- I  
 12 know that it was CC where it says Zurich Insurance  
 13 Company, 1400 American Lane in Schaumburg, which is  
 14 their office in Schaumburg, where she works. I know  
 15 that, so let's proceed.  
 16 (By Mr. Pritzker)  
 17 Q So not withstanding the fact that it says, under  
 18 "Insurance" we are noticing Zurich Insurance Company of  
 19 this significant claim, it's your testimony that if a  
 20 claim number is not identified on a report such as  
 21 this, you have no idea what the mail facilities do with  
 22 it, right?  
 23 MR. VARGA: Objection.  
 24 THE COURT: Overruled.

1 A Yes.  
 2 Q With a carbon copy to the current administrator of  
 3 Zurich and a post office box, right?  
 4 A Yes. Wait -- yes.  
 5 Q And we don't know what happened to that one either, do  
 6 we?  
 7 A I did not. It was not under my claim file.  
 8 Q Can you explain how 66C -- I'm sorry.  
 9 Can you explain how 66C, which Mr. McIntosh  
 10 agrees he saw, got to him, given the fact that it was  
 11 sent to the current administrator at the same post  
 12 office box number?  
 13 A Mr. McIntosh testified that Mr. Chaney faxed this to  
 14 him in August.  
 15 Q And that was the first that he saw it?  
 16 A That's what he stated.  
 17 Q So as of August of 2002, Zurich had a claim file open,  
 18 right?  
 19 A Yes.  
 20 Q It knew that Crawford was the administrator, true?  
 21 A Was the administrator for -- claims administrator for  
 22 GAF.  
 23 Q All right. It was the claims administrator.  
 24 Now, one of the purposes of your section is

1 to make sure that the TPAs, the third-party  
 2 administrators, do their job properly in order to  
 3 protect both the insurance interests and the legal  
 4 interests of Zurich; isn't that so?  
 5 A I don't have direct control over the TPAs in terms of  
 6 me. But, yes, if for some reason they're not  
 7 fulfilling their obligation I would bring it up.  
 8 Q You would bring it up and you would do something about  
 9 it, wouldn't you?  
 10 A I have the claim oversight. I'm not the TPA operations  
 11 department that --  
 12 Q Well, that doesn't really answer my question. You, and  
 13 Mr. McIntosh before you, part of your function is to  
 14 make sure that Zurich doesn't get on the hook for not  
 15 promptly effectuating settlement once liability is  
 16 clear --  
 17 MR. VARGA: Objection.  
 18 Q -- isn't that so?  
 19 MR. VARGA: Objection.  
 20 THE COURT: Overruled.  
 21 A Could you ask the question again? I'm not sure I'm  
 22 understanding what you're asking.  
 23 (By Mr. Pritzker)  
 24 Q Isn't one of your functions, and the function of Mr.

1 future care costs in order to properly prepare your BI  
 2 claim report, true?  
 3 MR. VARGA: Objection.  
 4 THE COURT: I'm sorry, are you referring to  
 5 what she said on direct or what she said on cross?  
 6 MR. PRITZKER: To Mr. Varga's questions.  
 7 THE COURT: Okay. Mr. Varga, your objection?  
 8 MR. VARGA: My objection is it  
 9 mischaracterizes the evidence, your Honor.  
 10 THE COURT: Yes, I think it's cleaner -- I  
 11 did hear it at the same time. I've got your version,  
 12 his version, and then AIG asked her about other things  
 13 that she may at times considered but didn't necessarily  
 14 consider with regard to this because she didn't have  
 15 it. So I think you're going to be muddling it as  
 16 opposed to helping it. But, go ahead.  
 17 (By Mr. Pritzker)  
 18 Q Ms. Fuell, is it your testimony that you needed  
 19 hospital discharge and admission notes as part of the  
 20 information to prepare your BI claim report?  
 21 A My testimony was that I needed the measurable damages  
 22 as part of my evaluation of the claim. That would have  
 23 helped.  
 24 Q And is it your testimony it also would have helped if

1 McIntosh before you, to make sure that Zurich doesn't  
 2 run afoul of its obligation to effectuate a reasonable  
 3 -- to effectuate a settlement once liability is  
 4 reasonably clear and to do so in a prompt manner?  
 5 MR. VARGA: Objection.  
 6 THE COURT: It's been asked and answered.  
 7 She's already acknowledged her obligation in that  
 8 regard.  
 9 (By Mr. Pritzker)  
 10 Q Q Now, you testified --  
 11 THE COURT: Let's actually take our morning  
 12 break. It's 11:10. We'll reconvene at 11:25. How  
 13 much longer do you have with her?  
 14 MR. PRITZKER: Maybe 15 minutes.  
 15 THE COURT: All right. I'll hold you to  
 16 that. We need to get her done. We'll reconvene at  
 17 11:25.  
 18 (A recess was taken at 11:10 a.m.)  
 19 THE COURT: All right, Mr. Pritzker, use your  
 20 15 minutes wisely.  
 21 (By Mr. Pritzker)  
 22 Q Ms. Fuell, you indicated to questions of Mr. Varga that  
 23 you needed hospital admission and discharge notes,  
 24 operating reports, doctors' reports, nurses' notes, and

1 you had had the operation reports?  
 2 A Yes.  
 3 Q And is it your testimony that would have helped if you  
 4 had doctors' reports?  
 5 A Yes.  
 6 Q And is it your testimony that it would have helped if  
 7 you had nurses' notes?  
 8 A Yes.  
 9 Q And is it your testimony that it would have helped had  
 10 you had future care costs?  
 11 A Yes.  
 12 Q And that you had all of these, or at least sufficient  
 13 information, when you received Exhibit 10, to finally  
 14 put together the BI claim report.  
 15 MR. VARGA: Objection.  
 16 THE COURT: Overruled.  
 17 A That was part of the information that I needed. I also  
 18 needed to get further information from defense counsel  
 19 and our own experts.  
 20 (By Mr. Pritzker)  
 21 Q Now, once you got the BI claim report to your bosses,  
 22 it took less than 45 days to get the approvals that you  
 23 were looking for; isn't that so?  
 24 A Yes.

1 Q Would you look at the Zurich Exhibit, 110. This is a  
 2 letter from David McIntosh to the claims manager at  
 3 Crawford & Company, true?  
 4 A Yes.  
 5 Q Written almost one year after Mr. McIntosh opened his  
 6 file on the Rhodes case, true?  
 7 A Yes.  
 8 Q If you look at the last paragraph of the letter on page  
 9 2, Mr. McIntosh states: As you know, Crawford is  
 10 contracted with Zurich to provide the claims handling  
 11 for this account.  
 12 Did I read that accurately?  
 13 A Yes.  
 14 Q And then he goes on to say: All of what I am seeking  
 15 here is consistent with the reporting required under  
 16 this contract.  
 17 A Right.  
 18 Q Now, if Mr. McIntosh felt that he needed the hospital  
 19 admission and discharge notes, there's several things  
 20 that he could have done; is there not?  
 21 MR. VARGA: Objection.  
 22 Q To get them?  
 23 THE COURT: Well, she's not really speaking  
 24 about him in personally. She's speaking about a person

1 documentation, what does a person in your position do?  
 2 THE WITNESS: We would continue to contact  
 3 the TPA and ask them to expedite it. We would do what  
 4 Mr. McIntosh did and write to the claim manager at the  
 5 TPA. We may incorporate the assistance of our TPA  
 6 Operations Department.  
 7 THE COURT: But is it not among the things  
 8 that you would do to contact defense counsel or to  
 9 contact plaintiffs' counsel directly? Is that not  
 10 among the things that you would do?  
 11 THE WITNESS: We would do that.  
 12 (By Mr. Pritzker)  
 13 Q Even if you felt that it was jeopardizing Zurich's  
 14 position to promptly respond to a claim, all you would  
 15 do is complain to the TPA of the insured?  
 16 A No.  
 17 MR. VARGA: Objection.  
 18 THE COURT: Overruled.  
 19 A We would make every effort to obtain the information  
 20 necessary to protect the insured, as well as GAF.  
 21 (By Mr. Pritzker)  
 22 Q And if it wasn't coming for a whole year after it had  
 23 been required or requested, wouldn't Zurich take steps  
 24 to protect its own interests?

1 in his position, which is the position that she took  
 2 over, so I'll allow it. I will allow it for that  
 3 purpose.  
 4 A Yes.  
 5 (By Mr. Pritzker)  
 6 Q He could have requested medical authorization forms  
 7 from the plaintiffs?  
 8 A He wouldn't have done that. It wasn't his role.  
 9 Crawford was the frontline claim administrator.  
 10 Q He could have done that in order to protect the  
 11 interests of Zurich; could he not?  
 12 MR. VARGA: Objection. Asked and answered,  
 13 your Honor.  
 14 THE COURT: Well, I'll allow it to the extent  
 15 that you're saying whether or not -- are you saying it  
 16 would have been inappropriate for him to do so?  
 17 THE WITNESS: It would have been -- it  
 18 wouldn't have been his function, because GAF was paying  
 19 Crawford to do such tasks to investigate the claim. He  
 20 was appropriately asking for the damages that would  
 21 support the claim.  
 22 THE COURT: Okay. And if a person in your  
 23 position finds that the TPA is not doing its job,  
 24 including with regard to gathering corporate medical

1 A Zurich did take such steps. The reporting from  
 2 Crawford was that they did not have such information.  
 3 David and then myself asked for the information from  
 4 Crawford, asked them if they had it from defense  
 5 counsel.  
 6 Q And you kept doing that for two years?  
 7 A Yes.  
 8 Q But that's all you did, right?  
 9 MR. VARGA: Objection.  
 10 THE COURT: Well, she wasn't there.  
 11 (By Mr. Pritzker)  
 12 Q That's all that Zurich did --  
 13 A No.  
 14 Q -- as far as you can determine from your Z notes.  
 15 No? What else did Zurich do?  
 16 MR. VARGA: Objection.  
 17 THE COURT: It's getting a little bit beyond  
 18 the scope of the redirect.  
 19 MR. PRITZKER: All right.  
 20 (By Mr. Pritzker)  
 21 Q As to future care costs, is there anything that  
 22 precluded Zurich from consulting with its own life-care  
 23 planner prior to receiving the plaintiffs' demand?  
 24 A Yes.

1 Q What?

2 A We didn't have anything to have the life-care planner  
3 look at.

4 Q He or she could have looked interviewed Mrs. Rhodes,  
5 right?

6 A Not without the permission of you.

7 Q Was there any request that you know of for that  
8 permission?

9 A No.

10 Q Could there have been?

11 A We could have but we wouldn't have retained a life-care  
12 planner without any information to give them.

13 MR. VARGA: Objection.

14 THE COURT: Overruled.

15 (By Mr. Pritzker)

16 Q Ms. Fuell, if Zurich had determined that it was in its  
17 best interest to act more promptly on this claim, would  
18 it have not -- strike that -- wouldn't it have taken  
19 steps to expedite the process rather than just  
20 complaining to the TPA with whom it had a contract?

21 MR. VARGA: Objection.

22 THE COURT: Sustained. The objection is  
23 sustained.

24 (By Mr. Pritzker)

1 Q Did you, however, look at the other cases that you  
2 cited on the next page of Exhibit 19?

3 A Yes.

4 Q For instance, did you know that the plaintiff had had  
5 17 drinks before rendering himself a paraplegic?

6 A Yes.

7 Q And would that have indicated to you that perhaps that  
8 jury verdict was low because of that factor?

9 MR. VARGA: Objection. Form.

10 THE COURT: Overruled.

11 A That was a factor in that jury verdict of that  
12 individual case.

13 (By Mr. Pritzker)

14 Q And if you look at the next case that was cited, the  
15 case withheld?

16 A Yes.

17 Q That was one where the plaintiff himself fell while he  
18 was on a ladder; isn't that so?

19 A Yes.

20 Q And so therefore there was an issue as to negligence  
21 and an issue as to his blood alcohol level; isn't that  
22 so?

23 A Yes.

24 Q And there was also evidence of his drug use; isn't that

1 Q Would you agree with me that once the information was  
2 obtained and once you submitted the BI claim report to  
3 your bosses, it didn't take too long for them to  
4 approve it, true?

5 MR. VARGA: Objection.

6 THE COURT: Sustained. It's speaks for  
7 itself.

8 (By Mr. Pritzker)

9 Q And what you were looking for was approval to tender  
10 the limits of a \$2 million policy; isn't that accurate?

11 MR. VARGA: Objection.

12 THE COURT: We're speaking -- this is not the  
13 time for rhetorical questions. That means the more  
14 information we can get from her, fine, but rhetorical  
15 questions you can save for your closing.

16 (By Mr. Pritzker)

17 Q And let me just finish up with Exhibit 19, if we could.  
18 Mr. Zelle asked you a number of questions  
19 concerning the recent paraplegic case listed on the  
20 fourth page of Exhibit 19 and whether factors which you  
21 didn't know about might have been of interest in  
22 evaluating the pain and suffering portion of the claim.  
23 Do you remember that?

24 A Yes.

1 so?

2 A Yes.

3 Q And would that have indicated to you that that verdict  
4 may have been low because of those factors?

5 A That would have been one of the factors that would have  
6 impacted the verdict.

7 Q And on the next one, the Rocco case, which is the only  
8 other one that you report that you looked at, you  
9 didn't know what the medicals were, did you? They were  
10 presented.

11 A It says his medicals of 250,000 were not presented to  
12 the jury.

13 Q But at least you knew that the medicals were \$250,000,  
14 right?

15 A Yes.

16 Q And you knew that that was significantly lower than  
17 Mrs. Rhodes' medicals; isn't that so?

18 A It was less than \$413,000.

19 Q Right. And so therefore that would have played into  
20 your consideration of whether that was an accurate jury  
21 verdict or not; isn't that so?

22 A It would have been something I looked at when looking  
23 at this jury verdict.

24 MR. PRITZKER: Your Honor, I believe I have

1 no further questions, but may I just have a moment to  
 2 look at my notes?  
 3 THE COURT: You may.  
 4 MR. PRITZKER: Just one follow-up question,  
 5 your Honor.  
 6 REDIRECT EXAMINATION BY MR. PRITZKER:  
 7 Q Do you know what the limit of authority was for Mr.  
 8 McIntosh?  
 9 A I believe he had \$1 million.  
 10 MR. PRITZKER: Thank you. I have no further  
 11 questions.  
 12 THE COURT: Any further questions in the  
 13 scope of the cross of Mr. Zelle and the redirect of Mr.  
 14 Pritzker?  
 15 MR. VARGA: Very few, your Honor, I'm happy  
 16 to say. I'll try to keep it under five minutes.  
 17 RECROSS-EXAMINATION BY MR. VARGA:  
 18 Q Kathleen, you were asked a few questions by Mr.  
 19 Pritzker regarding the issue of proof of loss versus  
 20 notice of loss. I want to follow up on that.  
 21 Can you explain to us what a proof of loss is  
 22 in the insurance industry, as you understand it?  
 23 A It's a formal document that's prepared by the insured  
 24 and signed by the insured to detail as part of the

1 and GAF Corporation as the insured, right?  
 2 A Right.  
 3 Q Okay. When someone at Zurich is attempting to  
 4 determine who the insured is on a particular insurance  
 5 policy, how do they do that?  
 6 A You generally go to the declarations page of the  
 7 policy.  
 8 Q Would you direct us to that in Exhibit 61, please?  
 9 A Under Commercial Insurance Declaration, it states named  
 10 insured is Building Material Corporation of America.  
 11 Q On the declaration page itself, on BMCA0050, does the  
 12 name ISP or GAF Corporation appear anywhere on that  
 13 page?  
 14 A No.  
 15 Q Thank you. You were asked some questions by Mr. Zelle  
 16 regarding information or documentation that was  
 17 requested to be sent to AIG by Zurich or Crawford. Do  
 18 you remember those questions?  
 19 A Yes.  
 20 Q Can I ask you please to turn to plaintiffs' Exhibit 14  
 21 in Volume 1 of plaintiffs' exhibits, please.  
 22 THE COURT: I'm sorry, 114?  
 23 MR. VARGA: Fourteen, your Honor.  
 24 A Yes.

1 claim administration when they're -- it's for when  
 2 they're presenting damages under a property case.  
 3 Q And is it part of the adjustment process where they  
 4 putting the value of building damage, for example?  
 5 A Yes.  
 6 Q Okay. Have you ever worked with a proof of loss in  
 7 your job at Zurich in the Liability TPA Claims  
 8 Oversight Unit on a casualty claim?  
 9 A No.  
 10 Q And is a notice of loss the same as a proof of loss?  
 11 A A proof of loss follows the notice of loss. It's as  
 12 you're getting into the claim and administering the  
 13 claim. It's not -- yes, it's not the same thing.  
 14 Q If you'd turn back to Exhibit 66A just for a moment.  
 15 Or, actually, no need. If you would go to Exhibit 61,  
 16 please, which is the Zurich policy.  
 17 A Yes.  
 18 Q Now, Mr. Pritzker asked you a few moments ago -- he  
 19 pointed out to you that Exhibit 66A, which is  
 20 Crawford's first full formal report, which we've  
 21 reviewed a number of times, identified a policy number.  
 22 Do you remember that?  
 23 A Yes.  
 24 Q And you mentioned that the January report listed ISP

1 (By Varga)  
 2 Q Can you tell me what that document is?  
 3 A It's a document -- it looks like an e-mail from Nick --  
 4 to Nick Satriano from Steve Penick dated November 19,  
 5 2003.  
 6 Q That's the date of the conference call that we've heard  
 7 so much about, yes?  
 8 A Yes.  
 9 Q And is this about the time that you asked Mr. Satriano  
 10 to send some material regarding the Rhodes claim to --  
 11 I'm sorry. Withdraw the question.  
 12 Is that about the time, November 19, 2003,  
 13 when you asked Mr. Penick of Crawford & Company to  
 14 provide certain materials regarding the Rhodes claim to  
 15 AIG?  
 16 A Yes.  
 17 Q All right. Would you turn now please to AIG Exhibit  
 18 224? If you don't have the binder, I'll try to find it  
 19 for you.  
 20 THE COURT: Which exhibit?  
 21 MR. VARGA: Exhibit 224, your Honor. It's  
 22 probably in the binder as 24.  
 23 MR. ZELLE: I'm sorry, I think I have the  
 24 court's.

1 THE COURT: No, I've got it.  
 2 MR. VARGA: Do we have a copy for the  
 3 witness?  
 4 MR. ZELLE: I have the official one.  
 5 (By Mr. Varga)  
 6 Q Directing your attention to Exhibit 224, can you tell  
 7 us what that is, please.  
 8 A It's a letter on AIG letterhead dated April 16, 2004 to  
 9 Kathleen Fuell, Zurich North America, from Martin  
 10 Matareen at AIG.  
 11 Q Okay. And you received that letter?  
 12 A Yes.  
 13 Q And was a copy of that letter kept in Zurich's file?  
 14 A Yes.  
 15 Q In the second paragraph it says: This will confirm our  
 16 requests -- strike that.  
 17 Before I get there. This is approximately  
 18 five months after you had asked Mr. Penick to send some  
 19 claim file materials to AIG, correct?  
 20 A Yes.  
 21 Q All right. The second paragraph: This will confirm  
 22 our requests to Mr. Steven Penick of Crawford and  
 23 directly to your office for submission of the coverage  
 24 opinion and coverage position letters issued in this

1 Are you sure you sent your claim file? and he would  
 2 have said yes.  
 3 THE COURT: All right.  
 4 FURTHER REDIRECT EXAMINATION BY MR. PRITZKER:  
 5 Q Ms. Fuell, would you look at Exhibit 61, which Mr.  
 6 Varga just asked you about.  
 7 A Yes.  
 8 Q Do you see on the second page the box at the top left,  
 9 where it says "insureds"?  
 10 A Yes.  
 11 Q And what does it say? Who does it say the insured is?  
 12 A GAP Materials Corporation.  
 13 MR. PRITZKER: Thank you. That's all I have.  
 14 THE COURT: I'm sorry, this is Exhibit?  
 15 MR. PRITZKER: Sixty-one, the second page.  
 16 MR. VARGA: Just one follow-up.  
 17 FURTHER CROSS-EXAMINATION BY MR. VARGA:  
 18 Q Ms. Fuell, that same page, that is a Certificate of  
 19 Liability Insurance, correct?  
 20 A Correct.  
 21 Q Is that part of the policy itself?  
 22 A No.  
 23 MR. VARGA: Thank you.  
 24 THE COURT: Any further questions of counsel?

1 case. We did not receive a response from Mr. Penick to  
 2 the request. We did not receive a response to the  
 3 telephone message left with your voice mail to date.  
 4 After you received this letter, did you cause  
 5 any of those type of materials -- coverage opinion or  
 6 coverage position letters -- to be sent to AIG?  
 7 A No.  
 8 Q Did you ask Mr. Penick or anyone at Crawford to send  
 9 those types of materials to AIG?  
 10 A No.  
 11 MR. VARGA: That's all I have, your Honor.  
 12 MR. PRITZKER: I just have one further  
 13 question.  
 14 THE COURT: Wait. Mr. Zelle has a chance.  
 15 MR. ZELLE: No, your Honor.  
 16 THE COURT: Okay. Before we get there, why  
 17 not?  
 18 THE WITNESS: Because Mr. -- I had spoken to  
 19 Mr. Penick and he said he'd send a copy of his claim  
 20 file.  
 21 THE COURT: Well, when you received this  
 22 letter on April 16 saying that Penick hasn't done so,  
 23 what did you do?  
 24 THE WITNESS: I would have asked Mr. Penick:

1 MR. ZELLE: No, your Honor.  
 2 MR. PRITZKER: No, your Honor.  
 3 THE COURT: All right. I've got one.  
 4 How much time passed between your taking over  
 5 responsibility for this file and your receipt of the  
 6 demand letter?  
 7 THE WITNESS: Of this --  
 8 THE COURT: In this case.  
 9 THE WITNESS: I don't recall exactly when I  
 10 received responsibility for the insured GAP. It would  
 11 have been within a couple of weeks.  
 12 THE COURT: And had you already reviewed the  
 13 file by the time you received the demand letter?  
 14 THE WITNESS: No, I hadn't.  
 15 THE COURT: So you hadn't even finished  
 16 reading the file before you got the demand letter and  
 17 the attachments?  
 18 THE WITNESS: Correct.  
 19 THE COURT: Any further questions?  
 20 Ms. Fuell, have a nice trip.  
 21 THE WITNESS: Thank you.  
 22 THE COURT: All right. Let's call the next  
 23 witness, please.  
 24 MS. PINKHAM: The plaintiffs call Rebecca

1 Rhodes.  
 2  
 3 REBECCA RHODES, Sworn  
 4 THE COURT: Good morning, would you please  
 5 tell me and everybody else what your full name is and  
 6 spell your last name please  
 7 THE WITNESS: Rebecca Elizabeth Rhodes,  
 8 R-H-O-D-E-S.  
 9 THE COURT: Okay, you may proceed, Ms.  
 10 Pinkham.  
 11  
 12 DIRECT EXAMINATION BY MS. PINKHAM:  
 13 Q Good morning, Rebecca. Rebecca, can you explain to the  
 14 court where you live now?  
 15 A I live at Hampshire College.  
 16 Q When did you start there?  
 17 A In September of '06.  
 18 Q How did your first semester go?  
 19 A Very well.  
 20 Q And the adjustment from home life to college life, how  
 21 did that go?  
 22 A It was a little difficult, I missed Mom and Dad, my  
 23 pets, but I got over it, it's good.  
 24 Q Before you came back from school to testify today, when

1 A To help pay for Mom's medical bills and make sure that  
 2 she'd be all right for the rest of her life.  
 3 Q Were you involved much in the lawsuit after the six-  
 4 month period when you first learned about it?  
 5 A No, not initially.  
 6 Q Did you ever ask anybody if you needed to be involved  
 7 in the lawsuit?  
 8 A Yes.  
 9 Q And what was your understanding?  
 10 A It was a slim possibility, but still a possibility.  
 11 MR. VARGA: Objection.  
 12 THE COURT: Overruled.  
 13 (By Ms. Pinkham)  
 14 Q Did you have any concerns about being involved in the  
 15 lawsuit?  
 16 A Yes.  
 17 Q What were they?  
 18 A I was very nervous about possibility being involved  
 19 into something as formal as lawsuit.  
 20 Q Did your parents discuss the lawsuit with you at all?  
 21 A Only when it became evident I'd be needed.  
 22 Q At some point in time did you have the opportunity to  
 23 observe any of your parents' interactions in connection  
 24 with any of the events that were going on in the

1 was the last time you had seen your parents?  
 2 A About two weeks earlier.  
 3 Q And what was the occasion of that event?  
 4 A I had a dentist appointment.  
 5 Q Rebecca, how old were you when your mother had the  
 6 accident in January of 2002?  
 7 A Thirteen.  
 8 Q What grade were you in?  
 9 A Eighth.  
 10 Q At some point in time did you become aware that there  
 11 was a lawsuit in connection with your Mom's injuries?  
 12 A I'm sorry can you repeat the question, I didn't hear  
 13 you.  
 14 Q Sure. At some point in time did you learn there was a  
 15 lawsuit about your Mom's injuries?  
 16 A Yes.  
 17 Q Do you recall approximately when that was?  
 18 A I'd have to say about half a year later.  
 19 Q Okay.  
 20 A A little more.  
 21 Q Sure. Do you recall how it was that you learned about  
 22 the lawsuit?  
 23 A My father told me.  
 24 Q What was your understanding of what the lawsuit was for?

1 lawsuit?  
 2 A Sometimes, yes.  
 3 Q Did you ever observe any communications between your  
 4 parents about responding to certain requests for  
 5 information about your Mom?  
 6 A Yes.  
 7 Q What did you observe?  
 8 A Dad would ask Mom more about her medication and not  
 9 just what she was taking, he would ask how much of it  
 10 and how often.  
 11 Q How often do you recall him asking those questions?  
 12 A He would ask it almost daily for a couple of weeks, he  
 13 would ask her to write it down for him.  
 14 Q Did you have the ability to observe your mother's  
 15 reaction when your dad would ask her to write down the  
 16 list of her medications?  
 17 A Yes.  
 18 Q What did you observe?  
 19 A At first she was all right and she would write it down  
 20 for her -- for him, she would do it quickly. But after  
 21 he kept asking and she'd get more tired, so she'd sort  
 22 of get drained a little bit after a while and she sort  
 23 of started to wilt from him just asking her repeatedly.  
 24 Q Did you ever speak with your mother about her reaction

1 to having to do this thing for the lawsuit?  
 2 A Yes.  
 3 Q And did whatever discussion you had with your mother  
 4 cause you any concern or emotions?  
 5 A Yes.  
 6 Q Could you describe that please?  
 7 A She was getting more tired, she was getting more  
 8 drained, she was having now bed sore problems and she  
 9 said that it was very stressful on her and she thought  
 10 it was very stressful on dad and she was worried about  
 11 that.  
 12 MR. VARGA: Your Honor, I just move to strike  
 13 that last part of the testimony.  
 14 THE COURT: Overruled.  
 15 (By Ms. Pinkham)  
 16 Q How did that make you feel?  
 17 A I was worried about her and dad.  
 18 Q At some point in time did you understand that a film  
 19 crew was going to come to your house?  
 20 A Yes.  
 21 Q And what was your understanding of why that was  
 22 happening?  
 23 A Dad said it was in case they needed it for the upcoming  
 24 trial.

1 Q At any point in time did you ever overhear either of  
 2 your parents talking about bills of finances?  
 3 A Yes.  
 4 Q Was that something that you ever overheard before prior  
 5 to the accident?  
 6 A No.  
 7 Q Can you recall whether it was your mother or your  
 8 father who was more involved in the financial aspect of  
 9 the family's life?  
 10 A Yes.  
 11 Q Who was it?  
 12 A My father.  
 13 Q Can you recall -- strike that.  
 14 Approximately how many times can you remember  
 15 your dad commenting on the costs or bills after the  
 16 accident?  
 17 A About four or five.  
 18 Q And do you remember generally what was the subject of  
 19 the comments that he made?  
 20 A It was usually about equipment that Mom would need now.  
 21 Q And were you able to observe your father as he was  
 22 making comments on the equipment?  
 23 A Could you observe his demeanor when he was discussing  
 24 the cost of equipment?

1 Q Did you ever have any discussions with your -- and this  
 2 is a yes or no question -- did you ever have any  
 3 discussions with your mother about the film crew coming  
 4 to your house?  
 5 A Yes.  
 6 Q Did you form any impression of whether she was happy  
 7 about the fact that the film crew was coming?  
 8 A Yes.  
 9 Q What was your impression?  
 10 A She wasn't very happy that there would be people coming  
 11 and recording her. She said that she didn't want them  
 12 to see her bedsores and that she was nervous that  
 13 people would be seeing them how we now lived.  
 14 Q How did that conversation affect you?  
 15 A I asked her if they would need to be observing all of  
 16 us and she said, yes, and she wasn't happy about that  
 17 either.  
 18 Q Did you understand that you would be involved in some  
 19 part in the video?  
 20 A Yes.  
 21 Q What was your reaction to that?  
 22 A I asked Dad how big a part I'd need in this and he said  
 23 they will only be observing you for about an hour and I  
 24 didn't think that was too bad.

1 A Yes.  
 2 Q What did you observe?  
 3 A He was starting to get a little stressed out, he and  
 4 mum would discuss the equipment she would need how it  
 5 would be more equipment than he originally thought that  
 6 she would need and he seemed a little nervous about,  
 7 well if this is what we need now, what will we need in  
 8 a year.  
 9 Q Had you ever observed your dad being nervous about  
 10 costs or finances before?  
 11 A No.  
 12 MR. VARGA: Objection.  
 13 THE COURT: Overruled.  
 14 (By Ms. Pinkham)  
 15 Q How did it make you feel that your father was concerned  
 16 about these costs?  
 17 A I was a little nervous, it was a little odd to see him  
 18 openly nervous about something. He was the sort of  
 19 person that planned for anything and any eventuality  
 20 and it was a little odd seeing him not be prepared for  
 21 something.  
 22 Q Did you have any feelings about that?  
 23 A It was a little odd, it was one of those surreal  
 24 experiences.

1 Q Did you ever talk to your parents about the lawsuit?  
 2 A Sometimes.  
 3 Q Can you recall approximately what grade you were in  
 4 when you would talk to your parents about the lawsuit?  
 5 A I was about to end eighth grade.  
 6 Q What would you ask your parents about?  
 7 A I was mainly concerned if I would be needed, indirectly  
 8 involved into it.  
 9 Q And over the course of time after you first asked that  
 10 question, did your parents responses to that question  
 11 change?  
 12 A Yes.  
 13 Q Can you explain that?  
 14 A When I first asked my father if I'd be needed in the  
 15 upcoming trial and everything he would say: There's a  
 16 slim possibility but I doubt it. And it eventually  
 17 became: There's a slim possibility. Then: Probably,  
 18 then: Yes.  
 19 Q When you're dad first indicated that there was only a  
 20 slim possibility that you would be needed; how did that  
 21 make you feel?  
 22 A I was nervous but he said there was a very slim  
 23 possibility so I wasn't too worried.

1 THE COURT: I'll allow it only to get some  
 2 context.  
 3 MS. PINKHAM: Foundation for state of mind,  
 4 your Honor.  
 5 THE COURT: All right. I'll allow it only  
 6 for that purpose.  
 7 A Can you repeat the question?  
 8 (By Ms. Pinkham)  
 9 Q Sure. Did you overhear -- what was the conversation  
 10 that you overheard about an offer?  
 11 A That Dad would --  
 12 MR. VARGA: Objection.  
 13 A We were being offered and then we could just sort of  
 14 move on with our lives and that would be it.  
 15 (By Ms. Pinkham)  
 16 Q And after you heard that comment; how did it make you  
 17 feel?  
 18 A I was happy that we would be getting done with this  
 19 already and we could just start really just healing and  
 20 getting back to some sense of normality.  
 21 Q Rebecca, do you recall when it was you learned that you

1 Q When the answer changed to there is a possibility that  
 2 you will be needed; how did that make you feel?  
 3 A Dad said he would try everything to make sure that I  
 4 didn't become blatantly involved into everything, and I  
 5 was a little more nervous that suddenly the answer he  
 6 seemed so sure had changed, but I was still confident.  
 7 Q Okay. Did you ever ask your mother about what was  
 8 going on in the lawsuit?  
 9 A If I did, she was very tired and wouldn't want to  
 10 discuss it.  
 11 Q Did you have an understanding of whether your mother  
 12 was pleased with the progression of the lawsuit?  
 13 A Not really.  
 14 Q At any point in time did you overhear a conversation  
 15 about an offer in the lawsuit?  
 16 A Yes.  
 17 Q What was your understanding of what was going on in the  
 18 lawsuit?  
 19 MR. VARGA: Objection. It's clearly hearsay,  
 20 your Honor. There is no basis for knowledge.

1 were going to be deposed?  
 2 A Yes.  
 3 Q Approximately when was it?  
 4 A About two months before I actually had to go to trial.  
 5 Q To trial or to the deposition?  
 6 A To the deposition part, it was two weeks before the  
 7 trial.  
 8 Q Okay. And you were deposed at the end of August of  
 9 2004?  
 10 A Yes.  
 11 Q Okay. Who told you that you were going to be deposed?  
 12 A My father.  
 13 Q And could you observe his demeanor when he was telling  
 14 you that?  
 15 A Yes.  
 16 Q Could you describe it please?  
 17 A He seemed a little exhausted, he seemed a little  
 18 peeved.  
 19 Q And what was your reaction to the fact that you were  
 20 going to be deposed?

1 A I was very nervous. I asked mum a lot: Do you think  
 2 I'm going to be all right with this? Am I doing okay  
 3 with this? And she said: You'll do fine.  
 4 Q Why were you nervous?  
 5 A I knew it was a big deal. It was something that would  
 6 help Mom and Dad and just of help us to get back to our  
 7 lives, but I also knew it was something very formal,  
 8 something that I had never done before. It was a new  
 9 experience.  
 10 Q Do you recall the deposition?  
 11 A Vaguely, yes.  
 12 Q Do you remember where it was?  
 13 A Yes.  
 14 Q Where was it?  
 15 A At the Radisson Hotel.  
 16 Q And had your family had a happy event at the Radisson  
 17 Hotel before the accident?  
 18 A Yes.  
 19 Q What was that?  
 20 A I had been bat mitzvahed there.

1 Q Did you feel comfortable answering all the questions  
 2 that were asked of you at the deposition?  
 3 A Not all of them.  
 4 Q Why not?  
 5 A Some of them were about our personal lives and how we  
 6 were now and about Mom and I was discussing things that  
 7 I didn't really have a full grasp of myself and hadn't  
 8 really dealt with myself.  
 9 Q Okay. Rebecca, at the time that you were deposed in  
 10 August of 2004, did you know that the trial was  
 11 scheduled to start right after Labor Day?  
 12 A Yes.  
 13 Q Could you describe the mood at your house in the month  
 14 before the trial?  
 15 MR. VARGA: Objection.  
 16 THE COURT: Overruled, I'll allow it.  
 17 (By Ms. Pinkham)  
 18 Q Go ahead.  
 19 A It was a very stressful atmosphere. Dad was starting  
 20 to go through the motions of taking care of mum and mum

1 Q Was your mother at your deposition?  
 2 A Yes.  
 3 Q How did that make you feel?  
 4 A I felt better that she was there.  
 5 Q Why?  
 6 A I felt I had some sort of moral support.  
 7 Q Did you need the moral support during the deposition?  
 8 A Yes.  
 9 Q Why?  
 10 A It was very nerve-wracking. It was something very  
 11 serious and I didn't want to hurt Mom, hurt Dad, and it  
 12 was a whole new experience I just wanted someone there  
 13 that I knew and I trusted.  
 14 Q Okay. Do you recall how many attorneys asked you  
 15 questions at the deposition?  
 16 A No.  
 17 Q Do you recall any of the questions that they asked you  
 18 at the deposition?  
 19 A The only questions that I recall were about my grades  
 20 the previous school semester.

1 was very tired all the time and they seemed a little  
 2 more nervous things than normal. Dad had started to --  
 3 he started to analyze everything and every aspect of it  
 4 and Mom just really wanted to sleep.  
 5 Q Do you remember what feelings you had in the month  
 6 before the trial?  
 7 A It was very difficult to be at home in such a stressful  
 8 atmosphere. I started to just find ways to sort of  
 9 relieve the stress.  
 10 Q How did you do that?  
 11 A I started to go for walks around the block, which is  
 12 about a mile long walk.  
 13 Q Did that make you feel better?  
 14 A Yes.  
 15 Q Did you continue to take walks around the block?  
 16 A Yes, but eventually it became a little bit boring so I  
 17 started to go to walks to K-Mart.  
 18 Q Where was K-Mart?  
 19 A About a mile away.  
 20 Q And what road would you have to walk on to get to K-

1 Mart?  
 2 A Along Route 109.  
 3 Q Did the fact that you were taking walks on 109 cause  
 4 any additional stress in your house?  
 5 A Yes.  
 6 Q On whose part?  
 7 A My mother.  
 8 Q Did your mother make any requests of you when you would  
 9 go for your walks on Route 109?  
 10 A Yes.  
 11 Q What did she ask you to do?  
 12 MR. VARGA: Objection.  
 13 THE COURT: Overruled.  
 14 A She would ask that as soon as I got to K-Mart that I  
 15 call her immediately and let her know that I had gotten  
 16 there safely.  
 17 (By Ms. Pinkham)  
 18 Q Would you do that?  
 19 A Yes.  
 20 Q Did the walks continue to make you feel better?  
 21 A Yes.

1 Q And when you were home and your had your bedroom on the  
 2 second floor, where would your dad spend most of his  
 3 time?  
 4 A He was usually in the basement.  
 5 Q Why was he in the basement?  
 6 A He did all of his work in the basement.  
 7 Q Did he have an office there?  
 8 A Yes.  
 9 Q Did you ever experience any emotions based on the fact  
 10 that your family were in one house but all separate  
 11 from each other before the trial?  
 12 A Yes.  
 13 MR. VARGA: Objection.  
 14 THE COURT: Overruled.  
 15 (By Ms. Pinkham)  
 16 Q What were they?  
 17 A It was a little odd that we were all on different  
 18 floors. It was a three-floor, including basement, it  
 19 was a three-floor house and there were three of us and  
 20 we were all on different floors and sometimes we would

1 Q Did the walks make you feel bad at the same time?  
 2 A Yes.  
 3 Q Why?  
 4 A I felt bad that something that was making me feel  
 5 better made Mom feel worse because she had to worry  
 6 that I was all right and that I was getting there  
 7 safely and getting back safely.  
 8 Q If you weren't going for a walk to relieve the tension  
 9 that you were feeling, what would you do when you were  
 10 in the house?  
 11 A I would usually go to my room and do homework or study  
 12 or read.  
 13 Q Where was your room?  
 14 A It's on the top floor.  
 15 Q In the month before the trial where was your mother's  
 16 room?  
 17 A In the middle floor. We were having part of the house  
 18 built so it was sort of in the back.  
 19 Q Was her bedroom on the first floor?  
 20 A Yes.

1 go long intervals without really talking.  
 2 Q Did you ever talk with your parents about being nervous  
 3 about the trial?  
 4 A Yes.  
 5 Q And how would they respond?  
 6 A When I first mentioned it to my father he apologized  
 7 that I would have to go and do it. He and Mom seemed  
 8 very confident that I could do it.  
 9 Q Do you remember the testimony in the trial in September  
 10 of 2004?  
 11 A Yes.  
 12 Q How did you get to the courthouse that day, Rebecca?  
 13 A My father drove us.  
 14 Q Was your mother there too?  
 15 A Yes.  
 16 Q When you got to the courthouse in Dedham, what did you  
 17 do?  
 18 A I stayed outside the court, I sat in the lobby and I  
 19 sort of just read.  
 20 Q How would you describe the car ride over from your

1 house to the Superior Court on the day that you had to  
2 testify?  
3 A It was a little odd. Mom was in her manual wheelchair,  
4 which we had to tie down to the van; she hadn't had her  
5 electric yet. It's always nervous when she's doing  
6 that and I was nervous. I had to wait in the lobby by  
7 myself because I didn't want to be in the courtroom any  
8 longer than I had to.  
9 Q Were your parents in the courtroom?  
10 A Yes.  
11 Q When you first took the stand in the court on September  
12 9th of 2004; do you remember what you were feeling?  
13 A I was a little sad and I was very nervous.  
14 Q Why were you nervous?  
15 A It was something very important, it was possibility the  
16 most important thing I'd done in my life to date and I  
17 didn't want to hurt Mom or Dad's feelings because I had  
18 to say thing that I knew they hadn't heard yet.  
19 Q When you testified in September of 2004, were you asked  
20 personal questions about how the accident affected your  
21 relationship with your mother?  
22 A Yes.

1 A Because it made me realize on the stand in front of  
2 everyone that it was guestroom now and it would never  
3 be her room again.  
4 Q Did you start to cry when you were answering -- strike  
5 that -- when you were providing that testimony?  
6 A Yes.  
7 Q Did you have to stop testifying?  
8 A Yes.  
9 Q Do you remember when the judge called a recess?  
10 A Yes.  
11 Q What happened after the judge called a recess?  
12 A Mom came over and tried to comfort me.  
13 Q Could your mother reach you on the witness stand?  
14 A No.  
15 Q Why not?  
16 A Because the witness stand was on a raised platform and  
17 she couldn't reach me from her wheelchair.  
18 Q So what did you have to do so your mother could comfort  
19 you?  
20 A I had to move forward a bit and when she wanted to hug  
21 me I had to get off the stand to hug her.  
22 Q Did you spend some time with your mom during the recess  
23 that Judge Donovan had called?  
24 A Yes.

1 Q And prior to the lawsuit -- strike that.  
2 Prior to the day that you had testified had  
3 you had conversations with either of your parents about  
4 some of the changes to your relationship with your  
5 mother?  
6 A No.  
7 Q Why not?  
8 A I didn't want to hurt either of their feelings,  
9 especially Mom.  
10 Q Were your parents in the courtroom when you testified?  
11 A Yes.  
12 Q How did that make you feel?  
13 A I was nervous that I was testifying in front of them  
14 but I felt better that they were there.  
15 Q Rebecca, when you were testifying in 2004, did you get  
16 upset at all during your testimony?  
17 A Yes.  
18 Q Do you recall what you were testifying about when you  
19 got upset?  
20 A Yes.  
21 Q What was it?  
22 A We were talking about Mom's old room that she had  
23 before the accident and how it's not her room anymore.  
24 Q Why was that upsetting to you?

1 Q Did she comfort you during that recess?  
2 A Yes.  
3 Q Do you remember what you did?  
4 A Yes. We got some candy and we were talking about  
5 things that had nothing to do with anything.  
6 Q Were you ready to go back and testify when the recess  
7 was over?  
8 A Yes.  
9 Q When you got back on the stand did you continue to talk  
10 about personal things about your relationship with your  
11 mother?  
12 A Yes.  
13 Q Did you testify about how you reacted when your dad  
14 first told you that she was going to be paralyzed?  
15 A Yes.  
16 Q Had you ever told your mother how you reacted when you  
17 got that news?  
18 A No.  
19 Q Was she in the stand when you testified to it?  
20 A Yes.  
21 Q Sorry, was she in the courtroom when you testified to  
22 it?  
23 A Yes.  
24 Q What did you testify?

1 A That when I heard that she'd be in a wheelchair and she  
 2 was in the hospital, I fainted.  
 3 Q Did you look at your mother at all during that  
 4 testimony?  
 5 A No.  
 6 Q Why not?  
 7 A I couldn't see her.  
 8 Q Did you testify at all about a trip that you and your  
 9 mother took to Florida after the accident?  
 10 A Yes.  
 11 Q Did you have any concerns about how that testimony  
 12 would affect your mother?  
 13 A Yes.  
 14 Q Why?  
 15 A The trip to Florida and when we were coming back from  
 16 Florida it was very stressful on her because it made  
 17 her realize that she can't walk and she'll probably  
 18 never walk again for the rest of her life, save some  
 19 miracle breakthrough in science.  
 20 Q Was there an event that took place on the trip to  
 21 Florida that caused your mother great embarrassment and  
 22 distress?  
 23 A Yes.  
 24 Q What was it?

1 testimony?  
 2 A I was very relieved.  
 3 Q What did you do on the way home?  
 4 A Mom and I were talking in the back and we were just  
 5 talking about nothing that had to do with anything.  
 6 Q Rebecca, did you miss school in order to testify?  
 7 A Yes.  
 8 Q Did you feel comfortable in having to explain why it  
 9 was that you missed school?  
 10 A No.  
 11 Q Did the lawsuit ever make you a center of attention at  
 12 school?  
 13 A Yes.  
 14 Q Can you explain how?  
 15 A There was a law class that I took when I was, I think a  
 16 junior in high school, and one of the sections of the  
 17 law class was on car accidents and when we got to case  
 18 files on major car accidents and how they affect the  
 19 lives of the victims my teacher said: Well Rebecca has  
 20 experience in this area, Rebecca, what happens in this  
 21 scenario; and he gave me a scenario.  
 22 Q How did you respond to that?  
 23 A I put my head on the desk and I sort of closed my eyes  
 24 and shook my head. I really didn't want to think about

1 A The security officer didn't understand that Mom  
 2 couldn't walk and repeatedly asked her to stand and  
 3 walk through security.  
 4 Q Why did you think that when you testified about that at  
 5 the trial in September of 2004 that that was going to  
 6 upset your mother?  
 7 A When it happened Mom got very very upset. It took me  
 8 and the home help aide that was with us to calm her  
 9 down and I was afraid that if I said it in the  
 10 courtroom and talked about it, it would remind her and  
 11 upset her again. It had been one of the major  
 12 realizations that she can't walk and she can't even do  
 13 something so simple as get off a chair and walk through  
 14 airport security.  
 15 Q Were you cross-examined by other attorneys at the trial  
 16 in September of '04?  
 17 A Yes.  
 18 Q How did you feel during the cross-examination?  
 19 A I was nervous.  
 20 Q Why?  
 21 A I didn't know what to expect, I didn't know what kind  
 22 of questions they would ask, I didn't know how long  
 23 they were going to be asking questions.  
 24 Q What did it feel like when you were all done with your

1 it.  
 2 THE COURT: By the way, when you testified,  
 3 what grade were you in then?  
 4 THE WITNESS: Eighth -- wait, ninth, I had  
 5 just turned, yes.  
 6 THE COURT: This would be in September of  
 7 '04?  
 8 THE WITNESS: Yes.  
 9 (By Ms. Pinkham)  
 10 Q In September of '04?  
 11 A Let me do the math, hold on.  
 12 Q Yes, do the math.  
 13 A Sophomore.  
 14 THE COURT: Tenth grade?  
 15 THE WITNESS: Yes.  
 16 (By Ms. Pinkham)  
 17 Q Rebecca, who told you that the verdict was being  
 18 appealed?  
 19 A My mother.  
 20 Q Can you recall how she was acting when she told you  
 21 that the verdict was appealed?  
 22 A Yes.  
 23 Q Could you describe it?  
 24 A She looked very very exhausted. She seemed to just

1 dread it immediately. She seemed to almost wilt when  
 2 she was telling me.  
 3 Q How did you respond to the fact that the verdict was  
 4 being appealed?  
 5 A I got nervous all over again.  
 6 Q Why?  
 7 A I was afraid I'd have to go back to court and get back  
 8 on the stand and testify all over again.  
 9 Q After the trial had ended and you were done testifying,  
 10 were you looking forward to moving on?  
 11 A Yes.  
 12 Q Why?  
 13 A It meant that we could just start getting back to some  
 14 semblance of normality, we can sort of get on with our  
 15 lives finally.  
 16 Q Did that feeling change once you learned that there was  
 17 going to be an appeal?  
 18 A Yes.  
 19 MS. PINKHAM: I have nothing further.  
 20 THE COURT: All right. Mr. Varga or Ms.  
 21 Sackett, any questions on behalf of Zurich?  
 22 MR. VARGA: We'll call on Mr. Cohen to begin.  
 23 THE COURT: Okay, Mr. Cohen.  
 24 MR. COHEN: Thank you.

1 A In what way?  
 2 Q Well, do you understand what a plaintiff in a lawsuit  
 3 is?  
 4 A Yes.  
 5 Q Somebody who is suing somebody else?  
 6 A Yes.  
 7 Q And you understand that you -- you now understand that  
 8 you are a plaintiff in this current insurance lawsuit,  
 9 right?  
 10 A Yes.  
 11 Q Okay. But in 2004 you were not aware that you were a  
 12 plaintiff in the accident case, correct?  
 13 A Yes.  
 14 Q And you just found that out when you turned 18 and your  
 15 Dad told you that you were a plaintiff and that you had  
 16 received \$500,000 as a result of that case, right?  
 17 A Yes.  
 18 Q So any nervousness or stress that you felt as a result  
 19 of the accident case had to do with your role as either  
 20 a witness or a prospective witness in that case or out  
 21 of concern for your who you understood was the  
 22 plaintiff in that case, right?  
 23 A Yes.  
 24 Q Okay. Now you weren't involved at all in any

1 CROSS-EXAMINATION BY MR. COHEN:

2 Q Good morning, Rebecca, how are you?  
 3 A I'm all right. You?  
 4 Q Good. Rebecca, you talked about the lawsuit that your  
 5 Mom was involved with and the trial concerning it,  
 6 correct??  
 7 A Yes.  
 8 Q You understand that there have been two different  
 9 lawsuits that your family have been involved in, the  
 10 lawsuit that you are testifying about here today and  
 11 the lawsuit that you testified back in 2004, correct?  
 12 A Yes.  
 13 Q Okay. And would it be okay with you if I refer to the  
 14 accident that you testified about in 2004 as the  
 15 "accident case"?  
 16 A Yes.  
 17 Q Now, you told Ms. Pinkham and the judge a few minutes  
 18 ago that at various points in your involvement in the  
 19 accident case you were nervous and stressed out,  
 20 correct?  
 21 A Yes.  
 22 Q And you in fact that you weren't aware that you were a  
 23 party to the accident case until you turned 18 just  
 24 last spring, correct?

1 settlement offers or demands that were made in the  
 2 accident case, correct?  
 3 A Yes.  
 4 Q Nobody consulted you and asked you how much you'd like  
 5 to settle for, correct?  
 6 A Yes.  
 7 Q And they certainly didn't talk to you about -- your mom  
 8 and dad certainly didn't talk to you about what you  
 9 thought they should settle for, correct?  
 10 A Yes.  
 11 Q When you testified at the trial for the accident case,  
 12 you were there for one day, correct?  
 13 A Yes.  
 14 Q And you missed just one day of school, right?  
 15 A Yes.  
 16 Q And the cross-examination that you were asked about by  
 17 the defense lawyers, actually there was only one  
 18 defense lawyer that asked you questions; do you recall  
 19 that?  
 20 A I don't recall.  
 21 Q Do you recall there was about five minutes or so that  
 22 the defense lawyer or lawyers were asking you  
 23 questions?  
 24 A I don't recall, it seemed like a long time.

1 Q Okay. Well would it help if I showed you the  
 2 transcript of your testimony and -- would you mind if I  
 3 just -- this is where your cross-examination started,  
 4 right?  
 5 MS. PINKHAM: Could I have a page reference  
 6 please?  
 7 MR. COHEN: I'm sorry, page 206, line 24.  
 8 (By Mr. Cohen)  
 9 Q Take a look at it if you want, it continues to page  
 10 207, 208, and 209 and it concluded on page 210, line  
 11 six, right?  
 12 A Yes.  
 13 Q Okay. So that wasn't a whole lot of time you were  
 14 asked about 24 or 25 questions --  
 15 MS. PINKHAM: Objection.  
 16 THE COURT: Sustained as to the form of the  
 17 question.  
 18 (By Mr. Cohen)  
 19 Q You were only asked about 24 or 25 questions by Mr.  
 20 Conroy, if you like you could count them?  
 21 A Yes.  
 22 Q Now, during this whole time period when you were  
 23 feeling the stress and nervousness about the accident  
 24 case, there were a lot of other things that were

1 correct?  
 2 A Yes.  
 3 Q And that's continued throughout the period that the  
 4 accident case was going on?  
 5 A Yes, I believe so.  
 6 Q Now you talked about some of the financial concerns  
 7 that you had that you heard your mom and dad talking  
 8 about, about having to buy equipment and whatnot; is it  
 9 true, is it not, that your family had health insurance  
 10 that was paying for much of your mom's medical care?  
 11 A I don't know.  
 12 Q Well, are you aware that you have health insurance when  
 13 you go to the doctor?  
 14 A Yes.  
 15 Q Is it fair to say that most of the stress and  
 16 nervousness that you felt after your Mom's accident had  
 17 to do with other things other than concerns about  
 18 having to testify at a deposition or trial?  
 19 A Before I knew that, yes.  
 20 Q Okay, but even after you knew about it, isn't it fair  
 21 to say that those other things were causing you more  
 22 worry than the fact that you'd have to testify one or  
 23 two days in the accident case?  
 24 A No.

1 causing you stress and nervousness in your life as  
 2 well, correct?  
 3 A Yes.  
 4 Q And not the least of which was that your mother had  
 5 this terribly injury and was paralyzed, correct?  
 6 A Yes.  
 7 Q And that had altered the whole family dynamic as to how  
 8 everybody interacted and what you could do with your  
 9 parents etcetera?  
 10 A Yes.  
 11 Q And you testified about all that in the accident case?  
 12 A Yes.  
 13 Q And presumably you were compensated for that as part of  
 14 the accident case, right?  
 15 A Yes.  
 16 Q Okay. In addition to that you had had some problems  
 17 before the accident as well and had been in counseling,  
 18 correct?  
 19 A Yes.  
 20 Q You had been seeing a social worker every week going  
 21 back to when you were in fifth grade?  
 22 A Yes.  
 23 Q And a psychiatrist who was prescribing you certain  
 24 antidepressant or anti-anxiety medications as well,

1 Q You were more worried about having to testify than  
 2 about your mother's accident and the effect on all of  
 3 your lives as a result?  
 4 A I was afraid of what my testimony would do too for my  
 5 mother's stress level and thus her health.  
 6 Q Were you afraid that if you testified in some manner  
 7 that perhaps wasn't appropriate that your mother  
 8 wouldn't get as much money as she would otherwise from  
 9 the accident case?  
 10 A No, I was more concerned about her health.  
 11 Q Okay.  
 12 MR. COHEN: That's all I have, thank you.  
 13 THE COURT: All right, any further questions  
 14 of defense counsel?  
 15 MR. VARGA: Just a few.  
 16 CROSS-EXAMINATION BY MR. VARGA:  
 17 Q Rebecca, during 2002 and 2003 and 2004 your mother had  
 18 a number of medical and doctor appointments outside the  
 19 home obviously, right?  
 20 A Yes.  
 21 Q Okay, who drove her to those appointments?  
 22 A I don't recall.  
 23 Q Was it your dad, do you know?  
 24 A I don't recall.

1 Q Okay. During 2003 and 2004 there were a number of  
2 modifications and renovations that were made to your  
3 house, right?  
4 A Yes.  
5 Q And it included putting an addition on the house,  
6 correct?  
7 A Yes.  
8 Q And it included renovating the basement of the addition  
9 at one point in time?  
10 A Yes.  
11 Q And included widening doors and otherwise making the  
12 home handicapped accessible so that your mom's  
13 wheelchair could get through the house, correct?  
14 A Yes.  
15 Q And who was dealing with all of that, with the  
16 contractors on a regular basis?  
17 A My father.  
18 Q You weren't?  
19 A No.  
20 Q And was that something that your dad was dealing with  
21 quite regularly?  
22 A I think so, yes.  
23 Q During the course of the lawsuit, Rebecca, your dad did  
24 everything he could to protect you from what was going

1 but yes, I knew that they had said that they had to go  
2 to trial.  
3 Q And when you testified during the trial Ms. Pinkham was  
4 the person who did the first examination, right?  
5 A Yes.  
6 Q You remember testifying at length with her during that  
7 trial?  
8 A Yes.  
9 Q And it was Ms. Pinkham who asked you questions about  
10 how the accident had affected your life, yes?  
11 A Yes.  
12 Q And it Ms. Pinkham that asked you questions about  
13 things that you and your mother used to do before the  
14 accident that you couldn't do after the accident,  
15 right?  
16 A Yes.  
17 Q And it was Ms. Pinkham that asked you questions about  
18 the trips that you and your mother used to take to Cape  
19 Cod in the summer prior to the accident, right?  
20 A Yes.  
21 Q And she asked you questions about trips that you  
22 couldn't take anymore to the Cape as frequently after  
23 the accident, right?  
24 A Yes.

1 on in the lawsuit, didn't he?  
2 A Yes.  
3 Q Did you Rebecca, in August of 2004 that there was a  
4 mediation in the underlying accident case?  
5 A Yes.  
6 Q Did you know that after that mediation -- or during  
7 that mediation your parents had rejected settlement  
8 offers that were made?  
9 A Yes.  
10 Q Did you know that they had made the decision at the  
11 close of that mediation to take the case to trial?  
12 MS. PINKHAM: Objection.  
13 THE COURT: Did she know that when?  
14 MR. VARGA: Did she know that at that time in  
15 2004, after the mediation. Let me rephrase the  
16 question.  
17 (By Mr. Varga)  
18 Q Between the time of the mediation, which was August 11,  
19 2004, and the beginning of the trial, which was  
20 September 7, 2004, you got the timeframe?  
21 A Yes.  
22 Q Okay. Did you learn that your parents had made the  
23 decision just after mediation to go to trial?  
24 A I don't know how long after it was after the mediation,

1 Q And answering those questions made you feel upset?  
2 A Yes.  
3 Q Did the defense attorney ask you any questions to that  
4 nature?  
5 A I don't recall.  
6 Q When your mother was in the hospital, UMass Medical  
7 Center, was your dad there visiting her at least part  
8 of every day?  
9 A Yes.  
10 Q When she was discharged to -- was it Fairlawn  
11 Rehabilitation Hospital?  
12 A I believe so.  
13 Q Okay, when she was discharged to Fairlawn  
14 Rehabilitation Hospital in February of 2002, did your  
15 father go there every day to visit her?  
16 A He went there very often, yes.  
17 Q How many times a week?  
18 A I would say at least four.  
19 Q Possibly more than that?  
20 A Yes, possibly.  
21 Q When your mother was admitted to the Whitinsville  
22 Rehabilitation hospital, when she started her stay  
23 there, or when she was there, how frequently did your  
24 father go and visit her there?

1 A About the same amount.  
 2 Q Okay, so something more than four times a week?  
 3 A Yes.  
 4 MR. VARGA: I have nothing further, your  
 5 Honor.  
 6 THE COURT: Any further questions, Ms.  
 7 Pinkham?  
 8 REDIRECT EXAMINATION BY MS. PINKHAM:  
 9 Q Rebecca, was it your understanding that your parents  
 10 wanted to go to trial?  
 11 A No.  
 12 MS. PINKHAM: Nothing further.  
 13 THE COURT: Any further questions?  
 14 MR. VARGA: No, your Honor.  
 15 THE COURT: Next witness.  
 16 MS. PINKHAM: The plaintiffs call Peter  
 17 Hermes.  
 18 PETER HERMES, Sworn  
 19 MR. : Your Honor, defendants object to  
 20 the calling of Mr. Hermes, as he's about to  
 21 testify about what happened at the mediation.  
 22 We contend that any statements that were made at  
 23 the mediation in the presence of the mediator  
 24 are barred by the mediation statute. We also

1 MS. PINKHAM: By representatives of  
 2 AIGDC.  
 3 THE COURT: All right. I'm sorry. Now  
 4 that I know that framework, let me hear from  
 5 counsel as to what the nature is of your  
 6 objection.  
 7 MR. McDONOUGH: Well, in any event, if  
 8 he's only going to be testifying about  
 9 statements made outside the presence of the  
 10 mediator, his statements, in any event, will be  
 11 subject to the mediation agreement that he  
 12 signed in which says that the parties agree that  
 13 the entire mediation process is confidential,  
 14 pursuant to M.G.L. Chapter 233, Section 23C, and  
 15 shall be treated as a compromised negotiation  
 16 for the purposes of the Federal Rules of  
 17 Evidence and applicable Massachusetts laws.  
 18 So the parties intended that any  
 19 discussions that were happening within the  
 20 context of the mediation were to be held  
 21 confidential.  
 22 THE COURT: All right. Ms. Pinkham?  
 23 MS. PINKHAM: Your Honor, I believe  
 24 we've already gone over this in the rulings on

1 contend that he shouldn't be testifying about  
 2 what happened at the mediation in light of the  
 3 mediation agreement that he signed and by which  
 4 he agreed that any and all communications that  
 5 occurred in the mediation would be subject to  
 6 the statute.  
 7 THE COURT: All right. Tell me who Mr.  
 8 Hermes is --  
 9 MS. PINKHAM: Your Honor, if I'm  
 10 allowed, Mr. Hermes I believe will testify  
 11 that --  
 12 THE COURT: First of all, what's his  
 13 role in this case?  
 14 MS. PINKHAM: That Mr. Hermes  
 15 represented the insurance company for the  
 16 third-party defendant, Professional Tree.  
 17 THE COURT: Okay. And he's here to  
 18 testify as to what subject matter?  
 19 MS. SACKETT: Statements that were made  
 20 outside of the presence of the mediator.  
 21 THE COURT: During the course of  
 22 mediation?  
 23 MS. PINKHAM: Yes.  
 24 THE COURT: Statements made by whom?

1 the motions in limine. Mr. Hermes has been on  
 2 the witness list for several months now.  
 3 There's been no motion in limine to exclude him.  
 4 Certainly AIGDC, having been  
 5 represented by counsel at the mediation, was  
 6 aware of Mr. Hermes' role. And in any event,  
 7 your Honor, as was set forth in the motion in  
 8 limine that the plaintiffs filed to allow  
 9 evidence, the mediation statute itself is clear  
 10 that the statute only bars statements made in  
 11 the presence of the mediator.  
 12 And as for the mediation agreement,  
 13 your Honor, it's not a rule of evidence and it  
 14 has no effect on the admissibility of Mr.  
 15 Hermes' testimony.  
 16 THE COURT: Let me see the mediation  
 17 agreement. I thought we had addressed every  
 18 issue that was going to come up, but I guess we  
 19 did not. So 23C Mass.?  
 20 MR. McDONOUGH: Yes.  
 21 THE COURT: All right. Let's take it  
 22 step by step. Mr. Cohen, you agree that the  
 23 statute doesn't apply?  
 24 MR. McDONOUGH: Mr. McDonough.

1 THE COURT: Sorry. Excuse me.  
 2 MR. McDONOUGH: That's okay. Do I  
 3 agree that the statute -- pardon me?  
 4 THE COURT: The statute applies only to  
 5 the extent that the communication is made in the  
 6 presence of the mediator?  
 7 MR. McDONOUGH: No, I disagree with  
 8 that. In fact, I think that there are decisions  
 9 that have gone so far as to say that any  
 10 statement made in the context of the mediation  
 11 is in fact barred by the statute. I'm aware of  
 12 a decision by Judge van Gestel issued in the  
 13 business litigation session that says exactly  
 14 that.  
 15 THE COURT: Well, there are two  
 16 separate issues. One is generally statements  
 17 made during the course of settlement  
 18 discussions, regardless of whether they're made  
 19 in the presence of a mediator, are generally  
 20 barred. The mediation statute says any  
 21 communications made in the course of and  
 22 relating to the subject matter of any mediation  
 23 and which is made in the presence of such  
 24 mediator -- I mean, participant, mediator or

1 even during the course of mediation are fair  
 2 game. That's the extent, I think, of my  
 3 rulings.  
 4 I frankly was not posed with the issue  
 5 of statements made outside of the presence of a  
 6 mediator during the course of settlement  
 7 discussions.  
 8 MR. McDONOUGH: Well, the witness list  
 9 on which Mr. Hermes was designated as a witness  
 10 wasn't given to us until a day or so before the  
 11 motion in limine hearings, and so the in limine  
 12 motions that had been prepared didn't  
 13 contemplate his being called.  
 14 The other point is, I don't believe  
 15 that your Honor took a position on the mediation  
 16 agreement itself and its effect. And the  
 17 mediation agreement is clear that the parties  
 18 intended that any communications that were made  
 19 during that mediation would be treated as  
 20 confidential.  
 21 I mean, it's going to completely  
 22 frustrate the intent of the parties going into  
 23 that mediation. In fact, if our client  
 24 understood that things that it said during that

1 other person, shall be a confidential  
 2 communication.  
 3 So how can the statute apply to  
 4 statements made outside the course of  
 5 examination -- I'm sorry -- statements made  
 6 outside the presence of the mediator?  
 7 MR. ZELLE: If I can respond, your  
 8 Honor. I argued the position you're advocating,  
 9 and Judge van Gestel construed the statute more  
 10 broadly than the statute explicitly provides.  
 11 THE COURT: Let me ask you, why am I  
 12 dealing with this right when Mr. Hermes is being  
 13 called, when we spent two or three days dealing  
 14 with comparable motions with regard to it? Why  
 15 did I not know about his testimony?  
 16 MR. McDONOUGH: Well, we did bring in  
 17 an in limine motion which raised the issue of  
 18 the confidentiality agreement and statements by  
 19 anybody who participated in the mediation, and  
 20 your Honor I believe said that, you know, he was  
 21 going to wait and see on that.  
 22 THE COURT: No. I said statements made  
 23 by the mediator are barred. I said statements  
 24 reflected in the offers made by the defendants

1 mediation process were going to be used against  
 2 it in a lawsuit later, they probably wouldn't  
 3 have participated or wouldn't have been able to  
 4 fully participate because they'd be constantly  
 5 on guard.  
 6 THE COURT: Ms. Pinkham had referred to  
 7 an agreement that had not been signed by anybody  
 8 in behalf of the plaintiffs.  
 9 Was this agreement signed on behalf of  
 10 the -- with regard to the plaintiffs?  
 11 MS. PINKHAM: What I had said, your  
 12 Honor, is that Harold Rhodes had not signed it.  
 13 In fact, at the time of the mediation, whole  
 14 agreement --  
 15 THE COURT: Are you saying Mr. Rhodes  
 16 personally had not signed it?  
 17 MS. PINKHAM: Right, Mr. Rhodes had not  
 18 signed it.  
 19 THE COURT: But had his attorney signed  
 20 it?  
 21 MS. PINKHAM: Yes, your Honor. And as  
 22 I was --  
 23 THE COURT: Is that your name, Margaret  
 24 Pinkham, number two?

1 MS. PINKHAM: Yes.  
 2 THE COURT: Okay. So you signed it?  
 3 MS. PINKHAM: Yes. And if I could,  
 4 your Honor, at the time this document was  
 5 circulated at the time of the mediation, it was  
 6 not a two-page document; it was a one-page  
 7 signature page that was signed that only made  
 8 reference to the mediator's charge.  
 9 THE COURT: Okay. I've now lost you.  
 10 You said you signed this agreement, but you  
 11 didn't realize what it said?  
 12 MS. PINKHAM: Your Honor, I signed this  
 13 page that made reference to scheduling mediation  
 14 and a cancellation charge. And I can't say what  
 15 the mediator said.  
 16 THE COURT: I'm sorry. You mean you  
 17 signed page two but never saw page one?  
 18 MS. PINKHAM: I did not, your Honor.  
 19 THE COURT: Is it your general practice  
 20 to sign a document without knowing what it says?  
 21 MS. PINKHAM: No, but I did rely on a  
 22 statement that was made by the mediator as it  
 23 was circulated, and I signed it. But in any  
 24 event, your Honor, the mediation statute does

1 MS. PINKHAM: It was the Bobick  
 2 decision, your Honor.  
 3 THE COURT: In which the court made an  
 4 exception to the mediation statute, and arguably  
 5 even an exception to any contractual agreement  
 6 so as to prevent a party from being effectively  
 7 barred from bringing a 176D claim. But that's  
 8 not what you're doing here. You're going beyond  
 9 that.  
 10 MS. PINKHAM: Your Honor, I actually  
 11 will be offering evidence as to the exchange of  
 12 offers made at the mediation through Mr. Hermes.  
 13 I was intending to elicit statements made by  
 14 representatives of AIG outside of the presence  
 15 of the mediator. I could make an offer of  
 16 proof.  
 17 THE COURT: Statements made after -- on  
 18 the day of the mediation?  
 19 MS. PINKHAM: Yes.  
 20 THE COURT: All right.  
 21 MR. McDONOUGH: Your Honor, so our --  
 22 maybe you're about to clarify.  
 23 THE COURT: I was going to give you one  
 24 last chance if you had anything to offer.

1 not exclude testimony or statements that were  
 2 made outside of the presence of the mediator.  
 3 And this agreement I don't believe would trump a  
 4 subpoena that has been served on Mr. Hermes who  
 5 has come here today ready to testify.  
 6 THE COURT: Okay. But you're breaching  
 7 this contract. Are you not breaching the  
 8 contract?  
 9 MS. PINKHAM: I am not calling the  
 10 mediator to testify.  
 11 THE COURT: I know you're not. But if  
 12 the parties agree that the entire mediation  
 13 process is confidential --  
 14 MS. PINKHAM: Right. But as you know,  
 15 your Honor --  
 16 THE COURT: The law, as I know, made an  
 17 exception in a case in which this statute was  
 18 being used as a means of preventing or learning  
 19 what the offer was of the plaintiff -- I'm sorry  
 20 -- of the defendant. But that's not the problem  
 21 here. The plaintiff will allowed to describe --  
 22 now, I will make an exception in keeping with  
 23 that case, which I don't have before me but have  
 24 read and discussed --

1 Well, first of all, I'm not thrilled  
 2 with having to -- with not having this issue  
 3 having been confronted earlier, but I play the  
 4 cards I'm dealt. My rulings, I think, have been  
 5 consistent. What the mediator says is barred by  
 6 the mediation statute. What the parties said  
 7 with regard to the exchange of offers is an  
 8 exception to the mediation statute and would be  
 9 an exception to the mediation contract.  
 10 But in view of the mediation agreement  
 11 signed by the attorney for Mr. Rhodes, I do  
 12 believe it would be a breach of that agreement  
 13 to offer any evidence with respect to what  
 14 occurred during the mediation beyond the scope  
 15 anticipated by Bobick, that is, beyond the scope  
 16 of permitting information to the court as to  
 17 what the offers were. So to the extent that  
 18 board seek to protect mediation and mediation  
 19 agreements are to be honored, I think it would  
 20 dishonor this mediation agreement to permit  
 21 private communications made between AIG, or, for  
 22 that matter, Zurich with another putative  
 23 defendant as to what they intended to do and  
 24 during the course of the mediation process and

1 how they planned to handle themselves. That  
2 would be, I think, a breach of this agreement.  
3 We honor mediation agreements and the courts  
4 will honor it by barring evidence except within  
5 the scope anticipated by Bobick.

6 So the bottom line is, the only thing I  
7 will permit to be heard that occurred during the  
8 course of mediation is information as to what  
9 offers were made by the defendants during the  
10 course of that mediation. But beyond that, I  
11 don't want to hear anything as to the mediation.

12 Ms. Pinkham, what you can do with  
13 regard to preserving your rights is you can make  
14 a proffer of what his testimony can be, you can  
15 put it in a sealed envelope and provide it. We  
16 will mark it for I.D. But I will not see it  
17 because I don't wish to be influenced by its content.  
18 The appeals court can see it, and if they believe that  
19 I erred, then you'll have the ability to make a proffer  
20 in that regard.

21 MS. PINKHAM: Thank you, your Honor, we'll do  
22 that.

23 THE COURT: I'm sorry. He still hasn't  
24 identified himself. We know who you are now, but if

1 you would tell us who you are and spell your last name  
2 for the court reporter.

3 THE WITNESS: My name is Peter G. Hermes, H-  
4 e-r-m-e-s.

5 THE COURT: Okay. Please proceed.

6 DIRECT EXAMINATION BY MS. PINKHAM.

7 Q Mr. Hermes, did you participate in a mediation on  
8 August 11 of 2004 in the Marcia Rhodes versus Carlos  
9 Zalewski case?

10 A I did.

11 Q And who did you represent in the mediation?

12 A I was asked to appear on behalf of One Beacon America  
13 Insurance Company, one of the insurers for J McMillan  
14 Professional Tree Service.

15 THE COURT: I'm sorry. One Beacon?

16 THE WITNESS: America Insurance Company, your  
17 Honor.

18 THE COURT: Okay.

19 (By Ms. Pinkham)

20 Q And what was your understanding of Professional Tree's  
21 role in the Rhodes versus Zalewski case?

22 A I was aware from review of certain pleadings that it  
23 was a -- that there was a third-party claim against  
24 McMillan in connection with certain operations it had

1 conducted along Route 109 immediately prior and, I  
2 guess, leading up to the time of the accident.  
3 Q What type of an insurance policy did One Beacon write  
4 for the McMillan's Tree Service Company?  
5 A One Beacon had a business automobile policy.  
6 Q Was there another carrier for McMillan's Professional  
7 Tree Service represented at the mediation?  
8 A Yes, there was.  
9 Q Could you identify who that was?  
10 A The insurer was Specialty National Insurance Company, a  
11 member of the Kemper Group.  
12 Q And what type of policy had Specialty National?  
13 A Specialty National had a commercial general liability  
14 policy.  
15 Q Was there any dispute between One Beacon and Specialty  
16 National over coverage for the claim, the third party  
17 claim asserted against McMillan's Tree Service?  
18 A Yes, there was.  
19 Q Can you describe that dispute?  
20 A Yes. The contention was made by Specialty National  
21 that the loss was in effect a business loss arising out  
22 of the ownership, maintenance or use of a covered motor  
23 vehicle, and One Beacon's position was that the claim  
24 did not arise out of the operation, ownership or

1 maintenance of a covered motor vehicle.

2 Q And you represented One Beacon?

3 A I did.

4 Q Mr. Hermes, if it was One Beacon's position that the  
5 third-party claim against Professional Tree was not  
6 covered, why were you at the mediation?

7 A I was there first because my client asked me, and  
8 second because there was an interest on the part of the  
9 insurer to protect its interest, its insured, first,  
10 and deal with coverage issues that might exist, second.

11 Q At some point in time did the insurance companies for  
12 Professional Tree begin negotiating separately with the  
13 plaintiffs?

14 A At the mediation?

15 Q Yes.

16 A Ms. Pinkham, I'm concerned about answering that  
17 question, because until the subject was raised a few  
18 minutes ago, I had not recalled if in fact I had signed  
19 a mediation agreement, and so I do not know whether in  
20 fact I did. And if I did, I am concerned about  
21 violating the terms of the agreement unless directed to  
22 respond to your question by the court.

23 THE COURT: This is the mediation agreement  
24 which we should mark, by the way, for I.D. After you

1 see it, we'll mark it for I.D.  
 2 THE WITNESS: My signature appears on the  
 3 agreement, your Honor.  
 4 THE COURT: All right. So it should be  
 5 marked for I.D.  
 6  
 7 (Exhibit B for I.D., marked; Mediation  
 8 Agreement.)  
 9  
 10 THE COURT: Okay. And your question again  
 11 is?  
 12 MS. PINKHAM: Whether the insureds companies  
 13 for Professional Tree began a negotiation with the  
 14 plaintiffs.  
 15 MR. McDONOUGH: Objection.  
 16 THE COURT: At the mediation?  
 17 MS. PINKHAM: Yes.  
 18 THE COURT: It's a yes or a no.  
 19 MR. McDONOUGH: Fine.  
 20 A Yes.  
 21 (By Ms. Pinkham)  
 22 Q Did the representative of Professional Tree break out  
 23 of the larger group of defense interests who were at  
 24 the mediation?

1 THE WITNESS: The notes that I have with me  
 2 are all of the notes I made during the course of the  
 3 mediation, your Honor.  
 4 MR. McDONOUGH: Your Honor, we object to the  
 5 use of this document inasmuch as we weren't given  
 6 notice of the subpoena, although we asked for notice of  
 7 subpoenas, and so we have not been given an opportunity  
 8 to know what documents were going to be brought today.  
 9 THE COURT: All right. Well, what I will do  
 10 is this: The only notes which we'll direct that you  
 11 provide are those notes which identify the settlement  
 12 -- well, let me ask you. Were any settlement offers  
 13 made by any other defendant in the presence of Mr.  
 14 Pritzker or Ms. Pinkham in your presence?  
 15 THE WITNESS: Yes.  
 16 THE COURT: I'm sorry. That was a poor  
 17 question.  
 18 Basically, with regard to those settlement  
 19 offers that you've identified, were they made in the  
 20 presence of plaintiffs' counsel?  
 21 THE WITNESS: I believe some were, your  
 22 Honor.  
 23 THE COURT: Okay. But some were not?  
 24 THE WITNESS: I'm not certain.

1 MR. McDONOUGH: Objection.  
 2 THE COURT: I'm not sure what it means to  
 3 "break out."  
 4 MS. PINKHAM: I'll take a step back, your  
 5 Honor.  
 6 (By Ms. Pinkham)  
 7 Q Mr. Hermes, were you aware of any of the offers that  
 8 were exchanged during the mediation?  
 9 A I was.  
 10 Q Did you make any notes?  
 11 A I did.  
 12 Q Have you been served with a subpoena in this case?  
 13 A Yes, I have.  
 14 Q Did you bring any documents with you?  
 15 A I was asked to bring my notes, and I did.  
 16 Q May I look at them?  
 17 MR. McDONOUGH: Objection.  
 18 THE COURT: His notes with regard to what  
 19 occurred during the mediation?  
 20 MS. PINKHAM: Settlement offers specifically,  
 21 your Honor.  
 22 THE COURT: Have they been redacted only to  
 23 include that, or they include all your work product  
 24 with regard to mediation?

1 THE COURT: Okay. Do you know of any  
 2 settlement offer that was communicated to you outside  
 3 the presence of plaintiffs' counsel which has been  
 4 incorporated in your notes?  
 5 THE WITNESS: My difficulty, your Honor, is I  
 6 know there were discussions outside the presence of  
 7 plaintiffs' counsel. I don't know -- I don't recall  
 8 when that was communicated, whether it was communicated  
 9 in my presence or outside my presence.  
 10 THE COURT: All right.  
 11 MS. PINKHAM: Your Honor, could I ask a  
 12 clarifying question?  
 13 THE COURT: Yes. Well, let me ask you. Is  
 14 there any dispute as to what the offers were that were  
 15 made to them during the course of mediation? I mean,  
 16 Mr. Hermes, I'm sure, has other things to do, but it  
 17 does not seem -- if all that's going to come in is what  
 18 offers were communicated to you, cannot there not be a  
 19 stipulation? Is there a dispute among the parties as  
 20 to what the offers were communicated to the defendant?  
 21 MS. PINKHAM: Your Honor, if I could --  
 22 THE COURT: I mean, communicated by the  
 23 defendants to plaintiff?  
 24 MS. PINKHAM: Yes.

1 THE COURT: Okay. What is the position of  
2 the plaintiff as to what was the -- as the offers made  
3 by the defense?  
4 MS. PINKHAM: Well, it's actually more the  
5 reaction to the defendant's statement that the last  
6 offer that was made at mediation by the plaintiffs was  
7 \$15.5 million and health insurance for Mrs. Rhodes.  
8 MR. ZELLE: Mr. Pritzker can testify about  
9 it.  
10 THE COURT: I'm sorry, the last offer made by  
11 what? By the plaintiffs?  
12 MS. PINKHAM: Yes.  
13 THE COURT: So you want him to testify to the  
14 last offer made by the plaintiffs?  
15 MS. PINKHAM: My understanding is that Mr.  
16 Hermes' notes reflect a different last offer from the  
17 plaintiffs.  
18 THE COURT: Okay. And when Mr. Pritzker  
19 testifies, what's he going to say to being the last  
20 offer made by the plaintiffs?  
21 MS. PINKHAM: That he made no notes of the  
22 offers at the mediation.  
23 THE COURT: And he doesn't remember?  
24 MS. PINKHAM: He has a memory of there being

1 witness, who has contemporaneous notes, at to what the  
2 offers were.  
3 THE COURT: All right. Are you asking him  
4 only about the plaintiffs' offer and counteroffer, or  
5 are you going to be asking him about the defense offers  
6 and counteroffers?  
7 MS. PINKHAM: The series of offers, your  
8 Honor, back and forth.  
9 THE COURT: So basically both sides.  
10 MS. PINKHAM: Yes.  
11 THE COURT: All right.  
12 MR. ZELLE: Your Honor, if I could interject  
13 there are signed interrogatory answers by Mr. Rhodes in  
14 which he identifies every offer and demand. That sets  
15 forth the Rhodes' position. With respect to our  
16 position, we will present evidence.  
17 THE COURT: Okay. And with regard to the  
18 Rhodeses -- was Mr. Rhodes present for all these offers  
19 and counteroffers?  
20 MS. PINKHAM: Which were communicated by the  
21 mediator? Yes.  
22 THE COURT: No. Communicated by plaintiff.  
23 MS. PINKHAM: Your Honor, the plaintiffs  
24 never communicated directly with the defendants, so all

1 a 15 -- something around 15, but we have no notes.  
2 THE COURT: Is his memory going to differ  
3 from that of Mr. Hermes'?  
4 MS. PINKHAM: Yes.  
5 THE COURT: You're offering Mr. Hermes'  
6 testimony because it will contradict the testimony of  
7 Mr. Pritzker?  
8 MS. PINKHAM: No.  
9 THE COURT: I'm a bit lost here now. All  
10 that's going to come in through Mr. Hermes, at least  
11 based on what you've proffered, is if Mr. Hermes was  
12 present when defense counsel communicated -- or  
13 insurance counsel communicated to plaintiffs' counsel  
14 an offer, or for that matter, fair enough, if  
15 plaintiffs' counsel communicated to defense counsel an  
16 offer. That's all that he's going to be allowed to  
17 testify to.  
18 You're welcome to have him testify to it.  
19 I'm just asking whether or not we need him for that or  
20 whether there's a dispute of fact as to what those  
21 offers and counteroffers were.  
22 MS. PINKHAM: Your Honor, the plaintiffs are  
23 not calling Mr. Pritzker to testify about the  
24 mediation. I would like to offer evidence from this

1 of the information that was received by the plaintiffs  
2 was received from the mediator.  
3 THE COURT: Okay. So what we're speaking  
4 about, then, are transmitted offers, offers transmitted  
5 through the mediator.  
6 MS. PINKHAM: Yes.  
7 THE COURT: All right. So now the issue is  
8 not merely what discussion there was of offers, I need  
9 to identify which offers were intended for  
10 transmission, because those are the only offers that  
11 would be admissible.  
12 MS. PINKHAM: Your Honor, all of the offers  
13 that have been referenced in the pleadings and which I  
14 seek to elicit from Mr. Hermes were offers that were  
15 intended to be communicated.  
16 MR. ZELLE: Well, the interrogatory answers  
17 -- the interrogatories list every offer of settlement  
18 that was made to you by AIG, Zurich, National Union, et  
19 cetera.  
20 The next interrogatory lists each settlement  
21 demand made by you that was relating to the underlying  
22 matter, who made each settlement demand, to whom each  
23 settlement demand was made, and the date and the  
24 amount.

1 THE COURT: Okay. And do you dispute that?  
 2 Is there --  
 3 MR. ZELLE: No.  
 4 THE COURT: Is there a factual dispute as to  
 5 what those demands were?  
 6 MR. ZELLE: These are their interrogatory  
 7 answers.  
 8 THE COURT: I know. But do you --  
 9 MR. ZELLE: Oh. Do we dispute them?  
 10 THE COURT: Does AIG dispute their accuracy?  
 11 MR. ZELLE: I'm going to take a second here,  
 12 your Honor, but I think the answer is no.  
 13 THE COURT: All right. And Ms. Pinkham, is  
 14 the Crawford testimony going to differ from what Mr.  
 15 Rhodes has written in his answer to interrogatory?  
 16 MS. PINKHAM: Yes, your Honor. It will also  
 17 differ from the testimony that was provided by Mr.  
 18 Nitti. The reason it is being offered, your Honor, is  
 19 that the testimony to date has been based simply on  
 20 people's memories of events. Mr. Hermes, to his  
 21 credit, took notes. And so to the extent that Mr.  
 22 Warren Nitti testified that the first offer was 2.6, I  
 23 would like to at least see what Mr. Hermes' notes  
 24 reflect as to the first offer that was authorized for

1 Pritzker. During Mr. Pritzker's deposition, he  
 2 expressed some memory that there was some offer  
 3 different than that that was reflected in the  
 4 plaintiffs' answers to interrogatories. He had a  
 5 memory of there being a lower number, but he was not  
 6 sure.  
 7 MR. ZELLE: I suspect Ms. Pinkham has spoke.  
 8 These interrogatory answers reflect Mr. Rhodes', not  
 9 Mr. Pritzker's recollections.  
 10 THE COURT: Right. I know. I mean, they  
 11 have to.  
 12 MR. ZELLE: Right.  
 13 THE COURT: So Mr. Rhodes makes his -- was  
 14 Mr. Rhodes present for all these? Was it based on his  
 15 personal knowledge or is this based on other  
 16 information?  
 17 MS. PINKHAM: He was present, your Honor.  
 18 THE COURT: Okay. So what we're going to get  
 19 now is you plan to offer information that's going to  
 20 contradict what Mr. Rhodes is going to say?  
 21 MS. PINKHAM: I believe Mr. Hermes' notes  
 22 reflect a different number than Mr. Rhodes' memory.  
 23 THE COURT: Okay. And what do you intend in  
 24 closing to argue to me is the correct number, what your

1 the mediator to communicate to the plaintiff.  
 2 THE COURT: Okay. But there's an  
 3 interrogatory made to a party, there's an answer to the  
 4 interrogatory made by a party. It's fair for the other  
 5 side to expect that that answer is what the party's  
 6 position is.  
 7 MS. PINKHAM: Yes.  
 8 THE COURT: If the party's position is to  
 9 differ, one would expect there were to be a supplement  
 10 to the answers to interrogatories changing that  
 11 position.  
 12 MS. PINKHAM: If the party felt confident  
 13 that there was an accurate basis to supplement the  
 14 answer to the interrogatory.  
 15 THE COURT: So you're offering testimony --  
 16 well, I gather you didn't supplement.  
 17 MS. PINKHAM: No, your Honor. In fact --  
 18 THE COURT: Okay. So what you're offering,  
 19 then, is evidence that you don't consider to be  
 20 accurate, and therefore did not think worthy of  
 21 supplementing your answer to interrogatory?  
 22 MS. PINKHAM: No, your Honor. If I may.  
 23 Again, the evidence as to the exchange of offers has  
 24 been based on the memories of Mr. Nitti and Mr.

1 client has said is the correct number in answered  
 2 interrogatory or what another witness says?  
 3 MS. PINKHAM: I'm sorry, your Honor.  
 4 THE COURT: When you get to closing, which do  
 5 you intend to argue to me is the answer is the position  
 6 of your client as to what the accurate numbers are, the  
 7 numbers which your client set forth in answers to  
 8 interrogatories or the answer from another witness?  
 9 MS. PINKHAM: The answers to interrogatories,  
 10 your Honor.  
 11 THE COURT: All right. So if that's your  
 12 position, then, why are you offering evidence that  
 13 would be contrary to your position?  
 14 MS. PINKHAM: I'll withdraw it, your Honor.  
 15 Could I continue on and hopefully get Mr. Hermes' done?  
 16 THE COURT: It's 1:06. How long do you have  
 17 with him?  
 18 MS. PINKHAM: I only have a few more minutes.  
 19 MR. GOLDMAN: And I've just got to ask. If  
 20 there are interrogatory answers that AIG is willing to  
 21 stipulate to the accuracy of, why are taking up all  
 22 this time doing this?  
 23 THE COURT: Don't ask me. I didn't call Mr.  
 24 Hermes. I'm trying to sort it out.

1 MS. PINKHAM: Your Honor, I'm sorry. Let me  
2 cut to the chase.

3 It's AIG's position that the last offer at  
4 mediation was a \$15 million offer with health insurance  
5 attached. That is not the plaintiffs' position, that's  
6 not the plaintiffs' response in the answers to  
7 interrogatories, and I believe that Mr. Hermes' notes  
8 would reflect accurately what the last communication,  
9 what the last offer was from the plaintiffs in  
10 mediation.

11 THE COURT: All right. So you're seeking,  
12 then, to bolster as opposed to contradict what Mr.  
13 Rhodes has said?

14 MS. PINKHAM: Yes.

15 THE COURT: All right. If that's all, how  
16 long will that take?

17 MS. PINKHAM: Three minutes, your Honor.

18 THE COURT: All right. We'll give you three  
19 minutes. Right now I'm missing a meeting that started  
20 at 12:30, which I said I'd be late for, but I figured  
21 I'd be finished at one. So go ahead. We'll see if we  
22 can get -- to the extent that this was information  
23 which he understood to be an offer that was to be  
24 communicated to the other side -- well, I gather since

1 he was on the other side -- all right. Let me set the  
2 contours, Mr. Hermes. I apologize for all this.

3 I will submit your answers to offers which  
4 you understood were intended for communication to an  
5 adverse party. Is that understood by you?

6 THE WITNESS: I hear that, your Honor,  
7 notwithstanding my signature on the agreement?

8 THE COURT: Right. The Bobick case and 176D  
9 cases, I believe, overrides not only the statute but  
10 also any contractual agreement to the contrary; that  
11 is, the court -- I think it was the appeals court has  
12 essentially said that 176D case information as to what  
13 offers were transmitted is necessary to resolve those  
14 cases and effectively an exception has been drawn to  
15 permit that information so that the offers and  
16 counteroffers may be made known to the court. That's  
17 the extent of the exception. So, yes.

18 MR. GOLDMAN: I'm sorry, your Honor, I don't  
19 mean to belabor this, but I think the problem is  
20 certainly any offers that AIG made or that were made by  
21 the defendants are relevant to this case. But as to  
22 the plaintiffs, the positions they took that were not  
23 communicated to the defendants --

24 THE COURT: It's only information. The only

1 thing he's permitted to discuss is that it was that  
2 which he understood to be intended for communication to  
3 an adverse party.

4 MR. GOLDMAN: Well, that's the glitch, it's  
5 intended to be communicated as opposed to was  
6 communicated. I think that's the problem. I'm not  
7 sure that --

8 THE COURT: Well --

9 MR. GOLDMAN: That's my concern.

10 THE COURT: Well, that's a matter that goes  
11 to evidentiary weight. It doesn't go to -- the only  
12 way necessarily to learn whether it was actually  
13 communicated is to call the mediator, but I'm not going  
14 to call the mediator because I think that goes beyond  
15 Bobick.

16 MR. GOLDMAN: Or you can call the recipient  
17 and ask if it was communicated.

18 THE COURT: That is true, but I can evaluate  
19 as part of that, if somebody declares something and  
20 intends for it to be done, that is a hearsay exception,  
21 if you remember from law school, with regard to what  
22 that minor intended to do. So let's see if we get him  
23 off the stand in the next five minutes.

24 (By Ms. Pinkham)

1 Q Mr. Hermes, do you have a present memory of the offers  
2 that the mediator communicated to the defense side?

3 A Yes.

4 Q What was your memory of the first settlement offer  
5 communicated to the defendants at mediation?

6 A What I refer to as the demand --

7 THE COURT: I'm sorry, just to be clear, when  
8 it was communicated to defense, was it communicated to  
9 all defendants?

10 THE WITNESS: Yes, your Honor.

11 THE COURT: Okay.

12 A We were all in the main conference room at Campbell and  
13 the offer communicated was \$15.5 million plus health  
14 insurance.

15 (By Ms. Pinkham)

16 Q And do you have a memory of the offer that was  
17 communicated to the plaintiffs by the mediator after it  
18 being authorized by the defendants?

19 A Yes, I do.

20 Q And what was that?

21 A \$2.75 million.

22 Q What is your memory as to the next offer that was  
23 communicated from the plaintiffs through the mediator  
24 to the defendants?

1 A My notes indicate that there was a \$15 million demand.  
 2 Q Do you have any memory of any other offer being  
 3 authorized by the defendants to the mediator to  
 4 communicate to the plaintiff?  
 5 A I do.  
 6 Q And what was that?  
 7 A \$3.5 million.  
 8 Q Mr. Hermes, your notes of the offers, can they be  
 9 segregated from the rest of your notes, the mediation?  
 10 A The notes with respect to the offers to which I just  
 11 testified are the last page of my notes, with some  
 12 additional information concerning the offers made on  
 13 behalf of McMillan. Yes, so they can be segregated in  
 14 that respect.  
 15 Q Could I take a look at them?  
 16 MR. McDONOUGH: Objection.  
 17 THE COURT: Do you wish for them to go to  
 18 her, because I was going to require disclosure only to  
 19 the extent that they reflect the offers as opposed to  
 20 your other work product.  
 21 MS. PINKHAM: And that's all I would be  
 22 seeking.  
 23 MR. McDONOUGH: Your Honor, he's testified.  
 24 We don't need the notes at this point.

1 A Yes.  
 2 Q Was there any continued activity between One Beacon and  
 3 Specialty National with regard to the dispute over  
 4 coverage for that claim?  
 5 A Yes.  
 6 Q Could you identify how the settlement that was reached  
 7 with the plaintiffs in Rhodes versus Zalewski case was  
 8 funded?  
 9 A One Beacon and Specialty National agreed to fund the  
 10 settlement in equal parts and reserving their rights to  
 11 bring a declaratory judgment action to sort out the  
 12 coverage issues.  
 13 Q And was a declaratory judgment action filed?  
 14 A Yes, by Specialty National.  
 15 Q And has that litigation been concluded?  
 16 A It was concluded in the district -- United States  
 17 District Court for the District of Massachusetts by a  
 18 judgment in favor of One Beacon. It's currently on  
 19 appeal and will be argued early next month in the Court  
 20 of Appeals in the First Circuit.  
 21 MS. PINKHAM: I have no further questions,  
 22 your Honor.  
 23 THE COURT: Any questions by the defense?  
 24 MR. McDONOUGH: Yes, your Honor.

1 THE COURT: It's not quite clear why, but I  
 2 mean I think what I'm going to do is this, I'm going to  
 3 -- it's true they would be useful only to refresh  
 4 memory or for \* of recollection. Is there anything in  
 5 your notes which differs from what you just testified  
 6 to?  
 7 THE WITNESS: No, your Honor.  
 8 THE COURT: Okay. What I will ask is that  
 9 you go back to your office, you make a redacted version  
 10 which includes only the offers communicated, that you  
 11 furnish that to Ms. Pinkham or furnish that to defense  
 12 counsel. All right.  
 13 THE WITNESS: Yes, your Honor.  
 14 THE COURT: Then you will be in honor of your  
 15 subpoena.  
 16 (By Ms. Pinkham)  
 17 Q Mr. Hermes, was there a judgment entered on behalf of  
 18 Professional Tree in the Rhodes versus Zalewski case,  
 19 judgment of dismissal?  
 20 A I know the case ended. I don't know the particular  
 21 form of the paper by which it ended.  
 22 Q Was there a settlement reached between the plaintiffs  
 23 in Rhodes versus Zalewski case and Jerry McMillan's  
 24 Professional Tree Service?

1 THE COURT: Okay. Mr. McDonough.  
 2 CROSS-EXAMINATION BY MR. McDONOUGH:  
 3 Q Mr. Hermes, what was the coverage limit of the One  
 4 Beacon policy?  
 5 A \$1 million.  
 6 Q And to your knowledge, what was the limit of the  
 7 Specialty National insurance policy?  
 8 A \$1 million.  
 9 Q Okay. And do you have any understanding as to the  
 10 amount that Specialty National had reserved for the  
 11 accident prior to the mediation?  
 12 A Not as you phrase it, sir, no.  
 13 Q In connection with the litigation that concluded  
 14 recently in the Massachusetts District Court, that  
 15 being the deck action between Specialty National  
 16 Insurance and One Beacon Insurance, did you file a  
 17 motion for summary judgment on behalf of One Beacon?  
 18 A Yes.  
 19 Q Okay. And if I might approach.  
 20 MR. McDONOUGH: May I have this marked for  
 21 identification?  
 22 THE COURT: You can mark it for I.D. Why  
 23 don't you go ahead and ask your question.  
 24 (By Mr. McDonough)

1 Q Is this in fact the motion for summary judgment that  
2 you filed in the case?  
3 A It appears to be.  
4 Q Okay. And I would direct your attention to page 9 of  
5 the motion. I'm sorry. You know what? I gave you the  
6 motion and I meant to give you the memorandum of law in  
7 support of the motion. So I'm going to give you  
8 memorandum --  
9 THE COURT: What's your purpose here? What  
10 are you trying to refresh his memory as to?  
11 MR. McDONOUGH: I'm trying refresh his memory  
12 -- I'm trying to find out whether or not he has  
13 knowledge as to how much Specialty National reserved  
14 the Rhodes action for prior to going to --  
15 THE COURT: If that's -- I'm going to sustain  
16 an objection to that. That's irrelevant.  
17 MS. PINKHAM: I was about to object, your  
18 Honor.  
19 THE COURT: It's irrelevant. It's also  
20 hearsay since that's -- all right. Anything else you  
21 may have of this witness?  
22 MR. McDONOUGH: Well, it's an exhibit filed  
23 with a court of law, so isn't --  
24 THE COURT: Right. It's not an exhibit

1 MR. COHEN: The exhibits -- if I may  
2 interrupt for just one second, your Honor. The  
3 exhibits also include the evaluation of --  
4 THE COURT: You're referring to exhibits.  
5 There's no exhibit. What are you referring to, a  
6 memorandum of law?  
7 MR. COHEN: There are exhibits attached to  
8 the summary judgment .  
9 THE COURT: Okay. Were you about to show him  
10 that or were you about to show him the memorandum of  
11 law, which is what he made reference to?  
12 MR. McDONOUGH: Well, I was using the -- if  
13 I may, I was using the memorandum of law only to  
14 refresh his memory as --  
15 THE COURT: As to something that's hearsay.  
16 So if you want to put into evidence that's there no  
17 dispute as to, frankly, what this document is -- in any  
18 event, I don't think we need him for it. He wasn't  
19 even their attorney, so we don't need this gentleman to  
20 speak about what Specialty did. It may or may not be  
21 admissible. We'll discuss it. I assume there's no  
22 question as to authenticity of the document, is there?  
23 MS. PINKHAM: I have no idea, Judge.  
24 THE COURT: All right. Well, you can show

1 filed, it's a memorandum of law filed. It's not  
2 evidence.  
3 MR. McDONOUGH --COHEN: It's supported by  
4 MR. COHEN: The report of Specialty National,  
5 which we'd like to make an offer of proof, shows that  
6 they reserved the case at \$800,000, that they had --  
7 excuse me, at a million dollars. They had \$800,000 of  
8 settlement authority at the mediation.  
9 Well, you may recall that one of the issues  
10 in this case was whether it was reasonable for AIG to  
11 believe that the tree company and its insurers would  
12 pay their policy limits, and the plaintiffs said no.  
13 THE COURT: And did you have knowledge of .  
14 what their reserve was at the time?  
15 MR. COHEN: Not at the time, but we believed  
16 that it would be reasonable for them to pay a million  
17 dollars and this confirms that they were prepared to  
18 pay a million dollars.  
19 MS. PINKHAM: I would object, your Honor.  
20 THE COURT: All right. They did what they  
21 did, so there was information out there. The  
22 reasonableness of your knowledge is going to be based  
23 on information that you understood at the time, not on  
24 what you did not know.

1 them, but we're not dealing -- I expect the issue is  
2 not going to be authenticity, the issue is going to be  
3 admissibility. But Mr. Hermes was adversary of them,  
4 so he's not in the position to be speaking about what  
5 his adversary put up as a reserve. So why don't we  
6 just focus on what he can offer us.  
7 Is there anything else that you wish to ask  
8 Mr. Hermes?  
9 MR. McDONOUGH: Sure.  
10 (By Mr. McDonough)  
11 Q Prior to going into the mediation, did One Beacon  
12 perceive an exposure for this case for Jerry McMillan  
13 Tree Company in excess of a million dollars?  
14 A That was one of a number of possibilities.  
15 MR. McDONOUGH: I have nothing further.  
16 THE COURT: Any further questions of counsel?  
17 REDIRECT EXAMINATION BY MS. PINKHAM:  
18 Q Mr. Hermes, did you have any understanding that there  
19 would be no coverage under the One Beacon policy for  
20 this claim?  
21 A One Beacon had disclaimed coverage and there was a live  
22 issue with respect to the existence or not of coverage.  
23 MS. PINKHAM: I have nothing further.  
24 THE COURT: All right. We will adjourn for

1 an hour, start at 2:20 for our motions.

2 Monday morning, we'll see you at 9. You will  
3 bring with you at 9 o'clock in the morning a schedule  
4 as to what you believe to be the witnesses who will be  
5 testifying for the balance of the case, their  
6 anticipated length with regard to direct and cross-  
7 examination, and a schedule leading to the conclusion  
8 of trial, since the two-week estimate, I gather, is no  
9 longer in place. So since you were two days off after  
10 day four, I worry about the accuracy of the evaluation.  
11 So you'll provide me with a document Monday morning at  
12 nine, which will set forth all the witnesses each side  
13 plans to call, the anticipated length of the direct and  
14 the cross, and we'll see now with that document when  
15 this will end.

16 MR. PRITZKER: Your Honor, in an attempt to  
17 try an speed up things, we do have a video deposition  
18 of Warren Nitti, who is the principal adjustor for AIG.  
19 It has to be shown on a computer. We have arranged for  
20 a computer for the court's convenience to watch it  
21 whenever he wants. It's a three-hour video deposition.  
22 It does not have to be done during court time, and we  
23 have use of the computer whenever the court wants it,  
24 including right now.

1 you've furnished me, including Ms. Peri's deposition I  
2 read two nights ago, so I'm up to speed with all that  
3 you've given me. I've not seen Mr. Nitti's deposition,  
4 if you can resolve any issues as to what's contained  
5 within it, if I decide whether or not I'm going to read  
6 it or whether or not I'm going to see it. And we'll  
7 see you Monday morning with that document so we can see  
8 when this case will end.

9 All right, Mr. Hermes. Sorry about that.

10 THE WITNESS: Thank you, your Honor. No  
11 problem.

12 (Court adjourned at 1:20 p.m.)  
13  
14  
15  
16  
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19  
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21  
22

1 MR. McDONOUGH: It can be read as well,  
2 probably much more quickly than viewed.

3 MR. PRITZKER: I know that, but this is a  
4 main witness and his demeanor is very important.

5 MR. VARGA: The only other question is, has  
6 the entire transcript been designated? I don't think

7 MR. PRITZKER: It's only the designated  
8 portions.

9 THE COURT: Who's Mr. Nitti, by the way?

10 MS. PINKHAM: He was at the mediation for  
11 AIG, your Honor. He was the claims adjustor.

12 MR. PRITZKER: He was the claims adjustor; he  
13 was the one that I negotiated with. He sat through the  
14 trial

15 THE COURT: All right. Well, I'm not going  
16 to do it between. I've got motions at two.

17 MR. PRITZKER: No, I understand.

18 THE COURT: I'm not going to do it between  
19 now and Monday morning, in any event.

20 MR. PRITZKER: Okay.

21 THE COURT: Don't include that time period in  
22 the period that you want. I want to know when you  
23 folks, based on live witnesses, think this case will  
24 end. I will add that I have read all depositions

C E R T I F I C A T E

I, Paula Pietrella and Faye LeRoux, Court  
Reporters, do hereby certify that the foregoing  
transcript, Pages 1 through 198, is a  
complete, true and accurate transcription of the  
above-referenced case.

\_\_\_\_\_  
Paula Pietrella

\_\_\_\_\_  
Faye LeRoux

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.  
SUCV2005-1360

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

\*\*\*\*\*  
 \*  
 \* MARCIA RHODES, HAROLD RHODES, INDIVIDUALLY, \*  
 \* HAROLD RHODES, ON BEHALF OF HIS MINOR CHILD \*  
 \* AND NEXT FRIEND, REBECCA RHODES, \*  
 \*  
 \* Plaintiffs, \*  
 \*  
 \* VS. \*  
 \*  
 \* AIG DOMESTIC CLAIMS, INC. f/k/a AIG TECHNICAL \*  
 \* SERVICES, INC., NATIONAL UNION FIRE INSURANCE \*  
 \* COMPANY OF PITTSBURGH, PA., and ZURICH \*  
 \* AMERICAN INSURANCE COMPANY, \*  
 \*  
 \* Defendants, \*  
 \*  
 \* \*\*\*\*\*

JURY-WAIVED TRIAL - DAY 6

BEFORE: GANTS, J.  
BOSTON, MASSACHUSETTS  
FEBRUARY 12, 2007

PAULA PIETRELLA  
FAYE LEROUX

APPEARANCES

BROWN RUDNICK  
M. Frederick Pritzker  
Daniel J. Brown  
Margaret M. Pinkham  
Attorneys At Law  
One Financial Center  
Boston, MA 02111

FOR: The Plaintiffs Marcia Rhodes, et al.

ROBINSON & COLE, LLP  
Gregory P. Varga  
Elizabeth C. Sackett  
Stephen Goldman  
Attorneys At Law  
1 Boston Place  
Boston, MA 02108

FOR: The Defendant Zurich American Insurance  
Company

ANTHONY R. ZELLE  
BRIAN McDONOUGH  
ROBERT MASELEK  
Attorneys At Law  
4 Longfellow Place, 35th Floor  
Boston, MA 02114

FOR: The Defendants AIG Domestic Claims and  
National Union Fire Insurance Company

THE McCORMACK FIRM, LLC  
Mark E. Cohen  
1 International Place  
Boston, MA 02110

FOR: The Defendants AIG Domestic Claims and  
National Union Fire Insurance Company

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RE-CROSS</u>
Carlotta Patten				
(By Mr. Pinkham)	15		62	
(By Mr. McDonough)		41		
(By Mr. Sackett)		54		
Marcia Rhodes				
(By Mr. Pinkham)	73		173	
(By Mr. Cohen)		115		
(By Mr. Varga)		155		

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
78	Deposition Designations of Robert Manning	12
79	Supplemental Answers to Building Materials Corporation of America's Set of Interrogatories to Plaintiff Marcia Rhodes [previously A for I.D.]	20
80	Plaintiff Marcia Rhodes' Response to Building Materials Corporation of America's First Request for Production of Documents	22
80A	Response to GAF's Request for Production of Documents	25
81	Pleading Index	67
130	Production Log	58

Exhibits (Cont'd)

<u>FOR I.D.</u>	<u>PAGE</u>
C      Sealed Envelope Containing Plaintiffs' Offer of Proof as to Testimony of Peter Hermes	10
D      Redacted Copy of Settlement Notes	11
E      Pleading Index	55

1 part of plaintiffs' case, it's also part of defendants'  
2 case. As you can see, Zurich's case is almost done.  
3 They have basically five hours left of an expert and  
4 Zurich's case is over. Plaintiffs' case, as their  
5 direct testimony is concerned, has nine hours left.--  
6            THE COURT: So try my question. Why are  
7 you off by a hundred percent?  
8            MR. PRITZKER: A lot of it is a  
9 miscalculation.  
10           THE COURT: I know that --  
11           MR. PRITZKER: A miscalculation of cross-  
12 examination and, candidly, a miscalculation. We just  
13 thought the case would move faster than it has. In the  
14 three and a half hours that approximately we have for  
15 trial and testimony, I would estimate that  
16 approximately a half hour a day has been utilized in  
17 other things: extra motions in limine, trying to get  
18 in documents that have not been agreed to, dialogue, a  
19 late start.  
20           THE COURT: That's called trial in a hotly  
21 contested case.  
22           MR. PRITZKER: I guess that's so. But a  
23 late start as well, at least on one of the days, your  
24 Honor, and all I can say is --

PROCEEDINGS

(In court at 9:15 a.m.)

1            THE COURT: All right. I have received  
2 your estimate of trial.  
3            MR. PRITZKER: Your Honor, perhaps just a  
4 word about how we arrived at it.  
5            THE COURT: Do you realize that it means  
6 the trial will last three more weeks?  
7            MR. PRITZKER: Yes, your Honor.  
8            THE COURT: It's basically double the  
9 estimate you gave me?  
10           MR. PRITZKER: That's true.  
11           THE COURT: How come you were off by a  
12 hundred percent?  
13           MR. PRITZKER: Well, there are several  
14 reasons, and part of it is if you look at what is left  
15 with the plaintiffs' case -- and the plaintiffs' case  
16 is somewhat of a misnomer because, as the court  
17 remembers, like Kathleen Fuell was a Zurich witness  
18 whom we called and then was cross-examined for well  
19 over a day, and the same is going to occur with Nick  
20 Satriano, who is the principal, live AIG witness, where  
21 we have a little more, two hours, and AIG has estimated  
22 three hours in cross-examination. So even though he's  
23  
24

1            THE COURT: That should add about an hour  
2 total for the week, probably half an hour one day,  
3 maybe 15 minutes another day, so --  
4            MR. PRITZKER: I can also tell you, your  
5 Honor, that it was a joint estimate. This was not a  
6 plaintiffs' estimate.  
7            THE COURT: I'm not necessarily aiming it  
8 at you. All right. Well, we'll have to see how this  
9 case is going to conclude.  
10           Now, I have a motion in limine with regard  
11 to Ms. Patten.  
12           MR. ZELLE: Your Honor, on the timing  
13 issue, I suggest we have visited this issue once before  
14 and I'm going to raise it again, that Mr. Satriano,  
15 whose total time is over five hours, would be far  
16 shorter if I were permitted to conduct his direct  
17 examination first, before plaintiffs do the cross. I  
18 suspect that would dramatically reduce the amount of  
19 time.  
20           THE COURT: Well, we're clearly going to --  
21 I mean, clearly, I'm going to have to take charge in a  
22 way I didn't before, because I let you take charge and,  
23 frankly, you bollixed it up. So we're now -- I mean,  
24 I've got trials starting -- I'm off next week, and I've

1 got trials starting on Monday. So now I've got to see  
2 when you folks go, since it's not fair to them. When I  
3 set a trial date, I set it based on the representations  
4 of counsel. Counsel represented the case would be two  
5 weeks; I gave you two weeks, so we'll have to see where  
6 we're going to go.

7 All right. Let's speak about your first  
8 witness is to be Ms. Patten?

9 MR. PRITZKER: Yes.

10 THE COURT: And she's to be testifying as  
11 to her observations of Mr. Rhodes' emotional state?

12 MR. GOLDMAN: I'm sorry, your Honor.  
13 Before we go on to that, I just did want to inform the  
14 court that not included in that estimate, Zurich has  
15 about five minutes or less of deposition testimony it  
16 would like to read at some point in the presentation of  
17 its case. I just didn't want the court to be misled  
18 about that. In the presentation of Zurich's case,  
19 that's all. I didn't mean to interrupt.

20 THE COURT: Five minutes is not going to --

21 MR. GOLDMAN: We can commit to five  
22 minutes.

23 THE COURT: It's the 49 hours that's the  
24 problem not the five minutes.

1 that were left over from Friday, including marking as  
2 an exhibit plaintiffs' offer of proof as to Peter  
3 Hermes' testimony of certain statements made by AIGDC  
4 during the mediation in August of 2004, which  
5 statements were made outside of the presence of a  
6 mediator.

7 THE COURT: Okay. So that may be marked  
8 for identification in a sealed envelope. Counsel may  
9 see it, but I don't want to see it.

10 MR. PRITZKER: Sealed.

11 THE COURT: Sealed.

12 MS. PINKHAM: And I'm going to provide  
13 copies to counsel.

14 THE COURT: And it will be sealed for  
15 purposes of appeal.

16 (Exhibit C, marked; Sealed Envelope  
17 Containing Plaintiffs' Offer of Proof as to Testimony  
18 of Peter Hermes.)

19 MS. PINKHAM: And the other item, your  
20 Honor, Mr. Hermes had provided a redacted copy of the  
21 notes of settlement conversations at mediation, and I  
22 would like to offer those.

1 Now, Ms. Patten is here to testify as to  
2 what she observed of Mr. Rhodes' emotional state?

3 MS. PINKHAM: That is some of the  
4 testimony, your Honor. But, frankly, the great bulk of  
5 the testimony is to the events, the litigation events,  
6 and the underlying events of the timing of certain  
7 events.

8 THE COURT: All right. Well, let's get on  
9 with her. If we're going to be asking her about her  
10 observations of emotional state, then we'll address the  
11 motion in limine as it emerges. It does seem as if I  
12 did give you some leeway to allow Judge Rhodes to  
13 testify, the person best able to express the emotional  
14 state of Mr. Rhodes apart from Mr. Rhodes. It's not  
15 clear to me that we need to hear other witnesses  
16 speaking of what they observed of his emotional state.  
17 Based on Judge Rhodes and my understanding of Mr.  
18 Rhodes' business success, I expect he's a rather  
19 articulate gentleman, so I don't know that we need a  
20 lot of other people to testify as to what they observed  
21 as to his facial features. So let's get to work.

22 Call your next witness.

23 MS. PINKHAM: Your Honor, actually, before  
24 I call the witness, I'd like to clean up a few things

1 THE COURT: Okay. Into evidence? Why  
2 would they be evidence? Offer them for I.D.

3 MS. PINKHAM: Well, your Honor, since Mr.  
4 Hermes testified about the notes, I would like to offer  
5 them as an exhibit.

6 THE COURT: On what evidentiary basis would  
7 somebody's notes come into evidence?

8 MS. PINKHAM: They were his contemporary  
9 answers recorded. I believe they refreshed his  
10 recollection.

11 THE COURT: Recorded recollection means  
12 that they're allowed to be stated, but the document  
13 itself does not go in. So you may mark it for I.D.,  
14 but that is not to be an exhibit either.

15 MS. PINKHAM: I ask that that be marked as  
16 D for identification.

17 (Exhibit D for I.D., marked; Redacted Copy  
18 of Settlement Notes of Peter Hermes.)

19 And, your Honor, we do have an additional  
20 deposition transcript that I'd like to hand up to the  
21 court. This is deposition testimony of Robert Manning.  
22 He was the Risk Manager for GAF, the insured in the  
23  
24

1 underlying action, and I would ask that the court try  
2 to take the opportunity to review it before Mr.  
3 Satriano testifies.

4 THE COURT: And when is Mr. Satriano  
5 testifying?

6 MS. PINKHAM: I believe he's on schedule  
7 for tomorrow.

8 THE COURT: All right. I will try to bring  
9 that home.

10 MS. PINKHAM: Here's a copy for your Honor.  
11 And I would ask that that be marked as the next  
12 plaintiff exhibit.

13 THE COURT: Seventy-eight.

14 (Exhibit Number 78, marked; Deposition  
15 Designations of Robert Manning.)

16 MS. PINKHAM: Your Honor, there's one other  
17 item I'd like to address, as certain things that have  
18 not been consented to that may be used during today's  
19 testimony, and I'm referring specifically to AIG's  
20 objection to correspondence written by Attorney Anthony  
21 Bartell, who we referred to as coverage counsel for  
22 GAF.  
23  
24

1 depositions that the court has read, we do want those  
2 that have not yet been marked as exhibits to be marked.  
3 They don't have to be discussed.

4 THE COURT: They've not all been marked?

5 MR. PRITZKER: I don't believe so, your  
6 Honor.

7 THE COURT: I see Penick, Peri, Manning has  
8 been marked. Chaney's been marked, McIntosh has been  
9 marked. The only one that may not have been marked is  
10 Johanna Mills.

11 MR. PRITZKER: She testified, your Honor.

12 THE COURT: Oh, I'm sorry.

13 MR. PRITZKER: Perhaps we did, but I will  
14 check it during the recess, your Honor.

15 THE COURT: I've got Chaney as 73. There  
16 are five so far, so we've got Chaney as 73; McIntosh,  
17 74; Penick, 76; Peri, 77; and Manning, 78, so I think  
18 we have them all, okay?

19 THE COURT: Let's call your next witness.

20 MS. PINKHAM: The plaintiffs call Carlotta  
21 Patten.

22 CARLOTTA PATTEN, Sworn

23 THE COURT: If you could state your  
24 name and spell both your first and last name for

1 My understanding of AIG's objection is the  
2 same objection that it raised when it sought to exclude  
3 one of Attorney Bartell's letters, particularly a March  
4 18, 2004 letter in which Attorney Bartell referenced  
5 Chapter 176D and Chapter 93A. That was addressed to  
6 Nicholas Satriano at AIGDC.

7 In ruling on the motions in limine, the  
8 court held that that March 18 letter would be allowed  
9 as evidence for the purpose of notice only to AIG. My  
10 understanding is that's the only basis for the  
11 objection as to all of the correspondence that was  
12 written by Attorney Bartell, and I think it would be  
13 faster for Attorney Deschenes' testimony if we know  
14 where we stand with regard to those letters before he  
15 gets called to testify.

16 THE COURT: When we begin it and I see  
17 the context, then I will address it.

18 Exhibit 77, what is that? I'm just trying  
19 to make sure I have it. All right. So basically the  
20 depositions which are in now are McIntosh, Chaney,  
21 Mills, Penick, Peri, those five which I've already  
22 read, and then Manning will be the sixth.

23 MS. PINKHAM: Yes.

24 MR. PRITZKER: And, your Honor, as to those

1 the court reporter.

2 THE WITNESS: Carlotta, C-a-r-l-o-t-t-  
3 a, P-a-t-t-e-n.

4 THE COURT: Okay. You may proceed.

6 DIRECT EXAMINATION BY MS. PINKHAM:

7 Q Good morning, Ms. Patten.

8 A Good morning.

9 Q Were you formerly employed at Brown Rudnick  
10 Berlack Israels?

11 A Yes, I was.

12 Q For what period of time were you employed at  
13 Brown Rudnick?

14 A From September 1999 through September 2004.

15 Q Where did you work after September 2004?

16 A I left Brown & Rudnick and joined a business law  
17 firm on the North Shore, Metaxas Norman &  
18 Pidgeon.

19 Q How long were you there?

20 A For two years.

21 Q Are you currently employed?

22 A Yes, I am.

23 Q Where are you employed now?

24 A I'm an Assistant Clerk in the Essex County

1 Superior Court.  
 2 Q How long have you held that position?  
 3 A Since October of 2006.  
 4 Q When you employed at Brown & Rudnick, did you  
 5 work on the Rhodes case?  
 6 A Yes, I did.  
 7 Q Could you describe generally what your  
 8 involvement in the case was?  
 9 A Primarily I was responsible for doing pre-trial  
 10 discovery, document production, answers to  
 11 interrogatories, preparing with Mr. Pritzker for  
 12 depositions, and client communication and client  
 13 contact.  
 14 THE COURT: In the capacity of an  
 15 associate?  
 16 THE WITNESS: Yes.  
 17 (By Ms. Pinkham)  
 18 Q Ms. Patten, how did Brown Rudnick keep track of  
 19 events that occurred in the litigation?  
 20 A For example docket --  
 21 Q Discovery of pleadings?  
 22 A Discovery? Pretty much every pleading or  
 23 discovery request or response we maintained a  
 24 pleading index, if you will, and it's all the

1 document request, everything went in a  
 2 chronological binder.  
 3 (By Ms. Pinkham)  
 4 Q Ms. Patten, I'm handing you a document. Does a  
 5 review of that document refresh your  
 6 recollection as to whether any of the defendants  
 7 served discovery on the plaintiffs in the  
 8 underlying case in 2002?  
 9 A If I could take a moment to review it. I don't  
 10 believe they did.  
 11 Q Did the plaintiffs serve discovery in 2002?  
 12 A Yes, we did.  
 13 Q What type of discovery?  
 14 A I believe we served interrogatories upon GAF and  
 15 document requests upon GAF. And I believe we  
 16 also served similar discovery requests upon  
 17 Driver Logistics and perhaps Penske.  
 18 Q Ms. Patten, I'm going to hand you a document  
 19 that has been marked as plaintiff's Exhibit 75.  
 20 Ms. Patten, do you recognize Exhibit 75?  
 21 A Yes, I do.  
 22 Q What do you recognize that to be?  
 23 A It is Plaintiffs' Answers to GAF's First Set of  
 24 Interrogatories; actually GAF's First Set of

1 documents either filed in court or exchanged  
 2 between counsel in chronological order. And  
 3 every time something went out the door basically  
 4 with a caption on it we put it in the pleading  
 5 index, indexed it and kept it in the binder.  
 6 That was in chronological order.  
 7 Q Do you have a memory of whether any of the  
 8 defendants in the underlying Rhodes case served  
 9 discovery on the plaintiffs in 2002?  
 10 A In the personal injury action?  
 11 Q Yes.  
 12 A Not that I recall.  
 13 Q Is there a document that you can refer to that  
 14 will refresh your recollection?  
 15 A The pleading index would.  
 16 THE COURT: I'm sorry. When you say  
 17 "served discovery" you mean served Brown &  
 18 Rudnick with a discovery request or do you mean  
 19 responded to a plaintiffs' discovery request?  
 20 THE WITNESS: Anything basically, like  
 21 I said, with a caption. If we have a complaint,  
 22 the answer; if we propounded offensive discovery  
 23 upon the defendants or if we got something in  
 24 from one of the defendants, a response to our

1 Interrogatories for Marcia Rhodes.  
 2 Q Is your signature on the last page of Exhibit  
 3 75?  
 4 A Yes, it is.  
 5 Q And can you tell me when the plaintiffs  
 6 responded to GAF's First Set of Interrogatories?  
 7 A April 10th, 2003.  
 8 Q Do you recall when those interrogatories were  
 9 served?  
 10 A We got interrogatories on February 20 to each of  
 11 the plaintiffs, in addition to a document  
 12 request from GAF to Marcia Rhodes. So I believe  
 13 we got four sets of discovery requests on  
 14 February 20.  
 15 Q Ms. Patten, I'm handing you a document that's  
 16 been marked plaintiffs' A for identification and  
 17 ask if you recognize that?  
 18 A Yes, I do.  
 19 Q What do you recognize A to be?  
 20 A It's a supplemental answer to the  
 21 interrogatories that are marked as Exhibit 75.  
 22 Q Is your signature also on the last page --  
 23 A Yes.  
 24 Q -- of A.?

1 A Yes, it is.  
 2 MS. PINKHAM: Your Honor, I would move  
 3 that Exhibit A now be moved into evidence as an  
 4 exhibit.  
 5 THE COURT: Any objection? Hearing  
 6 none, it may come in as Exhibit 79.  
 7 Just to be clear, this is the  
 8 plaintiffs' supplementary answers to  
 9 interrogatories?  
 10 THE WITNESS: To Marcia Rhodes. GAF's  
 11 -- right. Our supplemental answer to GAF's  
 12 interrogatories to Marcia Rhodes.  
 13  
 14 (Exhibit No. 79, marked; Previously A  
 15 for identification, Supplemental Answers to  
 16 Building Materials Corp. of America's First Set  
 17 of Interrogatories to Plaintiff Marcia Rhodes.)  
 18  
 19 (By Ms. Pinkham)  
 20 Q Ms. Patten, you've just testified that the  
 21 plaintiffs were also served with document  
 22 requests in 2002?  
 23 A In 2003.  
 24 Q I'm sorry, thank you for that correction. Were

1 MS. PINKHAM: Your Honor, I would move  
 2 that document be admitted as the next  
 3 plaintiff's Exhibit.  
 4 THE COURT: Any objection? Hearing  
 5 none, it may come in as Exhibit 80.  
 6  
 7 (Exhibit Number 80, marked; Plaintiff  
 8 Marcia Rhodes' Response to Building Corp. of  
 9 American's First Request for Production of  
 10 Documents.)  
 11  
 12 (By Ms. Pinkham)  
 13 Q Ms. Patten, I've just placed a pile of documents  
 14 before you. Would you tell me what the cover  
 15 sheet on the first page indicates? Is there an  
 16 exhibit label on it?  
 17 A It's says: Exhibit Mills, Exhibit 7-330-06.  
 18 Q Attorney Patten, have you had the opportunity to  
 19 review the documents that are in front of you  
 20 this morning?  
 21 A Yes.  
 22 Q Can you explain the review that you did?  
 23 A These? When?  
 24 Q This morning.

1 you involved in responding to that document  
 2 request?  
 3 A Yes, I was.  
 4 Q What did you do in order to respond to GAF's  
 5 request for the production of documents?  
 6 A We reviewed all of the medical records that we  
 7 had in our possession and produced them. We  
 8 Bates'd each medical record that we had and  
 9 produced them on April 10. If I recall, we had  
 10 medical records from UMass, Fairlawn  
 11 Rehabilitation Center, Milford-Whitinsville,  
 12 Whittier Rehab, and records from the Visiting  
 13 Nurses Association. And we also had some other  
 14 documents as I recall.  
 15 Q Ms. Patten, I'm handing you a document and ask  
 16 if you recognize that?  
 17 A Yes, I do.  
 18 Q What do you recognize that document that I just  
 19 handed you to be?  
 20 A This is Marcia Rhodes Response to GAF's Document  
 21 Request.  
 22 Q Is your signature also on the last page of that  
 23 document?  
 24 A Yes, it is.

1 A Okay, these documents I reviewed this morning.  
 2 I basically looked at each packet of documents  
 3 and looked at the Bates numbers and corresponded  
 4 those with what Brown Rudnick has as a  
 5 production log. Basically every document that  
 6 went out the door that we produced to the  
 7 defendants we recorded on a production log and  
 8 we record every Bates number on that, so I  
 9 cross-referenced the Bates numbers on these  
 10 documents with what's on the production log as  
 11 to what we produced on April 10, 2003; and this  
 12 is basically what we produced to all the  
 13 defendants -- excuse me, to GAF, on April 10,  
 14 2003.  
 15 Q The documents that are in front of you?  
 16 A Correct, this pile.  
 17 Q Ms. Patten, do you recall approximately how many  
 18 pages were produced in April 2003 by the  
 19 Plaintiffs Response to GAF's First Request for  
 20 Production of Documents?  
 21 A It's over two thousand. I don't know the exact  
 22 number, but I know it was over two thousand.  
 23 Q So the record is clear, could you approximate  
 24 the height of the pile of documents in front of

1 you?  
 2 A A foot and a half. I don't know, I'm sorry.  
 3 MS. PINKHAM: Your Honor, I would ask  
 4 that the documents that were marked as Mills  
 5 Exhibit 7 be admitted as the plaintiffs' next  
 6 exhibit in this case?  
 7 THE COURT: Any objection?  
 8 MR. VARGA: No.  
 9 THE COURT: All right. So these were  
 10 what were produced in response to the request  
 11 for production?  
 12 THE WITNESS: Right, GAF's Request for  
 13 Production to Marcia Rhodes. This is what I  
 14 produced on April 10, 2003.  
 15 THE COURT: And Exhibit 80 is your  
 16 response, the written response, correct?  
 17 THE WITNESS: Correct, yes.  
 18 THE COURT: And those are the documents  
 19 that you actually produced?  
 20 THE WITNESS: Right.  
 21 THE COURT: And they were produced the  
 22 same day as the response was issued?  
 23 THE WITNESS: I believe they were, yes,  
 24 on the 10th.

1 June 16th, and I think that might have been over  
 2 700 records. And all the documents that we had  
 3 from April and June that we didn't produced to  
 4 GAF in April, we basically supplemented. Even  
 5 though we didn't have any document requests, we  
 6 supplemented pursuant to our duty to supplement.  
 7 Q Attorney Patten, if any of the defendants in the  
 8 underlying action has served a request for the  
 9 production of documents seeking medical records  
 10 in 2002, would the plaintiffs have been able to  
 11 respond to that request?  
 12 MS. SACKETT: Objection, your Honor.  
 13 THE COURT: I'm not sure what that  
 14 means. Would they have been able to?  
 15 MS. PINKHAM: Yes.  
 16 A Yes.  
 17 THE COURT: All right.  
 18 (By Ms. Pinkham)  
 19 Q Can you explain how?  
 20 A We had medical records and medical bills from UMass in  
 21 2002. I believe we had records from, it was either  
 22 Milford-Whitinsville or Fairlawn in 2002, then we got  
 23 some additional records from Whittier in early 2003; so  
 24 we had a lot of records before we even got a document

1 THE COURT: I'm going to make it 80A,  
 2 so as to be connected to Exhibit 80. So they  
 3 can be marked as Exhibit 80A.

4  
 5 (Exhibit Number 80A, marked; Response  
 6 to GAF's Request for Production.)

7  
 8 (By Ms. Pinkham)

9 Q Ms. Patten, did the plaintiff produce additional  
 10 records to GAF and other defendants after April  
 11 10 of 2003?  
 12 A We did. After April 10th, as I recall, Driver  
 13 Logistics retained Morris Mahoney & Miller. And  
 14 I believe they filed a notice of approximately  
 15 at some point in April and Attorney Larry Boyle  
 16 and Michael Smith were counsel of record. They  
 17 produced -- excuse me -- they served upon us  
 18 document requests and interrogatories. So we  
 19 responded to those in June and by that time,  
 20 between April and June, we received additional  
 21 documents from a lot of individual healthcare  
 22 providers and some other ones coming in from the  
 23 institutional provider. So we did a large  
 24 production to Driver Logistics, I think it was

1 request from GAF in February '03.  
 2 Q And can you recall approximately how long it took for  
 3 Mrs. Rhodes' medical providers to respond to her  
 4 counsel's requests to produce medical records?  
 5 A I'm sorry, could you --  
 6 Q Sure. Let me ask you this way.  
 7 A Okay.  
 8 Q Could you describe the process that Brown Rudnick  
 9 followed in order to collect Mrs. Rhodes' medical  
 10 records?  
 11 A We obtained a release from Marcia Rhodes authorizing us  
 12 to receive medical records on her behalf, without her  
 13 signature, and then sent it out to the various  
 14 providers and then they sent in the medical records or  
 15 medical bills to us.  
 16 Q Did the time period in which the providers responded to  
 17 produce the medical records vary?  
 18 A It did. I believe we got UMass fairly quickly. Some  
 19 of the other larger institutional records like  
 20 Fairlawn, Milford-Whitinsville and Whittier took  
 21 probably six to eight weeks to get in, but we did have  
 22 all of those, I believe by January 2003. We got the  
 23 VNA shortly before we produced the records in April.  
 24 Q Ms. Patten, were you involved in the production of the

1 "Day in the Life" video in the underlying action?  
 2 A I didn't produce it, but I was involved in  
 3 coordinating, if you will.  
 4 Q Why was that "Day in the Life" video prepared?  
 5 A I was working with Mr. Pritzker primarily on the  
 6 litigation and we thought it would be a good way to  
 7 communicate to all the defendants what Mrs. Rhodes was  
 8 going through on a daily basis. We served an extensive  
 9 answer to GAF's interrogatories, but that didn't really  
 10 convey the whole picture. So we decided to work with a  
 11 company to put together a "Day in the Life" video and  
 12 the goal really was to show the defendants what she was  
 13 going through in the hopes that the case would resolve.  
 14 MR. ZELLE: Your Honor, this raises an issue,  
 15 obviously, it's disclosing work product of the  
 16 plaintiffs' counsel. Mr. Pritzker was deposed, as was  
 17 Ms. Pinkham, they objected and did not respond to any  
 18 such questions. At this point we would prefer that we  
 19 proceed with a waiver of the work product; however, in  
 20 the alternative, this ought to be stricken.  
 21 THE COURT: Well, Ms. Pinkham, what are you  
 22 doing here?  
 23 MS. PINKHAM: Your Honor, my memory of the  
 24 depositions is that the questions about work product

1 (By Ms. Pinkham)  
 2 Q Ms. Patten, did you have the opportunity to observe  
 3 Mrs. Rhodes' demeanor during the time period in which  
 4 the "Day in the Life" video was done?  
 5 A Yes.  
 6 Q Could you describe that please?  
 7 A Mrs. Rhodes was a bit uncomfortable, but she -- I think  
 8 anybody on video would be uncomfortable, she was a bit  
 9 nervous but she was going through -- she was basically  
 10 doing what she did every day. I was there when the  
 11 filming was going on. She was uncomfortable, but she  
 12 was just basically proceeding with her daily routine.  
 13 Q Ms. Patten, were you involved in preparing the demand  
 14 package that was served on defense counsel handling the  
 15 case in August of 2003?  
 16 A Yes.  
 17 Q Was there an issue with the total of the medical bills  
 18 in connection with preparing the demand package?  
 19 A Yes.  
 20 Q Can you explain what the issue was?  
 21 A In the spring of 2003, spring and going into summer if  
 22 I recall, we were getting medical bills in, certified  
 23 medical bills from various healthcare providers.  
 24 Looking at those in conjunction with -- there was a

1 were with regard to how he valued the case. I don't  
 2 believe there were any questions --  
 3 THE COURT: What is the relevant as to what  
 4 the reason was for Brown Rudnick to seek a "Day in the  
 5 Life" video, apart from the fact that it's obvious what  
 6 the reasons were, but why are you eliciting this from  
 7 her when it plainly involves trial strategy between a  
 8 partner and an associate?  
 9 MS. PINKHAM: Your Honor, there have been  
 10 some argument on the part of the defendants that the  
 11 "Day in the Life" video was not something that they had  
 12 requested, and I'm simply making the record clear that  
 13 that in fact was true; it was something that was  
 14 requested by plaintiffs' counsel.  
 15 THE COURT: Okay. You could have done that  
 16 by asking whether you have any information as to  
 17 whether defense counsel had ever made a request for the  
 18 "Day in the Life" video. Do you have any such  
 19 knowledge?  
 20 THE WITNESS: I don't.  
 21 THE COURT: Okay. So basically it was your  
 22 firm's idea?  
 23 THE WITNESS: I believe it was.  
 24 THE COURT: Okay. Let's move on.

1 running tally, if you will, of medical expenses from  
 2 United Healthcare that the firm was compiling from  
 3 United Healthcare's website. We realized that  
 4 basically the two numbers didn't jive, if you will. So  
 5 as soon as we realized that there was a discrepancy, we  
 6 wanted to make sure that all the bills added up, so we  
 7 held off, we didn't send the demand package right away.  
 8 We wanted to make sure that all of the bills -- we got  
 9 all the certified bills and then added those up and  
 10 they totaled, I believe, \$413,000.  
 11 The number in the United Healthcare's website  
 12 was larger. So as soon as we realized there was a  
 13 discrepancy, we just basically put the brakes on.  
 14 United Healthcare realized those weren't the right  
 15 numbers.  
 16 Q And what was United Healthcare's role in connection  
 17 with the medical claims by Mrs. Rhodes?  
 18 A Well, I believe it was her healthcare provider, so I  
 19 think every time she had a procedure or just if she  
 20 went to the doctor, the bill was submitted to the  
 21 insurance company for payment.  
 22 Q Who was the demand package sent to?  
 23 A It was sent to counsel of record, John Johnston -- for  
 24 Penske at Corrigan Johnston & Tudor; Grace Wu and Greg

1 Deschenes at Nixon Peabody; and Larry Boyle and Mike  
 2 Smith at Morris Mahoney & Miller.  
 3 Q Ms. Patten, after the demand package was sent out in  
 4 2003, did any of the counsel of record that it was sent  
 5 to respond to it?  
 6 A Not to my knowledge they didn't.  
 7 Q To your knowledge, did any representative of Zurich or  
 8 National Union respond to the demand package?  
 9 A Not to my knowledge.  
 10 MR. ZELLE: Objection.  
 11 THE COURT: Overruled.  
 12 (By Ms. Pinkham)  
 13 Q Did you have a reaction to the lack of response to the  
 14 demand package?  
 15 A Yes.  
 16 Q Ms. Patten, did you assist Mr. Rhodes in any appeals to  
 17 United Healthcare in connection with denials of  
 18 reimbursement of certain equipment for Marcia Rhodes?  
 19 A I did.  
 20 Q Do you recall an appeal for an Easy Stand?  
 21 A Yes, I do.  
 22 Q Can you tell me generally what was the situation with  
 23 the Easy Stand that necessitated your involvement?  
 24 A I believe --

1 A I believe it was June or July of 2003.  
 2 Q Was Harold Rhodes deposed in the underlying action?  
 3 A Yes, he was.  
 4 Q Were you aware of whether the depositions of both  
 5 Marcia and Rebecca Rhodes were noticed in the  
 6 underlying action?  
 7 A They were noticed in 2003, if I recall correctly.  
 8 Q And did those depositions go forward in 2003?  
 9 A No.  
 10 Q What was your understanding as to why?  
 11 A My understanding was that defense counsel didn't agree  
 12 to put them off for a period of time, probably in the  
 13 hopes that the case would resolve and they didn't want  
 14 to have Marcia go through a deposition or Becca.  
 15 MR. McDONOUGH: Objection. Move to strike  
 16 the portion of the answer that was speculation about.  
 17 THE COURT: Move to strike is allowed.  
 18 (By Ms. Pinkham)  
 19 Q Ms. Patten, I'm going to show you what's been marked --  
 20 strike that.  
 21 Ms. Patten, did you accompany Mrs. Rhodes to  
 22 an independent medical exam that was conducted in the  
 23 summer of 2004?  
 24 A Yes, I did.

1 MR. ZELLE: Objection, your Honor, just on  
 2 relevant grounds. I have no idea where this is going.  
 3 THE COURT: Relevance being?  
 4 MS. PINKHAM: Cost and financial burden to  
 5 the plaintiffs, your Honor.  
 6 THE COURT: I'll hear it?  
 7 A I believe one of Mrs. Rhodes' healthcare providers, or  
 8 physiatrists, somebody recommended that she get an Easy  
 9 Stand which is basically a machine that would allow her  
 10 to stand up with assistance and I believe she could do  
 11 arm exercises with it, and it was fairly expensive and  
 12 I think the insurance company was not inclined to cover  
 13 it, so we did an appeal of that denial. I believe it  
 14 was eventually covered.  
 15 (By Ms. Pinkham)  
 16 Q Ms. Patten, did you attend any of the depositions in  
 17 the underlying case?  
 18 A Yes, I did.  
 19 Q Can you recall generally when depositions took place?  
 20 A It was in the summer and fall of 2003.  
 21 Q Did you attend the deposition of the driver, Carlo  
 22 Zalewski?  
 23 A Yes, I did.  
 24 Q Can you recall approximately when that took place?

1 Q Do you recall when the independent medical exam was  
 2 done?  
 3 A It was in July, I think, approximately July 20.  
 4 Q And who had requested the independent medical exam?  
 5 A The defendants.  
 6 Q Can you describe Mrs. Rhodes' demeanor during the  
 7 independent medical exam?  
 8 A She was uncomfortable going through an independent  
 9 medical exam with a doctor she'd never met before,  
 10 nervous, not happy to be there.  
 11 Q Did you have the opportunity to observe Harold Rhodes'  
 12 demeanor when you accompanied Mrs. Rhodes to the  
 13 independent medical exam?  
 14 A Yes, I did.  
 15 Q Can you describe it, please?  
 16 A He also was not happy that his wife was there. He was  
 17 upset that she had to go through an independent medical  
 18 examination.  
 19 Q And how did you determine that?  
 20 A I think by his facial expressions, his -- I think his  
 21 general attitude, I think, as well as Marcia's. They  
 22 just -- they were upset they were there, but we were  
 23 all there and it got done, but they weren't thrilled  
 24 about being there again.

1 Q Ms. Patten, did the plaintiffs take steps to preserve  
2 the trial testimony of Mrs. Rhodes' treating  
3 physicians?  
4 A Yes.  
5 Q And how was that accomplished?  
6 A I believe they were audio-visual depositions of her  
7 primary care physician, in addition to an orthopedist  
8 and maybe one more, one other.  
9 Q Do you recall when those were conducted?  
10 A I believe in the spring of 2004.  
11 Q Did representatives of the defendants attend those  
12 audio-visual depositions?  
13 A I believe they did.  
14 Q Ms. Patten, do you recall that Mrs. Rhodes was deposed  
15 at some point in August of 2004?  
16 A Yes, she was.  
17 Q Do you recall when?  
18 A August 4.  
19 Q Of 2004?  
20 A 2004, right.  
21 Q Do you recall when the Notice of Deposition was issued  
22 for the August 4 deposition?  
23 A For that specific deposition, it was noticed on -- I  
24 think it was January 9.

1 dated 7/8/2004. Could you read that -- excuse me.  
2 It's a ruling on Motion No. 56.  
3 MR. VARGA: Could I have the page number,  
4 Counsel?  
5 MS. PINKHAM: Page 16.  
6 MR. VARGA: Thank you.  
7 (By Ms. Pinkham)  
8 Q Could you read that into the record, Ms. Patten?  
9 A Sure. It's the motion -- it's the ruling on the  
10 motion, GAF's motion to extend discovery deadline and  
11 to continue trial date.  
12 (Reading) The motion is denied as to  
13 additional discovery on the issue of vicarious  
14 liability. See paragraph 7 of the complaint and third  
15 amended complaint. GAF had sufficient notice from the  
16 beginning. To the extent the parties agree to postpone  
17 plaintiffs' deposition, they may proceed; however, the  
18 trial date stands and any effort to mediate shall be  
19 concluded before trial. By Judge Elizabeth Donovan.  
20 Q And following Judge Donovan's ruling on July 8 of 2004,  
21 Mrs. Rhodes' deposition was noticed?  
22 A The next day.  
23 Q Were you aware that mediation also took place after the  
24 entry of Judge Donovan's order?

1 Q Is there a document that you could refer to that would  
2 refresh your recollection?  
3 A The pleading index would have all the Notices of  
4 Deposition in it, so that would refresh my  
5 recollection.  
6 Q I believe you just testified that Marcia Rhodes'  
7 deposition was noticed on January 9?  
8 A I'm sorry. Did I say January? I meant July. I'm  
9 sorry.  
10 Q July 9 of what year?  
11 A 2004.  
12 Q And had there been a ruling by the trial court prior to  
13 the time that Mrs. Rhodes' deposition was noticed?  
14 A Yes.  
15 Q If you could, Ms. Patten, I realize you have a lot of  
16 things in front of you, if you could turn to Exhibit 72  
17 in the binders in front of you, it should be Volume 2.  
18 A Yes.  
19 Q Are you at Exhibit 72?  
20 A I am.  
21 Q Ms. Patten, could you turn to page 16 of Exhibit 72?  
22 The page numbers are in the lower right-hand corner.  
23 A I'm there.  
24 Q And I would direct your attention to the entry that's

1 A Yes. I believe it took place in August 2004.  
2 Q Ms. Patten, did you attend the trial in the underlying  
3 action?  
4 A I did.  
5 Q Did any representative of the defense call the doctor  
6 who had performed the independent medical exam of  
7 Marcia Rhodes?  
8 A No, he was not called as a witness.  
9 Q Was the defendant Penske dismissed from the case during  
10 the first week of trial?  
11 A Yes.  
12 Q Who had represented Penske at trial?  
13 A John Johnson.  
14 Q Was Mr. Johnson in the courtroom when the jury returned  
15 its verdict?  
16 A No, because he was -- Penske was out during the first  
17 week.  
18 Q And who represented the driver, Mr. Zalewski, and DLS  
19 at the trial?  
20 A Larry Boyle, and John Knight I believe was an  
21 associate. I'm not sure if he was at counsel table.  
22 Q Ms. Patten, did you have the opportunity to observe Mr.  
23 Rhodes' demeanor during any of the trial testimony?  
24 A Yes.

1 Q Can you recall what he appeared like and at what point  
2 in the trial you observed his demeanor?  
3 A I observed him pretty much every day -- I was in the  
4 back -- and he was physically upset throughout the  
5 course of the trial, more upset when his daughter was  
6 testifying and his wife, when they were on the stand.  
7 Q And how could you detect that?  
8 A He was -- for lack of a better term, he was glaring at  
9 the attorneys He was very upset. I could just tell he  
10 was -- I think at one point he was crying, clenching  
11 his fists, just very agitated.  
12 Q Ms. Patten, did you also have the opportunity to  
13 observe the demeanor of anyone in the courtroom at any  
14 point in time when any of the Rhodes family were  
15 testifying?  
16 A As in jurors, anybody?  
17 Q Anyone.  
18 A Yeah, I did. Yes, I did.  
19 Q Could you describe any of the demeanors on the part of  
20 anyone in the courtroom during --  
21 MR. VARGA: Objection.  
22 Q -- any of the plaintiffs' testimony at trial?  
23 MR. VARGA: Objection.  
24 THE COURT: Sustained.

1 A We did that in '03, I believe.  
2 Q Why weren't you doing it as the information was coming  
3 in?  
4 A Well, the information was coming in in '03. With  
5 respect to the medical bills?  
6 Q I believe you just testified that the stack of  
7 documents included some medical bills?  
8 A Yes, the UMass ones.  
9 Q Okay.  
10 A The first production included UMass.  
11 Q And when were those received?  
12 A March 28, 2002.  
13 Q Okay. And as you received them in March of 2002, did  
14 you begin cross-referencing what you were receiving  
15 with the information that was on Mrs. Rhodes' insurer's  
16 website.  
17 A Oh, in '02. I wasn't involved in the case until after  
18 the first of the year, in '03, so I can't answer that  
19 question.  
20 Q When you became involved in '03, did you check to see  
21 if there had been any cross-referencing of the medical  
22 bills that had come in up to that point with the  
23 information that was on the insurer's website?  
24 A We did, as soon as we got the bills in, and that's when

1 MS. PINKHAM: I have nothing further, your  
2 Honor.

3 THE COURT: All right. Mr. McDonough.

4 CROSS-EXAMINATION BY MR. McDONOUGH:

5 Q Good morning, Ms. Patten. My name is Brian McDonough  
6 and I'm co-counsel to AIGDC and National Union in this  
7 matter.  
8 A Good morning.  
9 Q The document response that was marked as Exhibit 80 and  
10 the stack of documents that was produced with it,  
11 Exhibit 80A, were those produced only to counsel of  
12 record and not to AIGDC or National Union?  
13 A Right. They were produced to counsel of record.  
14 Q Okay. And in that stack of documents that's Exhibit  
15 80A, are there any medical bills?  
16 A Yes.  
17 Q And I believe you said you started receiving those in  
18 January of 2002 from certain providers?  
19 A We received UMass medical bills. The certification is  
20 dated March 28, 2002.  
21 Q Okay. And as you were receiving the medical bills,  
22 were you cross-referencing them with the information  
23 that was on the insurer's website that you were relying  
24 on?

1 we realized there was a discrepancy with the tally from  
2 United Health Care. We realized there was a  
3 discrepancy with the bills that were coming in in '03.  
4 Q I believe you just testified that you became involved  
5 in January of 2003; is that correct?  
6 A Approximately.  
7 Q Okay. When you became involved, you understood in  
8 January 2003 that some medical bills were already in  
9 the position of Brown Rudnick; is that correct?  
10 A Right.  
11 Q At that point, in January 2003, did you attempt to  
12 cross-reference the medical bills that you had in your  
13 possession with the information about bills and  
14 payments that appeared on the website of Mrs. Rhodes'  
15 insurer?  
16 A I don't recall specifically.  
17 Q If you had done so, you personally would have known as  
18 early as January 2003 that there was a duplication of  
19 costs appearing on the insurer's website, correct?  
20 A I don't know.  
21 Q Well, at some point you learned that there was  
22 duplication of costs in the figures that you were  
23 taking off the insurer's website, right?  
24 A Correct.

1 Q Okay. Now, getting the medical bills and payment  
 2 records from your client's insurer, that was a simple  
 3 process, wasn't it?  
 4 A We received some -- we got a release from Mrs. Rhodes  
 5 and we sent them to the health care providers, and when  
 6 they had the documents ready, they sent them to us.  
 7 Q You would agree that's a simple process, correct?  
 8 A I don't know how you're defining "simple." I guess so.  
 9 Q Why did plaintiffs' counsel wait until -- well, when  
 10 exactly was that request for the actual underlying  
 11 documentation made to the insurer?  
 12 A What documentation?  
 13 Q The HIPAA release that you sent in in a request for the  
 14 documents.  
 15 A To which insurer? To which provider?  
 16 Q United Health Care.  
 17 A Oh, I don't recall when the release was sent to United  
 18 Health Care.  
 19 Q Was it in 2002?  
 20 A I believe it was.  
 21 Q Were you involved in the effort to obtain the HIPAA  
 22 release from the Rhodeses?  
 23 A I believe we had releases. When I became involved in  
 24 the case, we already had releases.

1 over a million dollars of medical costs, if you had  
 2 been keeping a running tally and cross-referencing the  
 3 bills that you were receiving?  
 4 A Because I believe in April 2003 the tally, if you will,  
 5 from United Health Care was around a million dollars.  
 6 And then when we started getting the bills in, we were  
 7 cross-referencing in '03, realizing that there might  
 8 have been duplication, so that's when we did a thorough  
 9 cross-referencing and made sure we had all the  
 10 certified medical bills and included the correct figure  
 11 in the demands that were sent to you in August -- that  
 12 were sent to counsel of record in August '03.  
 13 Q If you just requested the actual documentation from the  
 14 health insurer in the first instance, you would have  
 15 had an accurate figure for her medical costs incurred,  
 16 right?  
 17 A Most likely.  
 18 Q And you didn't request the actual records from the  
 19 insurer until 16 or 17 months after the accident?  
 20 A I think it was earlier than that.  
 21 Q What do you base that on?  
 22 A My memory.  
 23 Q And what memory in particular?  
 24 A I think it was after we sent out the answers to

1 Q Okay. And you can't say as you sit here today when the  
 2 release was actually submitted to United Health Care?  
 3 A No, but I believe it was early on.  
 4 Q Okay. But the actual documents weren't received until  
 5 when?  
 6 A What documents?  
 7 Q The documents from United Health Care.  
 8 A There were -- we were looking on line so --  
 9 Q I understand that. I'm asking when you received the  
 10 actual documentation of the costs.  
 11 MS. PINKHAM: Objection.  
 12 THE COURT: Overruled.  
 13 A I don't recall.  
 14 (By Mr. McDonough)  
 15 Q Was it not about the time that you provided the  
 16 supplemental answer to interrogatory on behalf of Mrs.  
 17 Rhodes that revealed that the original answer of a  
 18 million dollars in medical-related costs was off by a  
 19 factor of about three?  
 20 A I believe that there was a running tally of medical  
 21 bills from United Health Care, the running tally with  
 22 United Health Care in '02.  
 23 Q Okay. Well, why was it that the original answers to  
 24 interrogatories indicated that Mrs. Rhodes had incurred

1 interrogatories is when we started getting the bills  
 2 in. So if that was 16 months, then -- but we thought  
 3 that all the information on the United Health Care  
 4 website was correct. We didn't think that there would  
 5 have been duplication. We assumed that that was  
 6 correct when we had it.  
 7 Q Okay. I'd like to move on to another issue, and that's  
 8 the issue of observations of the Rhodes family's  
 9 emotional distress, okay?  
 10 A Mm-hum.  
 11 Q And is it your understanding that Mrs. Rhodes was  
 12 suffering from bipolar disorder before the accident?  
 13 A I believe she was.  
 14 Q Okay. And did you ever witness an episode of  
 15 depression due to that disorder before the accident?  
 16 A I didn't know her before the accident.  
 17 Q Okay. That was going to be my next question. You  
 18 didn't even know her before the accident, correct?  
 19 A No.  
 20 Q And you participated in the preparation of Exhibit 79,  
 21 which was the supplemental answer to Mrs. Rhodes'  
 22 interrogatories, correct?  
 23 A Yes.  
 24 Q Okay. And you in fact signed that document, correct?

1 A Yes.

2 Q Okay. And so you were aware that Mrs. Rhodes stated in  
3 her answers that were contained in that document that  
4 she lives with the deep depression of the knowledge of  
5 the limitations placed on her as a result of the  
6 accident, right?

7 A Yes.

8 Q Okay. So there were a number of sources of depression  
9 in Mrs. Rhodes' life during the times when you met with  
10 her, correct?

11 A A number when?

12 Q At any time.

13 A She was depressed. She was rendered a paraplegic.

14 Q Right. And that was the source of depression, correct?

15 A Right.

16 Q Okay. And she was also bipolar, correct?

17 A I believe she was diagnosed with that before the  
18 accident.

19 Q And that was another source of depression in her life,  
20 correct?

21 A I don't know.

22 Q You understand that the defense in the underlying  
23 action requested Mrs. Rhodes' medical records, and  
24 including medical records from mental health

1 A I reviewed it this morning.

2 Q Okay. Beyond the overstatement of Mrs. Rhodes' medical  
3 costs that are in Exhibit 79, are you aware of any  
4 other inaccuracies that are contained in those  
5 interrogatory answers?

6 A No.

7 Q Okay. And I believe you testified that -- well, maybe  
8 I'm misstating this.

9 Did you attend Mrs. Rhodes' deposition in the  
10 underlying action?

11 A No, I did not.

12 Q Did you at some point have an opportunity to review her  
13 transcript from that deposition?

14 A I might have. I don't specifically recall.

15 Q Well, you were counsel to her in the underlying action,  
16 right?

17 A Correct.

18 Q But you have no specific memory of reviewing that?

19 A I most likely did. I honestly don't have a specific  
20 recollection.

21 Q In any event, I think you testified a moment ago that  
22 you were aware that she was suffering from bipolar  
23 disorder prior to the accident, correct?

24 A Yes.

1 professionals that treated her before the accident,  
2 correct?

3 A I believe they did want her mental health records.

4 Q Okay. And you can understand why the defense would  
5 have wanted that information, right?

6 A I can. I was representing Mrs. Rhodes. I don't -- I  
7 mean, I wasn't representing the defendant, so I don't  
8 know why.

9 Q Simply because you were representing the plaintiffs you  
10 can't see why that information would be relevant,  
11 regardless of whether it was ultimately admissible?

12 MS. PINKHAM: Objection.

13 THE COURT: Sustained.

14 (By Mr. McDonough)

15 Q In anticipation of testifying this morning, I think you  
16 said you reviewed the doc response and you also  
17 reviewed the actual documents; is that correct?

18 A Yes, I reviewed these.

19 Q Did you review anything else in preparation of  
20 testifying this morning?

21 A I reviewed the pleading index. I don't recall what it  
22 was.

23 Q Did you review the supplemental interrogatory answer  
24 that's been marked as Exhibit 79?

1 Q I'd like to direct your attention to Exhibit 79. Is it  
2 in front of you in the book?

3 A I think it's on the bench..

4 THE COURT: Is there a copy that I have. I  
5 don't think I have a copy, do I?

6 MS. PINKHAM: We'll give you one, your Honor.

7 (By Mr. McDonough)

8 Q And I'd like you to direct your attention specifically  
9 to page 7 and Interrogatory Number 8. And I'm going to  
10 read the interrogatory, and it states:

11 Please state all the medications you were  
12 prescribed and/or taking prior to, at the time of, and  
13 after the date of the accident on January 9, 2002; the  
14 physician who prescribed them; and the reason for each  
15 prescription.

16 Did I read that correctly?

17 A Yes.

18 Q Okay. I'd now like to direct your attention to the  
19 answer, okay? Could you explain to me why there are  
20 medications for treatment of her depression that are  
21 listed under the category of "Medications" as of 1/9/02  
22 but there are no medications for treatment of  
23 depression listed under the heading "Medications Taken"  
24 prior to January 9, 2002?"

1 A No.

2 Q Did Mrs. Rhodes ever request that her IME be conducted  
3 by a female physician?

4 A I don't recall if she did.

5 Q Do you have any reason to believe that defendants'  
6 counsel wouldn't have acquiesced to such a request?

7 A If I asked?

8 Q That's right.

9 A I don't know.

10 Q You don't have any reason to believe that they wouldn't  
11 have?

12 A No.

13 Q Who requested that plaintiffs' deposition be put off?  
14 Was it Attorney Pritzker?

15 A No.

16 Q Who requested it?

17 A You mean when it was first noticed in '03?

18 Q Yes.

19 A I believe that there was a discussion with Attorney  
20 Deschenes and Attorney Pritzker and there was an  
21 agreement to put the deposition off.

22 Q What's the basis for that belief that you just  
23 testified about? Were you a party to that discussion?

24 A I don't recall.

1 A In this case?

2 Q In this case.

3 A I don't think that Attorney -- again, I think there was  
4 an agreement to put them off thinking that we didn't --  
5 that they didn't want to have to put Marcia through a  
6 deposition if the case could resolve.

7 Q Now, the defendants thought they might be able to put  
8 off putting her through a deposition and resolve it  
9 without doing so? Is that what you're saying?

10 A Right.

11 Q What's the basis of that understanding?

12 A Well, we produced over 2,000 medical records, detailed  
13 interrogatories. There was the "Day In The Life"  
14 video.

15 THE COURT: Why is she speculating as to what  
16 the intent was of defense counsel? Why should I take  
17 speculation?

18 MR. McDONOUGH: I won't pursue it further.

19 THE COURT: Okay.

20 MR. McDONOUGH: I have nothing else.

21 THE COURT: Ms. Sackett?

22 MS. SACKETT: Good morning, your Honor.

23 CROSS-EXAMINATION BY MS. SACKETT:

24 Q Good morning, Ms. Patten.

1 Q In any event, were you ever present when Attorney  
2 Pritzker and Attorney Deschenes discussed putting off  
3 plaintiffs' depositions?

4 A I might have. I might have been. I just -- I don't  
5 have a specific recollection.

6 Q Well, despite the fact that you weren't present during  
7 a discussion, what's your understanding as to what  
8 Attorney Pritzker said with regard to putting off the  
9 depositions?

10 A I don't know.

11 Q So as you sit there, you can't say one way or the other  
12 whether it was perhaps Attorney Pritzker who requested  
13 the depositions be postponed?

14 A I believe that there was an agreement to have the  
15 depositions put off, if you will, or postponed because  
16 there was a hope that the case would resolve and we  
17 wouldn't need -- they wouldn't need to take Marcia  
18 Rhodes' deposition.

19 Q Do you know who wanted them put off? Was it plaintiffs  
20 or defendants?

21 A I don't know.

22 Q As you sit there today, do you have any understanding  
23 as to why a defendant would want to put off a  
24 deposition of the plaintiff?

1 A Good morning.

2 Q Do you recall whether Mrs. Rhodes' deposition was  
3 noticed in 2002, not 2003?

4 A I believe it was 2003, but the pleading index would  
5 tell me if I received a Notice of Deposition in '02.

6 Q And do you still have that pleadings index with you in  
7 front of you anywhere?

8 A No.

9 MS. SACKETT: \*

10 THE COURT: Sure. It may be marked for I.D.

11

12 (Exhibit E, marked; Pleading Index.)

13

14 (By Ms. Sackett)

15 Q Have you finished reviewing it?

16 A With the first few pages. Do you want me to review the  
17 whole --

18 Q Are you all set with it?

19 A Yes.

20 Q Does that refresh your recollection whether her Notice  
21 of Deposition was sent to Mrs. Rhodes in 2002?

22 A There's something called a Summons to Witness. I  
23 didn't see a specific Notice of Deposition, though.

24 Q And you indicated that you testified previously that in

1 the course of working on the underlying litigation,  
 2 that all documents that had basically a caption would  
 3 be identified and put into a pleadings index, correct?  
 4 A Right.  
 5 Q Okay. And do you have an understanding of what the  
 6 summons for witness is that was identified in here?  
 7 A I haven't see it. I mean, it was in the pleading clip.  
 8 I haven't been at the firm for quite some time so I  
 9 don't know exactly what it looks like.  
 10 Q Do you know if the Summons for Witness of Marcia Rhodes  
 11 is for a deposition?  
 12 A Do I know if it was for a deposition? I don't.  
 13 Q Now, you previously testified that you did not know  
 14 Mrs. Rhodes prior to January 9 of 2002, correct?  
 15 A Right.  
 16 Q You didn't know Mr. Rhodes prior to January 9 of 2002,  
 17 did you?  
 18 A I did not.  
 19 Q And you didn't know Rebecca Rhodes prior to January 9,  
 20 2002?  
 21 A I didn't.  
 22 Q You also testified that you assisted Mr. Rhodes  
 23 concerning a fight with United Health Care concerning  
 24 an easy stand. You previously testified to that; is

1 130.  
 2  
 3 (Exhibit Number 130, marked; Production Log.)  
 4  
 5 (By Ms. Sackett)  
 6 Q Ms. Patten, have you seen that document before?  
 7 A Yes, I have.  
 8 Q You testified that you had seen it this morning in  
 9 looking at those documents. Had you seen it prior to  
 10 this morning?  
 11 A Yes.  
 12 Q And this document, in fact, was the production log you  
 13 testified to that when documents came in pertaining to  
 14 the accident litigation. This is how Brown Rudnick  
 15 kept track of the documents; is that correct?  
 16 A Yes.  
 17 THE COURT: I'm sorry, kept track of the  
 18 documents that came in to Brown Rudnick, or kept track  
 19 of the documents that were produced to defense counsel?  
 20 THE WITNESS: Both. We Bates'd documents as  
 21 they came in and then the specific documents that went  
 22 out, we recorded those Bates numbers. And if we got  
 23 documents in from a defendant with their own Bates  
 24 number, we recorded those as well.

1 that correct?  
 2 A I helped him with an appeal.  
 3 Q Okay. And do you know what time period that was?  
 4 A I think it was in 2003, in spring 2003 or the summer.  
 5 I don't have a specific memory of the exact month.  
 6 Q You also testified that this morning, in reviewing the  
 7 documents, you looked -- in reviewing what was marked  
 8 as Mills Exhibit 7, the foot and half stack of  
 9 documents, you compared it to something called a  
 10 production log?  
 11 A Yes.  
 12 MS. SACKETT: I'd like to have this marked as  
 13 the next exhibit for defense.  
 14 THE COURT: I'm sorry, do you wish to mark it  
 15 for I.D., or do you wish to offer it?  
 16 MS. SACKETT: I hope to offer it.  
 17 THE COURT: Okay. What are you seeking to  
 18 offer?  
 19 MS. SACKETT: The production log.  
 20 THE COURT: All right. Is there any  
 21 objection to the admission of the production log?  
 22 MR. PRITZKER: Could we see it?  
 23 No objection.  
 24 THE COURT: Okay. It may come in as Exhibit

1 (By Ms. Sackett)  
 2 Q And if you could look at the first row in this  
 3 production, it indicates a Bates number from 1 to 89?  
 4 A Yes.  
 5 Q And then in the next column it says date: April 2 of  
 6 2002. Do you see that in the middle row? The first --  
 7 A Oh, yes. I'm sorry. Yes.  
 8 Q And that's the date on which Brown Rudnick received  
 9 these documents; is that correct?  
 10 A Yes.  
 11 Q And these are, in fact, the invoices from UMass Medical  
 12 Center in Worcester, correct?  
 13 A Yes.  
 14 Q And these are, in fact, the medical bills, not medical  
 15 records, correct?  
 16 A From UMass.  
 17 Q And then in the row below that, it also appears that  
 18 Brown Rudnick received documents Bates No. 90746 in  
 19 April of 2002 from UMass Medical Center. Do you see  
 20 that?  
 21 A Yes.  
 22 Q And are those the medical records that were provided?  
 23 A Yes.  
 24 Q If you skip down to the fifth row, where it says Bates

1 No. 802-1000, do you see that?  
 2 A Yes.  
 3 Q And according to this production log, these are  
 4 documents provided to Brown Rudnick by Whittier  
 5 Rehabilitation Hospital. Could you tell what date that  
 6 those were produced to Brown Rudnick?  
 7 A They were produced to Brown Rudnick on December 10,  
 8 2002.  
 9 Q And if we go down further on the page, in row 8,  
 10 there's Bates No. 1238 --  
 11 A Yes.  
 12 Q -- through Bates No. 1311; do you see that?  
 13 A I do.  
 14 Q And what do those Bates numbers refer to.  
 15 A Documents produced to Brown Rudnick and Milford-  
 16 Whitinsville.  
 17 Q And what was the date on which they were produced to  
 18 Brown Rudnick?  
 19 A January 9, 2003.  
 20 Q Okay. Would you also look at the next row, where it  
 21 says Bates Nos. 1312 through 1857; do you see that?  
 22 A I do.  
 23 Q And could you tell the court what those documents are  
 24 and the date on which they were produced?

1 I don't quite know what you intend to do. So you can  
 2 ask your question; if there's an objection, I'll deal  
 3 with it.  
 4 REDIRECT EXAMINATION BY MS. PINKHAM:  
 5 Q Ms. Patten, have you been involved in all of the  
 6 litigation in the current case, the 93A action in which  
 7 you're testifying?  
 8 A No, I haven't. I can't actually, as a clerk.  
 9 Q Well, I will represent to you that there's a number of  
 10 correspondence from an attorney named Anthony Bartell,  
 11 and I'm going to show you a letter dated May 21, 2004,  
 12 from Anthony Bartell to Martin Maturine at AIG  
 13 Technical Services. For the record, I'm referencing  
 14 Bates No. B2043 to B2044.  
 15 MR. ZELLE: Could you identify the exhibit  
 16 sticker, please?  
 17 MS. PINKHAM: The plaintiffs had sought to  
 18 introduce this as Exhibit No. 40. It was objected to  
 19 so it bears a label 40.  
 20 THE COURT: Do I have it?  
 21 MS. PINKHAM: No, your Honor, because it was  
 22 objected to, so you don't have it.  
 23 MR. McDONOUGH: Objection, your Honor. This  
 24 isn't within the scope of the cross.

1 A Documents produced to Brown Rudnick by Fairlawn Rehab,  
 2 January 10, 2003.  
 3 Q So as of January 10 of 2003, all of the documents that  
 4 you've just referenced were in Brown Rudnick's  
 5 possession, correct?  
 6 A Yes.  
 7 Q And were you aware that in January of 2002, John Chaney  
 8 asked Mr. Pritzker in a telephone conversation for  
 9 information concerning Mrs. Rhodes' condition and  
 10 treatment?  
 11 A No, I don't know who John Chaney is. I'm not aware of  
 12 that.  
 13 Q Do you have any knowledge that John Chaney is an  
 14 adjustor for Crawford & Company?  
 15 A No.  
 16 MS. SACKETT: No further questions, your  
 17 Honor.  
 18 THE COURT: Any further questions of counsel?  
 19 MS. PINKHAM: Your Honor, if I could. And,  
 20 again, I bring up the issue of the Anthony Bartell  
 21 letters because there is one that I would like to use  
 22 on my recross of Attorney Patten.  
 23 THE COURT: Use it in context and I'll see.  
 24 I mean, I don't have the letters in front of me and so

1 MS. PINKHAM: If I could continue, your  
 2 Honor?  
 3 THE COURT: I'll give some leeway for her to  
 4 show her the document. You're showing it to her to  
 5 refresh her memory? I'm trying to keep track of what  
 6 you're doing here.  
 7 MS. PINKHAM: Well, your Honor, there's an  
 8 explanation in this letter regarding the continuance of  
 9 Marcia Rhodes' deposition. It was the subject of  
 10 cross-examination by Mr. McDonough.  
 11 THE COURT: So this is Bartell's explanation?  
 12 MS. PINKHAM: Yes.  
 13 THE COURT: And why is she being shown  
 14 Bartell's explanation? So that she can testify to what  
 15 Bartell was thinking? How would that come in?  
 16 MS. PINKHAM: There were a number of  
 17 questions as to who continued Marcia Rhodes' and  
 18 Rebecca Rhodes' depositions and who asked for them, so  
 19 there's an explanation in this letter as to what  
 20 transpired.  
 21 THE COURT: All right. Are you asking me to  
 22 consider that for the truth of the matter asserted?  
 23 Isn't that plainly hearsay?  
 24 MS. PINKHAM: Well, your Honor, it at least

1 goes to notice as to AIG, as to why the deposition was  
2 -- or at least notice as to AIG as to GAF's coverage  
3 counsel's understanding of why the depositions were  
4 postponed.

5 MR. McDONOUGH: Your Honor, not through this  
6 witness.

7 THE COURT: I think that's really beyond what  
8 this witness can testify to. If you remember, I did  
9 cut off Mr. McDonough by saying why are we having her  
10 speculate as to what the reasons were for somebody else  
11 doing what they did. That's not an appropriate role  
12 for this witness. So if that's what you're going to  
13 try to do, it's sustained.

14 MS. PINKHAM: Okay.  
15 (By Ms. Pinkham)

16 Q Ms. Patten, do you still have the pleading index in  
17 front of you?

18 A No. I think it's on the bench.

19 Q Ms. Patten, if I could direct your attention to page 18  
20 of the pleading index. I'm sorry, directed you to the  
21 wrong date.

22 If I could direct your attention to page 10  
23 of the document that's been marked for identification,  
24 the pleading index.

1 A I believe they were subpoenaed.

2 Q I'm going to show you a document to see if it refreshes  
3 your recollection, actually two documents.

4 Ms. Patten, what is your understanding as to  
5 what the summonses are that are referenced as Items 19  
6 and 20 in the pleading index that's been marked as  
7 Exhibit E for identification?

8 A Those were the summonses that you just showed me for  
9 them to appear at the, I believe it was the plea, when  
10 Carlos Zalewski pled to sufficient facts.

11 MS. PINKHAM: Your Honor, I would move that  
12 the document that's been marked for identification as  
13 Exhibit E be admitted as an exhibit.

14 THE COURT: What's the relevance?

15 MS. PINKHAM: It's simply the chronology of  
16 the events in the underlying action.

17 THE COURT: I don't see any relevance as to  
18 whether they were subpoenaed and apparently didn't  
19 testify.

20 MS. PINKHAM: I'm sorry, your Honor. I'm  
21 asking that the pleading index be marked.

22 THE COURT: Oh, the pleading index. I  
23 thought you were asking for the subpoena.

24 Okay. Any objection to the pleading index

1 A Yes.

2 Q Item number 144 and 145, do you see those?

3 A I do.

4 Q Do those indicate the date on which Marcia Rhodes' and  
5 Rebecca Rhodes' depositions were noticed?

6 A Yes.

7 Q And what were the dates?

8 A September 26, 2003. It was noticed for October 2003 at  
9 Nixon Peabody.

10 Q And if I could direct your attention on the same  
11 document that's been marked for identification. Could  
12 you actually give me the letter that's on the front

13 A I'm sorry. I think it's B -- E.

14 Q Thank you. Items 19 and 20 make reference to a  
15 summons. Do you recall some questions about that?

16 A Yes.

17 Q Ms. Patten, were you aware that there was a criminal  
18 proceeding initiated against Carlos Zalewski?

19 A Yes.

20 MR. McDONOUGH: Objection.

21 THE COURT: I'll allow that.

22 (By Ms. Pinkham)

23 Q Do you recall whether Mr. and Mrs. Rhodes were  
24 subpoenaed to appear at the criminal proceeding?

1 coming in.

2 MR. COHEN: I think it's already in.

3 THE COURT: No. It was just marked for I.D.  
4 initially, correct? So the pleading index, which had  
5 been marked E for identification, is now Exhibit 81.  
6 The production log is Exhibit 130. This is  
7 the pleading index.

8 MR. McDONOUGH: Your Honor, what is Exhibit  
9 79?

10 THE COURT: Exhibit 79 is the Supplemental  
11 Answers to the First Request of GAF for  
12 Interrogatories.

13 MR. McDONOUGH: Thank you.

14  
15 (Exhibit 81, marked; Pleading Index  
16 (previously E for I.D.)  
17

18 (By Ms. Pinkham)

19 Q Ms. Patten, I understand from your previous answers to  
20 Ms. Sackett's questions, that Brown Rudnick had  
21 collected a number of documents in 2002?

22 A Yes.

23 Q And when again was the first time that any of the  
24 defendants in the underlying action made a formal

1 request for the production of documents?  
 2 A February 20.  
 3 MS. SACKETT: Objection, your Honor.  
 4 THE COURT: It's been asked and answered, but  
 5 I'll hear it again. Go ahead.  
 6 A We received a document request on February 20, 2003.  
 7 MS. PINKHAM: I have nothing further, your  
 8 Honor.  
 9 THE COURT: Any further questions of counsel?  
 10 Okay. I've got a few questions.  
 11 Were you aware of there being any  
 12 confidentiality agreement with respect to the  
 13 production of documents in this case?  
 14 THE WITNESS: No.  
 15 THE COURT: When Brown Rudnick furnished the  
 16 medical records of Mrs. Rhodes, was there any  
 17 limitation that was imposed by your firm as to the  
 18 distribution of those records?  
 19 THE WITNESS: You mean to whom they were  
 20 going?  
 21 THE COURT: Right.  
 22 THE WITNESS: No. Were produced them to  
 23 counsel of record. The attorneys who requested them,  
 24 that's who we produced them to.

1 THE COURT: All right. Now, I'm going to  
 2 give it back to you in a moment.  
 3 With regard to page 5, I'd ask you to turn to  
 4 page 5, which is Interrogatory Answer 5, specifically  
 5 5A.  
 6 MR. PRITZKER: Of which set, your Honor?  
 7 THE WITNESS: Both.  
 8 At that time, I gather it was asserted that  
 9 the medical expenses that had been incurred to date  
 10 were more than \$1 million?  
 11 THE WITNESS: Yes.  
 12 THE COURT: And I gather that turned out to  
 13 be an error?  
 14 THE WITNESS: Correct.  
 15 THE COURT: When was that error corrected?  
 16 THE WITNESS: In the demand package that we  
 17 sent in August 2003, we calculated all past medicals at  
 18 approximately \$413,000. And we attached as exhibits to  
 19 the settlement demand a spreadsheet of all of the bills  
 20 produced to date.  
 21 THE COURT: But there was no second  
 22 supplemental to correct the error with respect to the  
 23 medical expenses that had been incurred?  
 24 THE WITNESS: I don't believe there was, but

1 THE COURT: Okay. But was there any  
 2 agreement that counsel of record would not show them to  
 3 anybody else without the approval of plaintiff or  
 4 plaintiffs' counsel?  
 5 THE WITNESS: Not that I recall.  
 6 THE COURT: Now, if I could see 79 for a  
 7 moment as well as 75.  
 8 (Documents were proffered to the court.)  
 9 THE COURT: The supplemental answer was  
 10 written on April 11, just three days after the initial  
 11 answer.  
 12 THE WITNESS: Yes.  
 13 THE COURT: How do they differ?  
 14 THE WITNESS: I believe the specific  
 15 interrogatory number, it's either 7 or 8, but I believe  
 16 what we did is we referred in the supplemental, we  
 17 referred counsel, in addition to all of her damages, if  
 18 you will, which went on for a page and a half, we, in  
 19 addition, referred them to all of the documents  
 20 produced on April 10. We didn't put that in the  
 21 previous answer.  
 22 THE COURT: Okay. So it's somewhat  
 23 ministerial in terms of the difference.  
 24 THE WITNESS: I believe it was.

1 as I said earlier, there was a dialogue in the spring  
 2 and we informed counsel that there was an error with  
 3 the bills and they were well aware by the time they got  
 4 the settlement package that it was \$413,000.  
 5 THE COURT: Okay. That concludes my  
 6 questioning. Any questions of counsel within the scope  
 7 of my questions? Seeing nobody rise, you may go back  
 8 to work in Essex.  
 9 THE WITNESS: Thank you.  
 10 THE COURT: Give my regard to the judges  
 11 there.  
 12 THE WITNESS: I will. Thank you.  
 13 THE COURT: All right. Next witness.  
 14 MS. PINKHAM: Your Honor, the plaintiffs call  
 15 Marcia Rhodes.  
 16 THE COURT: Okay. Now, before we bring Ms.  
 17 Rhodes up, how are we going to handle the logistics?  
 18 MS. PINKHAM: I've conferred with the court  
 19 reporter, whose preference is that Mrs. Rhodes stay  
 20 behind her, and then I will move the microphone that's  
 21 on the witness stand to the edge so that there is a  
 22 mike near her.  
 23 THE COURT: So in that corner? I don't think  
 24 counsel would see her so easily if she's in that

1 corner. Put her right there.

2 Ms. Rhodes, we're going to put you next to

3 the boxes, in front of what is the jury box, so we

4 don't need you to deal with the witness stand, which is

5 not terribly handicapped accessible.

6 THE COURT: Are you able to raise your right

7 hand? I guess you can. Okay.

8 MARCIA RHODES, Sworn

9 THE COURT: Ma'am, if you would please state

10 your name and spell your last name for the court

11 reporter.

12 THE WITNESS: My name is Marcia N. Rhodes.

13 THE COURT: Now, before we go any further, I

14 think we're going to need to adjust the microphone,

15 make it a little bit closer to her.

16 All right. It is twenty of eleven. I plan

17 to break at 11:15, but if you need a break earlier than

18 that, you'll tell me, okay?

19 THE WITNESS: Okay.

20 MR. PRITZKER: Your Honor, there is one

21 thing. You might hear some noise coming from Mrs.

22 Rhodes' wheelchair. There's a vibrator that

23 automatically vibrates. It does make some noise.

24 THE COURT: Thank you for telling me. You

1 Q Do you recall approximately when the criminal hearing

2 was for Mr. Zalewski?

3 A I believe it was November of 2002.

4 Q At any point after the end of 2002 did you make any

5 inquiries of your husband about the status of the

6 lawsuit?

7 A I did ask him if the lawsuit would be resolved in

8 December of 2002.

9 Q And what was your understanding?

10 A My understanding was that it would not.

11 Q In 2002, did you ever have --

12 THE COURT: Before you go any further, what

13 is being done with regard to privileged spousal

14 communications? Is there an attempt to have her

15 testify to that?

16 MS. PINKHAM: Certain conversations, yes,

17 your Honor.

18 MR. COHEN: I don't think that privilege

19 could be waived, your Honor.

20 THE COURT: I'm sorry?

21 MR. COHEN: I don't believe that that

22 privilege can be waived.

23 THE COURT: Well, I think that is correct.

24 It's a question as to what the scope of the privilege.

1 may proceed.

2 DIRECT EXAMINATION BY MS. PINKHAM:

3 Q Good morning, Mrs. Rhodes.

4 A Mrs. Rhodes, at some point in 2002, did you become

5 aware that there was a lawsuit regarding your claim for

6 compensation for the injuries that you suffered in the

7 accident in January of '02?

8 A Yes.

9 Q Were you actively involved in the lawsuit?

10 A I left it up to my husband. I left everything legally

11 to my husband and the firm of Brown Rudnick.

12 Q And did you and your husband have an agreement as to

13 who was going to focus on what in 2002?

14 A Yes. I was to focus on my health and my getting

15 better, rehabilitation, and my husband was to focus on

16 everything else.

17 Q Mrs. Rhodes, at any point in 2002, did you have an

18 expectation that the lawsuit regarding your claim for

19 compensation would be resolved?

20 A Yes, I did.

21 Q When did you have that expectation?

22 A I thought that after Mr. Zalewski was found guilty,

23 that forthcoming within the end of the year would be a

24 payment from t defendant.

1 So we'll proceed with regard to it and we'll deal with

2 that issue as it arises, if it arises.

3 (By Ms. Pinkham)

4 Q Mrs. Rhodes, in 2003, were you involved in any of the

5 documents that were part of the litigation process,

6 specifically answers to interrogatories?

7 A I can't remember.

8 Q I'm going to show you a document, Mrs. Rhodes.

9 MS. PINKHAM: I'm looking for Exhibit 75.

10 I have it, your Honor.

11 (By Ms. Pinkham)

12 Q Mrs. Rhodes, do you recognize the exhibit that's been

13 marked as Exhibit 75 in this case?

14 A I certainly remember the cover.

15 Q If I could direct your attention to the next to the

16 last page of Exhibit 75.

17 A Yes.

18 Q Is that your signature that's on page 11 of Exhibit 75?

19 A Yes, it is.

20 Q If I could borrow it for a moment, thank you.

21 I'd like to direct your attention to

22 Interrogatory Number 13 and the answer, Mrs. Rhodes.

23 Do you recall reviewing this document before you signed

24 it in 2003?

1 A If it's including the date of my recovery at that  
 2 point, then I would say yes, I was aware of the nature  
 3 of my injuries at that point.  
 4 Q And you reviewed the description that's contained in  
 5 Exhibit 75 before you signed the document?  
 6 A The answer?  
 7 Q Yes.  
 8 A Yes, it seems accurate.  
 9 Q Mrs. Rhodes, do you recall any emotions that you felt  
 10 as you were reviewing and preparing your answers to  
 11 interrogatories in the underlying action?  
 12 A First, a feeling of disbelief that I had to answer  
 13 these very personal questions of something that had  
 14 happened to me that was quite terrible. I understood  
 15 it was part of a legal process; but, nonetheless, it  
 16 made me very embarrassed and very uncomfortable. Many  
 17 of the things that are in here I later found out, when  
 18 I left Mass General and went into Fairlawn, that these  
 19 are accidents or results of the accident that I was  
 20 unaware of.  
 21 Q Mrs. Rhodes, after you completed the answers to  
 22 interrogatories that have been marked as Exhibit 75,  
 23 did you have any expectation that your case, seeking  
 24 compensation for your injuries, would be resolved?

1 filming of the video?  
 2 A Well, the first and most obvious was complete  
 3 embarrassment. It was a very personal process that I  
 4 was going through in my attempt to recovery and I was  
 5 totally embarrassed and somewhat indignant that I had  
 6 to go through this process in order to prove in some  
 7 way that I was hurt in this accident and that I was  
 8 indeed paralyzed and that I had to go through -- just  
 9 daily routine, just to prove that I had to go through  
 10 this daily routine.  
 11 MR. ZELLE: Your Honor, I'm going to object  
 12 and move to strike. Unless plaintiffs are seeking to  
 13 recover for pain and suffering related to making a "Day  
 14 in the Life" video, that that somehow was further  
 15 caused by the defendants, this is very emotional and I  
 16 just don't think it's necessary for the witness, the  
 17 court or the parties.  
 18 THE COURT: Is it your intent to claim that  
 19 there was emotional distress involved in the  
 20 preparation of that video for which you are  
 21 compensable?  
 22 MS. PINKHAM: No, your Honor. The  
 23 plaintiffs' claim for emotional distress is based on  
 24 the defendants' failure to respond at all to the video,

1 A I believed that after the judge -- I guess it was the  
 2 judge -- that Carlos Zalewski was found guilty, I  
 3 thought -- the results of the criminal trial -- that  
 4 the defendants would immediately make restitution.  
 5 Q And then did you have a similar expectation after April  
 6 of 2003, when you completed the written answers to the  
 7 questions?  
 8 A Yes.  
 9 MR. VARGA: Objection.  
 10 THE COURT: Overruled.  
 11 (By Ms. Pinkham)  
 12 Q You can put that down, Mrs. Rhodes.  
 13 Mrs. Rhodes, do you recall that there was a  
 14 "Day in the Life" video made of you in 2003?  
 15 A Yes.  
 16 Q What was your understanding of the purpose of that  
 17 video?  
 18 A It was my understanding that the primary policy who  
 19 were representing myself and my family were producing  
 20 this video to try to show the defendants what it was to  
 21 experience my life on a typical day after the accident.  
 22 Q Did you want to make the video?  
 23 A No.  
 24 Q What emotions do you recall in connection with the

1 not the filming of the video itself.  
 2 THE COURT: Then the video was going to be  
 3 made anyway. So if you're not seeking to compensate  
 4 her for emotional distress in making it, why must she  
 5 go through how embarrassing it was to make it?  
 6 MS. PINKHAM: So the record is clear, your  
 7 Honor, I am not seeking to introduce Mrs. Rhodes'  
 8 emotional distress about the making, but I believe that  
 9 this testimony is also probative of Mrs. Rhodes'  
 10 feelings at the time of trial when the video was shown  
 11 and that the plaintiffs do seek damages for the fact  
 12 that Mrs. Rhodes, having not been in a position to  
 13 avoid trial, is entitled to emotional distress in  
 14 connection with the viewing of the video at trial. And  
 15 that's the only purpose of this testimony, your Honor.  
 16 THE COURT: You can ask her how she felt when  
 17 she saw it as opposed to how she felt when she had the  
 18 film crew at her house for two days.  
 19 MS. PINKHAM: Okay.  
 20 (By Ms. Pinkham)  
 21 Q Mrs. Rhodes, given your testimony of how  
 22 intrusive you thought the video was, why did you  
 23 agree to have it made?  
 24 A I thought, truthfully, it would hurry things

1 along.

2 Q Mrs. Rhodes, were you aware that in the summer  
3 of 2003, that your attorneys submitted a demand  
4 letter and a number of documents and the video  
5 to defense counsel?

6 A No.

7 Q Were you aware that at some point in time there  
8 had been a demand communicated to the defendants  
9 in the accident case on your behalf?

10 A At some point at that time?

11 Q If you can recall when you became aware of the  
12 fact that the demand had been sent on your  
13 behalf.

14 A It was quite a bit of time from the time that  
15 Carlo Zalewski was found guilty.

16 Q Mrs. Rhodes, did you ever come to understand  
17 that a number of months had gone by after a  
18 demand package was provided to defense counsel  
19 and that there had been no response to that  
20 demand?

21 MR. VARGA: Objection. Leading the  
22 witness, your Honor.

23 THE COURT: I will sustain it as to  
24 leading.

1 interrogatories in April of 2003, did you have  
2 an expectation after that time period that your  
3 case was going to be resolved?

4 MR. VARGA: Objection.

5 THE COURT: Resolved when?

6 MS. PINKHAM: That's my question.

7 THE COURT: Just resolved at all?

8 MS. PINKHAM: Yes.

9 THE COURT: All right.

10 A At that point in time I had hoped that this  
11 would all be over, yes.

12 (By Ms. Pinkham:)

13 Q Did you have any understanding that a number of  
14 documents, medical documents and bills had been  
15 sent to defendants in the accident case?

16 A Again --

17 MR. VARGA: Objection.

18 MR. COHEN: Objection.

19 THE COURT: Overruled. She may testify  
20 as to her understanding of what was going on at  
21 the time.

22 A I understood that everything having to do with  
23 the legal, financial or any of those matters  
24 were left to my husband, and I was not to dwell

1 (By Ms. Pinkham:)

2 Q Mrs. Rhodes, were you aware of whether any of  
3 the defendants responded to a demand package  
4 that was sent on your behalf?

5 A I left everything legal to my husband. My  
6 actions, as it were, were focused on recovery,  
7 physical recovery as a result of the accident,  
8 where my husband handled everything else that  
9 had to do with the accident.

10 Q At any point in 2003 did you have -- strike  
11 that.

12 After the period of time, which we  
13 discussed in connection with your -- the  
14 completion of your answers to interrogatories,  
15 at any point after April of 2003, did you have  
16 the expectation that your case would be  
17 resolved?

18 MR. VARGA: Objection. Leading.

19 THE COURT: Overruled. I'll allow  
20 that.

21 You may answer the question.

22 A Could you ask the question again?

23 (By Ms. Pinkham:)

24 Q Sure. After you completed the answers to

1 on the accident. All the medical professionals  
2 were telling me to not focus on the accident but  
3 to move forward in my recovery.

4 (By Ms. Pinkham:)

5 Q Mrs. Rhodes, do you recall attending -- strike  
6 that. Did you meet with a Dr. Stephen Hanak at  
7 New England Medical in 2004?

8 THE COURT: I'm sorry? Stephen Panak  
9 was the --

10 MS. PINKHAM: Hanak. Yes, H-a-n-a-k.

11 THE COURT: Okay.

12 A I remember meeting with the defendants' doctor;  
13 I don't know the exact date.

14 (By Ms. Pinkham:)

15 Q What was your understanding of why it was you  
16 were meeting with Dr. Hanak?

17 A It was my understanding that I was meeting with  
18 him to prove that I was paralyzed.

19 Q And what emotions did you feel as the result of  
20 the independent medical exam?

21 A Well, the primary was embarrassment and anger,  
22 because quite a bit of time had gone by before I  
23 was asked to go through this routine of a  
24 strange doctor to examine me without really an

1 understanding of why he was examining me and why  
 2 it was so far from when Carlo Zalewski was found  
 3 guilty.  
 4 Q Ma'am, do you recall any parts of the  
 5 independent medical exam?  
 6 A Besides it being male doctor, which I would have  
 7 preferred a female doctor, I don't recall him  
 8 doing very much at all. He asked questions, but  
 9 I don't think he gave me any physical  
 10 examination.  
 11 Q Did Dr. Hanak ask you to transfer from your  
 12 wheelchair to an examining table as part of the  
 13 independent medical exam?  
 14 MR. VARGA: Objection. Leading, your  
 15 Honor.  
 16 THE COURT: I'll allow it.  
 17 A I think I don't have direct recall of him asking  
 18 that question, but I do have a direct memory of  
 19 being on a table.  
 20 (By Ms. Pinkham:)  
 21 Q And what memory do you have of being on a table?  
 22 A I remember a difficult transfer, it was a very  
 23 difficult transfer. And, if I may, my chair  
 24 obviously is only so high, and most doctors'

1 Q Can you recall whether your legs touched the  
 2 floor as you were sitting on the examining  
 3 table?  
 4 A They wouldn't have, they would not have touched  
 5 the floor.  
 6 Q Your referenced Carlotta; who attended the  
 7 independent medical exam with you?  
 8 A I recall Carlotta was there from Brown Rudnick,  
 9 and then Dr. Hanak and then myself.  
 10 Q And that was Carlotta Patten?  
 11 A Yes.  
 12 Q Ms. Patten represented you?  
 13 A Yes.  
 14 Q Did you request her presence at the independent  
 15 medical exam?  
 16 A I requested a female from Brown Rudnick to be  
 17 there; I didn't particularly ask for Carlotta by  
 18 name.  
 19 Q And why did you ask for a female attorney to  
 20 accompany you to the independent medical exam?  
 21 A Because I feel much more comfortable with female  
 22 attorneys, I mean, female anything that has to  
 23 do with my personal being. All my doctors are  
 24 females, with the exception of my dentist.

1 transfer tables are much higher, so it was an  
 2 uphill climb to get to the doctor's table. And  
 3 conversely, it was a downhill climb getting  
 4 down, back into my wheelchair.  
 5 Q Do you recall any emotions you felt when you  
 6 were sitting on the examining table?  
 7 A I felt a lot of anger. This was now past  
 8 embarrassment; this was now anger that I had to  
 9 go and see their doctor so long after what I had  
 10 thought -- naively, I had thought it would be a  
 11 case that was resolved or should have been  
 12 resolved immediately after Zalewski was found  
 13 guilty.  
 14 Q Mrs. Rhodes, how did you hold yourself on the  
 15 table during the independent medical exam?  
 16 A Well, by that time I had developed some degree  
 17 of body control, so if I held onto the ends of  
 18 the table then I felt that I was fairly  
 19 comfortable. But Carlotta was there just in  
 20 case, you know, to block me if felt like I was  
 21 falling forward, so I had someone there to block  
 22 me to push me back.  
 23 Q Did you have a fear of falling?  
 24 A I always have a fear of falling.

1 Q At the time of the independent medical exam --  
 2 strike that.  
 3 Can you recall any feelings that you  
 4 had about the status of the lawsuit as of the  
 5 time you went to see Dr. Hanak in June of 2004?  
 6 A Well, I felt disbelief that this was kind of  
 7 late in the game. As far as I was concerned the  
 8 lawsuit should, as I've said before, should have  
 9 been resolved by the end of 2002. And to ask me  
 10 to be examined in 2004 seemed ludicrous, which  
 11 made me very angry because I couldn't believe  
 12 that they were going to try -- what could they  
 13 find? I mean, that I wasn't paralyzed and I was  
 14 faking it? You know, I mean, I just couldn't  
 15 see why this was happening. I just didn't  
 16 understand why this was happening.  
 17 Q After the independent medical exam was  
 18 conducted, did you have any expectation as to  
 19 whether your lawsuit for compensation for your  
 20 injuries would be resolved?  
 21 A I believed that after the defendants could prove  
 22 that or feel confident that I was indeed  
 23 paralyzed that this would be, you know, a major  
 24 point in turning to a closing point in this

1 whole, I don't know, litigation process, this  
 2 whole process, everything, everything that my  
 3 husband was involved in, that I know he was  
 4 involved in, anything that I was involved in, I  
 5 just thought it would be over. I thought it was  
 6 a definitive closing point.

7 Q How did you get to the independent medical exam?  
 8 A I don't remember.

9 Q Were you driving as of the summer of 2004?  
 10 A I don't think I was driving by then. I don't  
 11 remember when I started driving.

12 Q Mrs. Rhodes, were you deposed after the  
 13 independent medical exam?  
 14 A I was deposed, but I couldn't say if it was  
 15 before or after.

16 Q Do you recall the deposition?  
 17 A I remember where it was.

18 Q Where was it?  
 19 A It was at the Radisson Hotel in Milford.

20 Q And why do you remember it was at the Radisson?  
 21 A Because it's really -- up until that time, it  
 22 was really the only hotel in Milford, so it had  
 23 to be at the Radisson. I remember a conference  
 24 room and I remember a number of lawyers asking

1 rear-ending is always found guilty and the  
 2 person who is hit would be not guilty. And this  
 3 one seemed so obvious a case of being rear ended  
 4 that I just couldn't believe that we were going  
 5 through this whole process, that it hadn't been  
 6 resolved.

7 Q Mrs. Rhodes, during your deposition in August of  
 8 2004, were you asked to diagram the accident and  
 9 how it occurred?  
 10 A I have no memory of that.  
 11 Can I say "strike that"?  
 12 THE COURT: Well, you can say it, but  
 13 it wouldn't do you any good.  
 14 (By Ms. Pinkham:)  
 15 Q Would you like to amend your answer?  
 16 THE COURT: But then again, when  
 17 counsel says it, it doesn't do any good either.  
 18 A The thing is when you say do I have a memory of,  
 19 I think of, you know, Judge Judy, and they have  
 20 a big white board and they have a little car  
 21 there and a little car there and she pictures  
 22 the accident that way.  
 23 Now, from that point of view, no, we  
 24 didn't. We did have a piece of paper that one

1 me questions, but that's all I have in memory of  
 2 the deposition.

3 Q Can you remember how you were feeling during the  
 4 deposition?  
 5 A Well, again, I had a feeling, a complete feeling  
 6 of disbelief that this process -- I know legal  
 7 processes can go slowly, but I didn't think it  
 8 would go this slowly. And it was dragging on  
 9 and I was answering questions that they already  
 10 knew the answer of, and they just wanted to hear  
 11 me say what they already knew. That made me  
 12 really angry.

13 Q Apart from the anger that you were feeling  
 14 during the deposition, did you have any other  
 15 emotions?  
 16 A Beside anger and a feeling of invasion of  
 17 privacy, which I felt very strongly, again,  
 18 there was a feeling of disbelief that here it is  
 19 2004 and this was a rear-ender and this was what  
 20 I would call a no-brainer. There was a  
 21 policeman on the scene, not immediately on the  
 22 scene, he was on the scene. And I just couldn't  
 23 understand -- it was my understanding of the law  
 24 that in a rear-ender the person who does the

1 of the attorneys drew out that indicated where I  
 2 thought my car was, where I thought Mr. Zalewski  
 3 was, where I thought the policeman was, and  
 4 where I thought the tree company was. But that  
 5 was just on a yellow piece of paper.

6 (By Ms. Pinkham:)  
 7 Q And you remember going through that process at  
 8 your deposition?  
 9 A That part, yes.

10 Q Okay. Do you remember the emotions that you  
 11 were feeling when you were diagramming the  
 12 accident scene?  
 13 A Again, I just didn't -- I felt a lot of anger  
 14 because I couldn't believe that these people  
 15 were not moving forward on a case that was  
 16 already found guilty and that, you know, when  
 17 you're found guilty, that's it, you're found  
 18 guilty. And I was really angry that they were  
 19 probing and asking me questions and I felt  
 20 trying to get me -- I felt that they were trying  
 21 to get me to say something 24 different ways.  
 22 But it was the same question over and over  
 23 again.

24 Q Were you comfortable in describing how the

1 accident happened?

2 A Well, I wasn't embarrassed because I didn't have  
3 any fault in the accident. I was uncomfortable  
4 with having to describe the accident just  
5 because I was uncomfortable talking about the  
6 accident and it was very emotional for me,  
7 especially when it came to this yellow piece of  
8 paper drawing. I felt as if that the defendants  
9 didn't believe that this had actually happened,  
10 that I could have possibly been rear ended  
11 without any culpability on my part. And then  
12 they were questioning whether this accident had  
13 occurred or not.

14 Q Mrs. Rhodes, did you attend the deposition of  
15 your daughter, Rebecca?

16 A I believe I did, yes.

17 Q Why?

18 A I wanted someone from the family to be there as  
19 an act of support.

20 Q Mrs. Rhodes, it's my understanding that you were  
21 not involved in the lawsuit on a regular and  
22 daily basis?

23 A I wasn't involved in the lawsuit at all except  
24 to the parts where I had to actually speak. I

1 do that.

2 Q Can you recall any specific areas of financial  
3 concern after the lawsuit, apart from the  
4 renovations to the house that you just  
5 referenced?

6 A My husband told me --

7 MR. VARGA: Objection, your Honor.  
8 Clearly hearsay. She has testified repeatedly  
9 that she left all matters of finance and legal  
10 issues up to Mr. Rhodes. And her knowledge of  
11 the subject could only come from statements he  
12 made outside of court.

13 MR. COHEN: Also the marital privilege,  
14 your Honor.

15 THE COURT: All right. Ms. Pinkham?

16 MS. PINKHAM: Your Honor, my question  
17 asked for Mrs. Rhodes' understanding of any  
18 other financial concerns. There may be other  
19 sources of information to Mrs. Rhodes other than  
20 her husband.

21 THE COURT: You can ask her whether  
22 there were.

23 MS. PINKHAM: Sure.

24 A I knew that we had to liquidate the assets that

1 had to be there the first day of the trial. I  
2 believe we were there for the last day of the  
3 trial and I was there when Mr. Zalewski was  
4 found -- oh, that wouldn't have been the  
5 lawsuit, that would have been when Mr. Zalewski  
6 was found guilty. But anything to do with the  
7 lawsuit or finances I left up to my husband.

8 Q And is it fair to say that your husband had the  
9 daily responsibility for the lawsuit?

10 A Yes. It was his headache, yes.

11 Q Could you observe any effect that being  
12 responsible for the lawsuit had on your husband?

13 A Well, there was the actual genuine concern of my  
14 physically being able to move on while being  
15 pushed backwards, back into the memory of the  
16 accident. But I realized that he was going  
17 under a lot of stress; one, trying to keep me as  
18 out of it as possible; and two, a great deal of  
19 financial concern was how we were going to fix  
20 this house so that it would now be wheelchair  
21 accessible for me because this was the way it  
22 was going to be. And the house had to be  
23 redesigned and I believe he was very concerned  
24 as to where we were going to find the money to

1 we had put aside for I guess retirement, if you  
2 want to call it that. And I also found out  
3 quite a bit later that my husband had to take  
4 out a loan, which I knew from my life with my  
5 husband he is opposed to any debt. He pays  
6 money for cars. He pays cash for everything.  
7 And I knew that he was very upset about the fact  
8 that he had to actually go into a bank and  
9 borrow money just to keep the process of my  
10 getting better going.

11 (By Ms. Pinkham:)

12 Q Mrs. Rhodes, do you yourself have to sign for  
13 the home equity loan that was used to renovate  
14 your house?

15 A I might have, but I don't remember.

16 Q Mrs. Rhodes, were you able to observe the  
17 effect, if any, that the financial pressures  
18 were having on our husband?

19 A Well, I can tell he was stressed out. I mean,  
20 as what I would the case had dragged on and  
21 dragged on, there was rising financial concerns  
22 and rising concerns to keep me out of it as much  
23 as possible, and that level of stress on him was  
24 very obvious. Yes, it was very obvious, I felt.

1 Q Did you yourself have any feelings in response  
2 to the expenses that your family was now facing  
3 after the accident?  
4 A Well, besides the fact that my husband was now  
5 caregiver and caretaker, which completely  
6 changed our relationship, I noticed that he --  
7 you can't ignore a degree of stress, and I felt  
8 as if I was the cause of this stress and I felt  
9 very guilty about his having to have to deal  
10 with all this financial stress and legal stress  
11 so he could keep me out of it, so I could  
12 concentrate on progressing physically forward in  
13 my recovery.  
14 Q Did you have any feelings about the number and  
15 size of the expenses that you and your husband  
16 were responsible for after the accident?  
17 MR. COHEN: Objection.  
18 MR. VARGA: Objection.  
19 THE COURT: I'm sorry. The objection  
20 is?  
21 MR. COHEN: She already has testified  
22 that she knew nothing about the financial  
23 aspect.  
24 MR. VARGA: Foundation, your Honor.

1 Q And what was your reaction to the fact that there was  
2 going to be a mediation in the case?  
3 A I had a sense of relief because I honestly felt that  
4 this was going to resolve the case and that would be  
5 it, and everything would be cut and dry.  
6 Q Before the mediation was scheduled, had you ever  
7 thought about the value of the compensation that you  
8 would be willing to accept in exchange for your  
9 injuries?  
10 A If you want to be honest about it, I felt there was no  
11 value on God's green earth that could pay me  
12 compensation for the loss of my legs. Did I think of a  
13 serious number? No, I did not. I left that between my  
14 husband and my lawyers.  
15 Q Prior to the mediation, did you authorize your husband  
16 and your lawyers to accept a certain figure to settle  
17 the case and resolve it?  
18 A I know we settled on, I would say, a range of figures,  
19 but I did not have any knowledge of any specific figure  
20 that I agreed with. I just don't remember that.  
21 Q Were you aware that your husband had provided  
22 authorization for a specific figure to settle the case  
23 at mediation?  
24 A Did I have knowledge of it?

1 THE COURT: I think I've heard about  
2 that, so I think we'll move on.  
3 (By Ms. Pinkham)  
4 Q Mrs. Rhodes, did you choose to incur the expenses that  
5 were necessitated as the result of your accident?  
6 MR. VARGA: Objection.  
7 THE COURT: I'm sorry. I'm not quite sure  
8 what that means. It means was it forced upon her to  
9 spend?-- I'm not quite sure what you're getting at.  
10 MS. PINKHAM: That's essentially what I'm  
11 getting at, your Honor.  
12 MR. COHEN: Objection, then, your Honor.  
13 THE COURT: She was forced to spend the money  
14 because of the needs generated by her paralysis, so I  
15 don't know that that's a good use of our time; and I  
16 don't think it bears on the issue in this case, so why  
17 don't you move on.  
18 (By Ms. Pinkham)  
19 Q Mrs. Rhodes, did you learn that there was going to be a  
20 mediation in the case in 2004?  
21 A I don't remember when I learned about the mediation,  
22 what date it was going to be, I don't even remember  
23 what year, but I do know there was going to be a  
24 mediation.

1 Q Yes.  
2 MR. COHEN: Objection.  
3 THE COURT: Well, it's a yes or a no.  
4 A No.  
5 (By Ms. Pinkham)  
6 Q Did you rely on your husband and your attorney in  
7 deciding what would be the amount at which you would be  
8 willing to settle the case have the lawsuit be over?  
9 A Yes.  
10 MR. VARGA: Objection.  
11 THE COURT: Overruled.  
12 MR. ZELLE: Can I be heard on that, your  
13 Honor? Inasmuch as we've been deprived the opportunity  
14 to obtain that information through discovery when we  
15 asked Mr. Pritzker and Mr. Rhodes what discussions they  
16 had regarding coming up with a number, I think this is  
17 ambush, if they're trying to put -- if that's what  
18 they're trying to put in.  
19 THE COURT: All that I heard her saying --  
20 and Mrs. Rhodes can correct me -- is that she left it  
21 to the attorneys and her husband to determine what  
22 would be an appropriate settlement amount. Is that  
23 true, Mrs. Rhodes?  
24 THE WITNESS: Yes.

1 THE COURT: So with that, it's overruled. It  
2 was not something that she played a role in. She  
3 delegated that to her husband and to her attorneys.

4 (By Ms. Pinkham)

5 Q And, Mrs. Rhodes, why was it that you delegated that  
6 role to your husband and your attorneys?

7 A Well, besides have a much better financial  
8 understanding of these things and a direct relationship  
9 with the attorneys, as I said before, I was not  
10 supposed to be concentrating on these things. I was  
11 supposed to be concentrating on my physical -- getting  
12 better.

13 Q Mrs. Rhodes, were you ever aware of any settlement  
14 offer that was communicated on behalf of the defendants  
15 in this case prior to mediation?

16 A Well, yes and no. My husband called me at lunchtime  
17 and told me that there were about 20 or 30 other  
18 lawyers on one side of the room --

19 THE COURT: I'm sorry. It appears to be  
20 hearsay; is it not? Apart from the privilege issues,  
21 it appears to fall victim of hearsay, since she's being  
22 asked about the truth of the matter asserted; is she  
23 not?

24 MS. PINKHAM: That's not actually what I was

1 could avoid a trial and all the embarrassment and all  
2 the anger, and I could put everything beside me, behind  
3 me and I wouldn't have to deal with it.

4 Q After the case did not settle at mediation, was it your  
5 expectation that there was going to be a trial?

6 A I was told that if mediation didn't work, that there  
7 would be a trial.

8 Q Up to the time of the mediation, had you ever expected  
9 that this case was going to go to trial?

10 A No, I really didn't.

11 Q After the mediation, did you have an understanding of  
12 whether your daughter was going to be deposed?

13 A After the mediation but before the trial I believe that  
14 my husband told me that all three of us would be  
15 deposed.

16 Q If you could refrain from describing what your husband  
17 told you in your answers, I'd appreciate it.

18 Did you understand after the mediation that  
19 your daughter was likely to testify at trial?

20 A Yes.

21 Q Did you experience any emotions about that?

22 A That was anger, that they would put -- well, at the  
23 time, she must have been 15 by that time, but that they  
24 would put a teenager through the process of going to

1 intending to ask, your Honor, but I would agree that  
2 the response --

3 THE COURT: All right. Well, you can sort  
4 out what you want to ask her. We'll take our morning  
5 break. It's 11:20, we'll reconvene in 15 minutes.

6 (A recess was taken at 11:20 a.m.)

7 THE COURT OFFICER: Court is back in session,  
8 please be seated.

9 THE COURT: All right, you may proceed.

10 (By Ms. Pinkham)

11 Q Mrs. Rhodes, by August of 2004, did you want the case,  
12 your claim for compensation to be settled?

13 MR. VARGA: Objection.

14 THE COURT: No. You may answer.

15 A Yes.

16 (By Ms. Pinkham)

17 Q Why?

18 A Because I thought it had dragged on long enough.

19 Q The case did not settle at mediation. Was that your  
20 understanding?

21 A Yes.

22 Q How did that make you feel?

23 A Actually, my primary feeling was anger. I really  
24 thought something would resolve at a mediation and we

1 trial and all that entailed.

2 Q After the mediation, can you describe how your family  
3 reacted to the prospect of a trial?

4 A If I picked one word, I'd say disbelief. There was  
5 that much more stress on everyone. It was pal -- how  
6 do you say that word?

7 Q Palpable?

8 A Whatever that word is. And it was certainly a very  
9 strong source of stress from Harold, because, again,  
10 he'd been trying to shield myself and certainly Becca  
11 from anything to do with this case and now there it was  
12 staring us in the face.

13 Q Why were you anxious about going to trial?

14 A Well, part of me just didn't understand why it was  
15 necessary. I didn't understand why we had to prove any  
16 kind of claim that we were making to resolve the issue.  
17 As I said before, I thought it was a simple rear ender  
18 and that it would be cut and dry, and now here we were  
19 going to trial and it was extremely stressful and very  
20 -- I can't think of the word -- not disbelief but, you  
21 know, I -- that's the word I'd have to use for it. I  
22 just was shocked that we were going to go through trial  
23 over something that I felt should have been settled the  
24 month after Zalewski pleaded guilty.

1 Q By the time of the trial, were you driving again?  
 2 A I don't remember.  
 3 Q Do you remember who drove to the courthouse during the  
 4 trial?  
 5 A Harold would have.  
 6 Q Do you remember the route that you used to get to the  
 7 Dedham Superior Court?  
 8 A No.  
 9 Q Do you remember what you were feeling as you were  
 10 driving over to the Dedham Superior Court when the  
 11 trial began?  
 12 A A great deal of anxiety, a lot of stress. I felt there  
 13 was a lot of stress was going to be put on me because  
 14 the case was about me. You know, I've always been what  
 15 you would call a low-profile type of person, and then  
 16 here I was, the center of all this attention that I  
 17 didn't want to be the center of, and I felt a great  
 18 deal of stress and anxiety over the fact that I had to  
 19 perform, as it were, in front of a courtroom of  
 20 strangers to prove a case that, as I said before, was a  
 21 simple case, or what I thought was a simple case.  
 22 Q When you arrived at the courthouse in Dedham, where did  
 23 you situate yourself at the trial?  
 24 A I don't remember. I remember where I sat when I had to

1 gave your testimony?  
 2 A I believe I was next to the place where the jury, the  
 3 defendant, whatever, the person being questioned --  
 4 Q The witness?  
 5 A Yeah, that's the word, the witness. I couldn't,  
 6 obviously, get into the witness box. It wasn't a nice  
 7 flat -- it was one with steps, so I was actually that  
 8 much closer to the jury, but that's all I remember of  
 9 it.  
 10 Q Did you have a lot of room to maneuver your wheelchair  
 11 in the area that you were supposed to be able to  
 12 testify?  
 13 A No, it was pretty tight.  
 14 Q Did you have to turn your wheelchair around in order to  
 15 face the attorney who was questioning you?  
 16 A Oh, yes. That was quite an interesting process. The  
 17 room that was available to me, was cut by the jury and  
 18 cut by where the judge sits. So I had to make a really  
 19 sharp turn, which was really hard. It was really hard  
 20 to make that turn without-- and I didn't -- I'd say  
 21 without hitting any furniture or anything, and I hit  
 22 furniture.  
 23 Q As you were positioning yourself?  
 24 A As I come up, I'm coming this way, and then I have to

1 testify, but all I remember is I couldn't see from  
 2 where I was sitting, which I believe was on the left.  
 3 I couldn't see my daughter when she testified. There  
 4 was something blocking my obstruction -- that was  
 5 causing obstruction.  
 6 Q You were sitting on the left-hand side of the  
 7 courtroom?  
 8 A Yes. I believe it was the left-hand side.  
 9 Q And was that as you came into the courtroom?  
 10 A I don't remember which side we came into the courtroom.  
 11 I just remember I was blocking traffic.  
 12 Q How were you blocking traffic?  
 13 A Well, if I can recall -- I mean I was sitting at the  
 14 end of one row or another. I mean there was no way  
 15 around that. I couldn't, obviously, sit in the pews, I  
 16 couldn't sit there, so there was only one place I could  
 17 sit and it was either on one side of the aisle or the  
 18 other side of the aisle. And either way, I'd be  
 19 blocking traffic, the flow of people wanting to go in,  
 20 dismissal, trying to get out. And like even now, I  
 21 just told my attorney to just let everybody else go  
 22 first and then I'll go.  
 23 Q Do you recall where you were when you gave your  
 24 testimony, where in the courtroom you were when you

1 turn the chair to go facing the judge and, you know.  
 2 So I hit the wood that was going through so I could get  
 3 -- I believe I was facing the judge, but it was a  
 4 maneuver that, you know, every time I hit wood it's  
 5 embarrassing. It really is.  
 6 Q Do you remember feeling that as you were positioning  
 7 yourself?  
 8 A Yes, yes. I remember thinking, I was thinking before I  
 9 had to get up there, how was I going to get up and  
 10 there and how I was going to negotiate this turn. And  
 11 as I got up there, I realized that I probably was not  
 12 going to be able to negotiate this turn without hitting  
 13 some wood.  
 14 Q Once you got yourself situated and were ready to  
 15 testify, do you recall what you were feeling?  
 16 A Well, disbelief. I was truly embarrassed. I don't  
 17 like to be the center of attention. It gave me a lot  
 18 of anxiety and disbelief and fear that I was going to  
 19 screw up the case, all the emotions that you feel when  
 20 you have to testify.  
 21 Q Did you have any positive feelings when you were  
 22 testifying?  
 23 A No.  
 24 Q What was the hardest thing for you to testify about?

1 A The hardest thing for me to testify about was, in  
 2 essence, re-living this accident again. I have any  
 3 number of doctors telling me forget the accident, move  
 4 on with your life, forget it, and now I'm being drawn  
 5 back into this, remember everything that you're  
 6 supposed to forget, which for me was a major step  
 7 backwards in my recovery from this accident. It was  
 8 devastating to have to re-live this accident again.

9 Q Do you recall being cross-examined by any of the  
 10 attorneys at trial?

11 A No, I really don't.

12 Q Do you remember what it felt like when you were done  
 13 with your testimony?

14 A Relief.

15 Q For yourself?

16 A Well, for myself, because I didn't have to deal with it  
 17 anymore in terms of talking or anything Now it's just  
 18 a matter of me sitting there for my daughter to talk  
 19 and having a lot of anxiety about how I felt about, you  
 20 know, my daughter, who I mentioned was a young  
 21 teenager, having to talk in front of this roomful of  
 22 adults about something that was so important that she  
 23 could tell that I was stressed out and we already knew  
 24 Harold was stressed out. This was just that much more

1 discussed with me how, you know, what if I screw up,  
 2 what if I say the wrong thing. Like I said, it's a lot  
 3 of stress on her. And I just, you know, I was angry  
 4 that she had to go through this. I couldn't believe  
 5 that they were putting a young teenager through this,  
 6 because her actual knowledge of the accident itself was  
 7 fairly limited to what she observed after the accident  
 8 and then the stress as to the fact that we had to go to  
 9 trial and that she was going to have to talk to a bunch  
 10 of strangers and reveal her raw emotions about how she  
 11 felt.

12 Q How did you feel when your daughter stepped down from t  
 13 witness stand?

14 A Well, I was relieved. I thought she did a good job and  
 15 she, you know, stood on her own two feet, and she  
 16 didn't let, except for the one time when she broke down  
 17 crying, she didn't let them really frazzle her or make  
 18 her feel stupid or make her feel the responsibility of  
 19 the whole case lay on her shoulders. I know she was  
 20 relieved it was over with, that was for sure.

21 Q Were you in the courtroom when your husband testified?

22 A I don't remember. I remember being there.

23 Q Do you remember being in the courtroom when the "Day in  
 24 the Life" video was shown to the jury?

1 pressure on her to, again, feel like you're performing.

2 Q Do you remember your daughter testifying?

3 A I remember hearing my daughter testify. There was  
 4 something obstructing my view that I couldn't see her  
 5 testify. I did hear her crying at one point and then  
 6 the judge took a recess, and I remember that she  
 7 composed her. Then the process went on, but I couldn't  
 8 tell you for how much longer the process went on.

9 Q During the time when Rebecca was testifying, did you  
 10 have the opportunity to observe your husband's  
 11 demeanor?

12 A Oh, yes. My husband was very angry. He was very angry  
 13 that his daughter was being subjected. And he has, I  
 14 don't know how to relay a characteristic, but he has a  
 15 tendency, when he's angry about something, to clench  
 16 his fists and get really mad, his fists get really mad,  
 17 and his face gets really mad when he's angry about  
 18 something. And that was pretty much the way he was for  
 19 the whole testimony, because there was nothing he could  
 20 do to protect Rebecca from these questions that they  
 21 were asking her, including how she felt.

22 Q Do you recall what feelings you had as you watched her,  
 23 listened to your daughter testify?

24 A I felt really bad for her because I knew she -- she had

1 A Yes. I remember I was extremely embarrassed. It was a  
 2 very embarrassing video because it showed a day in my  
 3 life, not a pretty thing. And I do have a clear memory  
 4 of the judge getting off the bench and walking behind  
 5 me and walking over to the jury, who's viewing the  
 6 video, standing next to the jury box so she could watch  
 7 the video, which I thought was even more, you know,  
 8 that much more embarrassing because the judge is doing  
 9 the video. There was now thirteen people viewing this  
 10 video that, one, I was the center of and, two, you know  
 11 - it was not a pleasant experience. It was very hard  
 12 for me to have somebody watching this unpleasant  
 13 experience of my having to go through what I have to go  
 14 through now that's an average day in my life.

15 Q Do you recall who was explaining or testifying about  
 16 what was shown in the video when the jury saw the  
 17 video?

18 A I think that was Harold.

19 Q What was the worst part of your husband's testimony for  
 20 you?

21 A It was all bad. I mean, there was no point in the  
 22 video that was good. He was trying to keep his anger  
 23 down. He was trying to just be a narrator, but he  
 24 wasn't very successful at being just a narrator.

1 Q Why do you say that?

2 A Because, again, it's the characteristics of when he's  
3 angry. And I also think he was quite upset that people  
4 were intruding. It was a very intrusive video. It was  
5 fairly graphic, and he was upset because he was putting  
6 me through it and he knew how I felt about it and I  
7 felt really unhappy.

8 Q Mrs. Rhodes, were you in the courtroom when the jury  
9 returned its verdict?

10 A No, I don't think I was.

11 Q Do you recall where you were when you learned about the  
12 jury verdict?

13 A I believe we were home.

14 Q What was your reaction to the amount that the jury  
15 awarded to you?

16 A Again, if they gave me \$400 million, it wasn't going to  
17 make any difference. I mean, how much would you pay to  
18 accept the fact that you're never going to walk again?  
19 So regardless of whatever they gave, I was unsatisfied.

20 Q Apart from not being satisfied with the amount of the  
21 verdict, did you have any other feelings knowing that  
22 the jury had come back?

23 A Well, first of all, I was glad that it was over, you  
24 know, that the trial was over, the whole thing was

1 dragging on. Actually, "horror" would be a better word  
2 that this thing was just going on and on and on. As I  
3 said, it was a rear ender. You know, there was a  
4 policeman on the scene. There was no doubt about what  
5 happened. And hearing all these injuries, I mean,  
6 there were major injuries and there were major  
7 subsequent injuries because of the first set or  
8 injuries and there was so much recovery. And at the  
9 same time they're telling me go back and think about  
10 those recoveries. And I thought, as I said, when the  
11 jury comes back with a verdict, I thought that's it,  
12 that's what the verdict would be, and that somebody  
13 would write us a check for that amount of the verdict  
14 and it would all be over with. And then I find out  
15 that's not the case.

16 I believe my husband told me that --

17 Q Mrs. Rhodes, if you could not refer to your husband's  
18 statements to you, I'd appreciate that.

19 A Okay, I won't.

20 THE COURT: It's time for a new question.

21 MS. PINKHAM: I have no further questions,  
22 your Honor.

23 THE COURT: Okay. Any cross-examination?  
24

1 over, the jury rendered a verdict, whatever it is. You  
2 know, as I said, I let the financial aspects of what  
3 number would be good, what number wouldn't be good, to  
4 my husband and my attorneys. But as I said, there's no  
5 number that they could have come up with that would  
6 placate me.

7 Q Do you recall learning that the verdict was going to be  
8 challenged?

9 A Yes. I remember there was going to be an appeal, if  
10 that's what you mean by "challenged."

11 Q That's exactly what I'm referring to, Mrs. Rhodes.  
12 What feelings did that cause you?

13 A Total disbelief. I couldn't believe that, you know, I  
14 thought that once a jury rendered a verdict, that that  
15 was it, that was all to it, and then the person whom  
16 the verdict went against would have to write a check of  
17 the amount that the jury said that we should get and  
18 that the check would be immediately forthcoming and  
19 that would be the end of it.

20 I found out later, not much later, but I  
21 found out later that the defendants were appealing the  
22 decision. I didn't understand why they were, but I did  
23 understand they were appealing. Just total disbelief  
24 that this thing wasn't finished. Again, it was still

1 CROSS-EXAMINATION BY MR. COHEN:

2 Q Good morning, Mrs. Rhodes. I'm Mark Cohen. I  
3 represent two of the defendants here, AIGDC and  
4 National Union.

5 A I can't hear what you said.

6 Q I represent AIGDC and National Union. Good morning.  
7 Mrs. Rhodes, you've testified a number of  
8 times during today's examination, did you not, that you  
9 thought that once Mr. Zalewski had his criminal  
10 proceedings over, that that should be the end of your  
11 accident case, correct?

12 A Except for the recovery, yes.

13 Q And did you understand that in the accident case, your  
14 attorneys on your behalf were seeking a finding of  
15 damages?

16 A For the injuries, yes.

17 Q Correct. And in order to assess what damages you were  
18 entitled to, it was necessary to determine what  
19 injuries you had incurred as a result of the accident,  
20 correct?

21 A Yes.

22 Q And you've told us yourself, haven't you, this morning,  
23 that determining the amount of damages that related to  
24 your injuries is a very difficult thing to do, right?

1 A Yes, it was.  
 2 Q And in fact, you've told us that no amount of money  
 3 could compensate you for having been in this accident  
 4 and never having to walk again.  
 5 A Yes, that's true.  
 6 Q But the defendants had to put, or their insurance  
 7 companies had to be put a number on what those damages  
 8 were, right?  
 9 A Not the insurance companies. I thought it was the jury  
 10 who determined what the number -- the damages would be.  
 11 Q Okay. Well, at trial the jury had to determine what  
 12 the damages were, right?  
 13 A Yes. It was the jury's responsibility.  
 14 Q But in order to settle the case, the defendants and  
 15 their insurance companies had to determine what an  
 16 appropriate amount of settlement would be, right?  
 17 A No.  
 18 Q Why not?  
 19 A I felt that once the jury rendered their verdict, that  
 20 was the verdict.  
 21 Q Okay. But I'm talking about before the verdict was  
 22 rendered. Before the verdict was rendered, you knew  
 23 that there were settlement discussions that were going  
 24 on between your attorneys and your husband and the

1 take into account the fact that, as my life goes  
 2 forward, I'm going to have injuries sustained and  
 3 injuries that appear later in life that are the result  
 4 of this accident. And also, I've been told by one of  
 5 my doctors that typically in these type of injuries, a  
 6 person's life is considered to be ten years shorter  
 7 than it would have been if they hadn't had the  
 8 injuries. So I was looking for a verdict that would  
 9 take care of any and all expenses in life continuing,  
 10 as if I was walking again, into the future for the rest  
 11 of my life. That was what I was expecting.  
 12 Q And that's what you asked the jury to do at the trial,  
 13 to compensate you for all damages that you suffered in  
 14 the past, that you were suffering in the present, and  
 15 that you would be expected to suffer in the future,  
 16 correct?  
 17 A No. I did not equate the jury's verdict with having to  
 18 be forced to go to trial. That was a separate entity  
 19 to me. There was damages before, there would be a lot  
 20 of damages after, but the trial shouldn't happen and I  
 21 didn't -- no, I didn't consider them.  
 22 Q Okay. Regardless of whether the trial should have  
 23 happened or shouldn't have happened, when there was a  
 24 trial, what the jury was asked to do was to put a

1 defendants in the accident case and their insurance  
 2 companies, right?  
 3 A I knew there was a chance for mediation. Other than  
 4 that, as I said, I left all that to my husband and the  
 5 attorneys.  
 6 Q Okay. Well, let's talk about the mediation. At the  
 7 mediation did you understand that there was a  
 8 settlement demand that was made by your attorneys on  
 9 your behalf and there were offers that were made by the  
 10 insurance companies on behalf of the defendants to the  
 11 accident case?  
 12 A I knew there were offers, but I knew they were  
 13 ridiculously low.  
 14 Q Okay. In event, you knew that there were numbers  
 15 that were going back and forth between your side and  
 16 the other side, correct?  
 17 A Yes. There were numbers going back and forth, yes.  
 18 Q And what those numbers were based upon was the amount  
 19 of damages that your attorneys and your husband thought  
 20 your injuries should be valued at and the amount of  
 21 damages that the defendants and their insurers thought  
 22 the case should be valued at.  
 23 A No, that's not true. That's not true. I thought that  
 24 the amount of money that the jurors would render would

1 number in terms of money on your past, present and  
 2 future damages, correct?  
 3 A Yes.  
 4 Q And in order to do that, it was necessary for the  
 5 jurors to have an understanding of what your past  
 6 damages were, right?  
 7 A Yes.  
 8 Q And what your present damages were, right?  
 9 A Yes.  
 10 Q And what your future damages would be also, correct?  
 11 A Yes.  
 12 Q And in order to do that, you presented various doctors  
 13 who came in and gave medical evidence as to what your  
 14 past, present and future damages would be.  
 15 A I believe that's true.  
 16 Q And you understand, having gone through your injury,  
 17 that there's a wide range of results that, in terms of  
 18 level of rehabilitation, that paraplegics have,  
 19 correct?  
 20 A I wouldn't say that's exactly correct because no one  
 21 person who's paralyzed has one set of injuries that  
 22 they could put a number on and say well, she's a  
 23 paraplegic so we can expect her to need X dollars into  
 24 the future, because you don't know what's going to come

1 around the road and you have to be prepared for what's  
 2 going to happen. And we're asking them, in essence,  
 3 to, yes, to compensated us for the injury itself, but  
 4 we're also asking them in one point to give us money  
 5 towards the future and then, again, a separate amount  
 6 of money because we had to go through the indignity of  
 7 a trial.

8 Q I think I understand from your answer that you're  
 9 saying that there is a wide range of complications that  
 10 paraplegics can suffer or not suffer, correct?

11 A Yes.

12 Q And some paraplegics are out racing wheelchairs in the  
 13 Boston Marathon or playing wheelchair basketball,  
 14 right?

15 A Those would be men paraplegics, yes.

16 Q Well, there are women who race in the Boston Marathon  
 17 in wheelchairs too, correct?

18 A Not that I know of.

19 Q Okay. In any event, there are some people who are able  
 20 to get back to their activities of daily living, albeit  
 21 that their ability to walk has been ended and their  
 22 ability to engage in normal bathroom functions have  
 23 been ended, correct?

24 A Well, it depends on how soon you expect that to happen.

1 Q And one of those complications is that you had several  
 2 bouts of pressure sores, correct?

3 A Yes.

4 Q And as a result of the pressure sores, you were  
 5 essentially bedridden during virtually the entire year  
 6 of 2003, correct?

7 A It was December -- I don't know the year, but it was  
 8 till the following October that I was in bed on my side  
 9 waiting for the pressure sores to heal, yes.

10 Q Okay. I think to be exact, you told us in your  
 11 deposition and you testified in the accident case that  
 12 you were essentially bedridden from December 2002 to  
 13 October 2003.

14 A For the pressure sores, yes.

15 Q And in addition to that, you also fractured both of  
 16 your legs during that time period?

17 A Yes.

18 Q And that --

19 A No, that's not true either. I did fracture my leg well  
 20 after that time period. My doctors had told me that I  
 21 would have developed severe osteoporosis and fractures  
 22 would be fairly common now as a result of this  
 23 accident. And I had another accident and, yes, I broke  
 24 another leg.

1 Q Okay. It happens at different times for different  
 2 people, right?

3 A I can give you an example, if it helps. There's a  
 4 support group that Whittier Rehabilitation has of  
 5 paraplegics, and the men are -- they have a lot of  
 6 upper body strength and they're whizzing around like,  
 7 you know, like this is easy. And I remember they were  
 8 totally shocked when I couldn't get the door of the  
 9 room we were in open because I didn't have any upper  
 10 body strength to just swing it open like they did, and  
 11 that it was going to cost me -- I was going to spend a  
 12 lot of time physically developing that strength, just  
 13 something to be equal to what they already were at.

14 Q Okay. So there are paraplegics who have a great deal  
 15 of difficulty functioning in the activities of daily  
 16 living after their accident because they may not have  
 17 as much strength as somebody else who has the exact  
 18 same injury, correct?

19 A If they were the exact same injuries, yes.

20 Q Okay. And, in fact, you had a very difficult course  
 21 after this accident; did you not?

22 A Well, there were a lot of aftereffects, yes.

23 Q You had a number of complications?

24 A Which were because of the accident, yes.

1 Q And that set back your rehabilitation as well, correct?

2 A The rehabilitation for the leg, well, it was a  
 3 removable cast, if you know what that means, and so it  
 4 was more like starting rehabilitation all over again  
 5 rather than continuing on with the rehabilitation that  
 6 I'd started with and then just jumping back into the  
 7 game. It was like starting all over.

8 Q So in 2004, around the time of the mediation and the  
 9 trial, you were really just starting the whole  
 10 rehabilitation process, correct?

11 A I can't give you dates.

12 Q Okay. Can you recall, in relation to the trial and the  
 13 mediation, which if I told you took place in August and  
 14 September of 2004, whether that was around the time you  
 15 were just starting to get back and to really engage the  
 16 rehabilitation process?

17 A Well, there are other -- as you said, there were other  
 18 complications as well that would prevent me from just  
 19 getting back to the rehabilitation process, as one  
 20 would expect.

21 Q And at the time of trial, your doctors testified that  
 22 in fact your level of rehabilitation at that time was  
 23 far lower than would be expected for a person with the  
 24 same injury that you had suffered. Do you recall that

1 testimony?  
 2 A I didn't hear my doctors testify.  
 3 Q Okay. But did you understand that that was the case?  
 4 That's what your doctors were telling you, correct?  
 5 A No. They didn't tell -- they were telling me that my  
 6 life would now be ten years shorter and that I had  
 7 osteoporosis. I picked up a couple of serious  
 8 infections at Mass. General. The only good thing that  
 9 came out of that was that I had picked up an infection,  
 10 which would now mean that I would always have a single  
 11 room if I ever went into the hospital again. That was  
 12 the only plus that I saw out of this whole process.  
 13 Q All right. Well, whether your doctors said that to you  
 14 or not, did you have an understanding around the time  
 15 of trial that your level of rehabilitation wasn't what  
 16 normally would be expected for a person with injuries  
 17 of your type?  
 18 A I didn't really know what would be expected of  
 19 someone's injuries. I only knew what I was to be  
 20 expected if the case was a normal, straightforward,  
 21 paraplegic case, which it wasn't.  
 22 Q Because you had so many complications, right?  
 23 A Right. Exactly.  
 24 Q And let me go back to my beginning question, which was

1 because I can't remember where I was in the case versus  
 2 where I was in rehabilitation at the time of the trial.  
 3 I only break it down to the accident, the trial that I  
 4 felt was unnecessary, and the future that I would now  
 5 have to live.  
 6 Q Okay. But all those factors that you just identified  
 7 were relevant to determining the amount for which the  
 8 accident case should settle, correct?  
 9 A If you're just putting a dollar value on it and not  
 10 considering any emotions or any of those kind of  
 11 feelings, stress and anger and disbelief, the chief of  
 12 which was anger, you know, if you don't consider any of  
 13 those, yes.  
 14 Q Well, somehow the jury had to put a dollar value on  
 15 your injuries, past, present, and future, right?  
 16 A Yes.  
 17 Q And in considering the amount for which the case should  
 18 settle, your attorneys and your husband had to also put  
 19 a dollar value on your injuries, past, present, and  
 20 future, correct?  
 21 A A range.  
 22 Q A settlement range, because you can't put an exact  
 23 number on it, correct?  
 24 A Correct.

1 that we agreed that in order to settle the case, do we  
 2 not, a number would have to be put on your past,  
 3 present and expected future damages?  
 4 A Again, I separate them between the cause of the  
 5 accident, the trial, the ensuing trial, and the amount  
 6 of money that would be given to me to help me survive  
 7 the rest of my life as a paraplegic.  
 8 Q Okay. And isn't it fair to say, Mrs. Rhodes, that  
 9 given all the complications that you've had suffered  
 10 and the fact that your rehabilitation hadn't been going  
 11 particularly well before the time of the mediation and  
 12 the trial, that it was especially difficult to put a  
 13 number on how your damages should be valued at that  
 14 time?  
 15 MS. PINKHAM: Objection.  
 16 THE COURT: Overruled. I'll allow her to  
 17 answer.  
 18 A Say the question again. I'm sorry.  
 19 Q Let me see if I can break it down. You agree that in  
 20 order to assess what your case should settle for, it  
 21 was necessary to have an understanding of what your  
 22 past damages, present damages, and expected future  
 23 damages would be, correct?  
 24 A Past damages. I don't know about the current damages,

1 Q It could be more, it could be less, right?  
 2 A I suppose.  
 3 Q And that's the same process that the defendants and  
 4 their insurance companies would have to go through as  
 5 well, correct?  
 6 A I don't know what insurance companies go through.  
 7 Q Okay. Well, anyone, in order to try and figure out for  
 8 what your case should settle, would have to come up  
 9 with a range that took all those factors that we just  
 10 identified into consideration, correct?  
 11 A Well, I don't know. I can understand about the  
 12 accident because they can certainly assess the medical  
 13 damages. I don't know if they could assess the amount  
 14 of emotional damage that trial caused. And yes, they  
 15 could probably assess with a life-care planner what the  
 16 future would be probably hold for me.  
 17 Q Well, in any event, because of all the complications  
 18 that you had suffered, that was a difficult thing to  
 19 do, to come up with that settlement range within which  
 20 your case should settle. Do you agree with that?  
 21 A I left it all to my husband.  
 22 Q Did you have any opinion at the time of the mediation  
 23 or at the time of the trial what a fair value of your  
 24 case would be?

1 A My opinions were outrageously high.  
 2 Q And you understood that other people could have an  
 3 opinion and also be fair and reasonable but not have,  
 4 obviously, the emotional, personal investment that you  
 5 had in the case that could be a lot less than what your  
 6 opinion was as to what would compensate you, right?  
 7 A Well, I felt that, first, they would have to consider a  
 8 number of factors, first of which would be the medical  
 9 expenses that we're incurring and the medical expenses  
 10 that were expected that we would future incurred.  
 11 Including that, of course, would be medical expenses  
 12 that we couldn't possibly imagine will happen.  
 13 Q Okay. Let me turn to another subject, Mrs. Rhodes. You  
 14 talked about you were aware that there was a mediation  
 15 in your case that took place and that was in August of  
 16 2004, correct?  
 17 A I don't remember the date.  
 18 Q Whenever it was, and the record will reflect when it  
 19 was, your expectation prior to the mediation was that  
 20 was going to result in the settlement of the case.  
 21 A I felt there was a good chance, yes.  
 22 Q And did you have an expectation of the amount for which  
 23 the case was going to settle at the mediation?  
 24 A No. I left that to my husband and the attorneys.

1 mediation?  
 2 A Sometime afterwards. When they actually gave us money,  
 3 I learned that they had reached a number during  
 4 mediation.  
 5 Q Did you learn that before or after the trial of the  
 6 accident case?  
 7 A I don't remember.  
 8 Q Did you learn how much money you had received from  
 9 McMillan's Tree Service?  
 10 A No, I don't remember.  
 11 Q Do you recall knowing at the time, whatever the amount  
 12 was, do you recall knowing what it was back then?  
 13 A No, I don't think I did. I don't think I knew. Are  
 14 you saying before the trial or during the trial or  
 15 after the trial?  
 16 Q Well, there was a settlement reached with McMillan's  
 17 Tree Service on the day of the mediation.  
 18 A And mediation was before the trial.  
 19 Q Yes.  
 20 A Then yes, I knew that the tree people would not be  
 21 involved with the trial.  
 22 Q And were you aware of any point that the tree service  
 23 had paid your family \$550,000 to settle the claim  
 24 against them?

1 Q Now, after the mediation, you were advised that the  
 2 case hadn't settled at the mediation, or you learned  
 3 that.  
 4 A I learned that -- I learned.  
 5 Q Okay. I thought you were going to say something else.  
 6 A I found out that there was no compromise.  
 7 Q You understood at that point that you were going to go  
 8 to trial, correct?  
 9 A Well, I had hoped that it wouldn't have to go to trial,  
 10 but yes, I understood that it would probably have to be  
 11 a trial.  
 12 Q And at that point you knew that the trial date was just  
 13 about three weeks away, correct?  
 14 A No. I really don't have any memory of when mediation  
 15 is, so I can't put it in perspective of how soon the  
 16 trial took place after that.  
 17 Q Do you recall that the trial was not long after the  
 18 mediation?  
 19 A No, I don't remember that.  
 20 Q Were you informed, did you learn that at the mediation  
 21 a settlement had been reached on your behalf with one  
 22 of the parties to the case, McMillan's Tree Service?  
 23 A Yes, I knew that.  
 24 Q And you knew that at the time right after the

1 A In truth, I was totally surprised because I was unaware  
 2 that they were part of the defense team, if you want to  
 3 call them that.  
 4 Q Okay. Well, whether you were aware that they were part  
 5 of the defense team, as you put it, or not, did you  
 6 find out around the time of the mediation that they had  
 7 paid \$550,000 to your family?  
 8 A It would have been around the time of mediation. I  
 9 wouldn't necessarily know it was at the mediation, but  
 10 it was certainly around the time of the mediation.  
 11 Q Is it fair to say that that eased quite a few of the  
 12 financial concerns that you were having, you had this  
 13 more than half-million dollars that you had received  
 14 from the tree company?  
 15 A You're kidding right? No, no.  
 16 Q That didn't ease your financial concerns at all?  
 17 A No. Knowing what our medical bills were and were  
 18 likely to be and not even knowing what was going down  
 19 the road in the immediate future, that money didn't  
 20 touch it, no.  
 21 Q Well, the medical bills that you had were all paid by  
 22 your health insurer or virtually all paid by Health  
 23 Insurer United, correct?  
 24 A Do they pay at the time the injuries occur -- at the

1 time the expenses occurred? I don't believe they do.  
 2 Q You knew that you weren't paying out for doctor's and  
 3 hospital bills. That was being taken care of by your  
 4 health insurance company, right?  
 5 A I didn't know that, no. Again, my husband handled  
 6 everything financial.  
 7 Q If you had known that, would that have alleviated a lot  
 8 of your financial concerns?  
 9 A I don't think it would have made any difference.  
 10 Q Why not?  
 11 A Because I was letting my husband handle it, and he  
 12 would know if that was an adequate amount or a non-  
 13 adequate amount or whatever.  
 14 Q So is it fair to say that you pretty much left it up to  
 15 your husband to worry about the finances one way or  
 16 another?  
 17 A Yes.  
 18 Q In addition, after the mediation -- I'll represent to  
 19 you it was within a month afterwards -- you received a  
 20 verdict in the accident case, correct?  
 21 A I don't remember being that soon, but I know we reached  
 22 a verdict.  
 23 Q And you're aware, are you not, that the amount of the  
 24 verdict plus the judgment on the verdict ultimately

1 Q And in fact, are you aware that in December 2004,  
 2 Zurich, which is one of the insurance companies -- it's  
 3 not my client, but it's the other insurance company  
 4 that's involved in this accident case -- are you aware  
 5 that they paid you more than \$2.3 million?  
 6 A No.  
 7 Q This is the first that you're aware of that?  
 8 A If it's true, yes.  
 9 Q In fact, if you had known that in December 2004, just a  
 10 few months after the trial, would that have alleviated  
 11 some of your financial concerns that you had?  
 12 A No, because there was ongoing financial concerns that  
 13 we had; plus, again, there were the concerns that we  
 14 knew were coming down the road, which would be  
 15 considerably more than just \$2.3 million.  
 16 Q Okay. But you're aware that there was also nearly a  
 17 \$12 million that the Superior Court had rendered,  
 18 right?  
 19 A Right.  
 20 Q And you were going to get that money, unless the appeal  
 21 was successful, and if the appeal was successful, then  
 22 the court would be saying you'd have to try the case  
 23 again, correct?  
 24 A No, I really didn't understand the appeal process.

1 totaled well above \$11 million, correct?  
 2 A What do you mean by "judgment on the verdict"?  
 3 Q Well, the jury rendered a judgment that said Mrs.  
 4 Rhodes, you should get a certain amount of money, and,  
 5 Mr. Rhodes, you should get a certain amount of money,  
 6 and Rebecca Rhodes should get a certain amount of  
 7 money. You're aware of that, right?  
 8 A Yes.  
 9 Q And were you aware of the amounts that the jury awarded  
 10 around the time the trial concluded?  
 11 A I'm sure I was told, but I don't remember at the time  
 12 who got what, you know, how much Becca lost and how  
 13 much Harold lost and how much I lost as a result of  
 14 this accident.  
 15 Q And even before the trial, once you knew that there was  
 16 a trial, there was going to be a trial, you were aware  
 17 that there was going to be a jury put a fair value on  
 18 your injuries such as it's possible to do so.  
 19 A Yes.  
 20 Q And whatever that number the jury came up with, that  
 21 would presumably be a value that would be something  
 22 that eventually you would be paid unless there was an  
 23 appeal, right?  
 24 A Yes.

1 Q Isn't it true that the money that you received from  
 2 Zurich of \$2.3 million and the \$550,000 from the tree  
 3 service was essentially more than the entire life-care  
 4 plan that your experts presented at trial?  
 5 A I would doubt they would venture that amount. But if  
 6 you want to know if I thought it was enough, no.  
 7 Q Why not?  
 8 A Because again, it was my understanding that with my  
 9 current and my ongoing medical expenses, plus all the  
 10 losses that we had in the three or four years it would  
 11 take me just to get back to where I was before the  
 12 accident, no.  
 13 Q In June of 2005, my clients settled with your family.  
 14 Are you aware of that?  
 15 A Who are your clients again?  
 16 Q AIGDC and National Union.  
 17 A No. But -- no, I did not know that.  
 18 Q And did you ever become aware that my clients had  
 19 settled the accident case with your family?  
 20 A You mean that they eventually gave us some money at one  
 21 point?  
 22 Q Right.  
 23 A A long time after the trial I believe, yes, we received  
 24 money.

1 Q Okay. And in your deposition, you testified, when we  
 2 took your deposition several months ago, that you  
 3 weren't aware even then that you had received money  
 4 from my clients of \$9 million or so, correct?  
 5 MS. PINKHAM: Objection.  
 6 THE COURT: Overruled. You may answer.  
 7 A Go ahead, say the question again.  
 8 (By Mr. Cohen)  
 9 Q Do you recall testifying at your deposition that you  
 10 were not aware that your family had received money from  
 11 my clients, AIGDC and National Union?  
 12 A I knew money was received. Who paid what, as long as  
 13 it was the jury's verdict, I didn't really put a dollar  
 14 amount on who should pay what.  
 15 Q Did you understand that by the summer of 2005, you had  
 16 been paid nearly \$12 million for the accident case?  
 17 A I really don't know the date.  
 18 Q Now, getting back to the mediation for just one second,  
 19 Mrs. Rhodes, did you ever learn that any offers were  
 20 made by my clients, AIGDC or National Union, at the  
 21 mediation?  
 22 A I learned later that an offer had been made that would  
 23 not cover current, future medical expenses or changes  
 24 of lifestyle, such as rebuilding or adding on to the

1 Do you recall giving that testimony?  
 2 A Do I recall saying that \$2 million was what was offered  
 3 and that wouldn't cover, or begin to cover, the  
 4 necessities that we had? Two million dollars wouldn't  
 5 -- I would have said that then and I would say that  
 6 now.  
 7 Q But you didn't understand that, in fact, between the  
 8 tree service and the truck defendants, actually more  
 9 than \$4 million had been offered at the mediation,  
 10 right?  
 11 A Well, again. I left the tree defendants out of this  
 12 because they had -- they were not involved in the  
 13 mediation, or I didn't believe at the time that they  
 14 were involved in the mediation process. I believed it  
 15 was just the two insurance companies that were involved  
 16 with the mediation process; and considering them as a  
 17 whole, \$2 million was an insult.  
 18 Q Okay. But you weren't aware that more than \$4 million  
 19 had actually been offered at the mediation, correct?  
 20 A No.  
 21 Q And were you aware of the demands that your counsel  
 22 made on your behalf at the mediation?  
 23 A Dollar amount?  
 24 Q Dollar amount, yes.

1 house or anything, that would begin to touch what we  
 2 had already experienced.  
 3 Q Well, isn't it true that your understanding was that at  
 4 the mediation, only \$2 million was offered to settle  
 5 your accident case, correct?  
 6 A I don't remember the amount. I just remember it was  
 7 extraordinarily low.  
 8 Q Let me just read you briefly from your deposition, and  
 9 we'll start with page 79, line 18.  
 10 Question: You thought that the 2 million was  
 11 what they, being Zurich, offered at mediation?  
 12 Answer: No, that the crowd of 20 or 30  
 13 people had offered 2 million, which was ludicrous.  
 14 Question: So your understanding, as a result  
 15 of the mediation process, or during the mediation  
 16 process, was that the total amount that had been  
 17 offered to plaintiffs in the mediation to settle the  
 18 entire case and give up their rights, your rights  
 19 against the defendants in the underlying action, was 2  
 20 million?  
 21 And your answer was: Yeah, I believe that  
 22 was what was offered from everybody.  
 23 Question: Okay. During the mediation?  
 24 Answer: Yeah.

1 A No.  
 2 Q So you weren't aware that at the mediation your  
 3 counsel's lowest demand was \$15 million plus payment of  
 4 your future health insurance costs, correct?  
 5 MS. PINKHAM: Objection.  
 6 THE COURT: Overruled. You may answer. Does  
 7 that trigger your memory as to what offers were made by  
 8 your attorney?  
 9 THE WITNESS: I really didn't ask them what  
 10 offer they made. I didn't ask them what offer they  
 11 countered. I knew it was a process of give and take,  
 12 but I didn't know what numbers were being given and  
 13 taken.  
 14 (By Mr. Cohen)  
 15 Q Let me talk a little bit about the independent medical  
 16 examination that you went to in 2004.  
 17 A Dr. Hanak?  
 18 Q Yes. And you testified to that this morning in  
 19 response to questions from Attorney Pinkham, right?  
 20 A Yes.  
 21 Q And isn't it true that at no time prior to the  
 22 independent medical examination that you communicated  
 23 to anybody that you wanted the examination to be  
 24 performed by a male physician?

1 A The truth of the matter is, it never dawned on me that  
2 that late into the game that they would then choose to  
3 have a male or a female physician consider my injuries.  
4 Q Well, regardless of that, you didn't tell anybody I  
5 only want to go to this independent medical examination  
6 if the doctor is a male -- female, excuse me, and not a  
7 male, correct?  
8 A I don't think I specified. I think I just assumed it  
9 would be a female.  
10 Q And aside from whatever embarrassment you felt during  
11 the IME, it's true, is it not, that immediately after  
12 the IME and thereafter, you didn't really give any  
13 thought to whether the doctor had been a male or a  
14 female, correct?  
15 A Well, afterwards I knew it was a male.  
16 Q And that wasn't something that you dwelled on, right?  
17 A What do you mean?  
18 Q Well, it didn't continue to bother you that it was a  
19 male and not a female after you got out of the  
20 examination, right?  
21 A It bothered me, yes.  
22 Q Let me just read again from your deposition in the  
23 Chapter 93A case, at page 54, starting with line 4:  
24 Would you have preferred a woman doctor?

1 physical examination; he was mostly asking you  
2 questions, right?  
3 A No. He did feel my legs, just to see if they were  
4 paralyzed.  
5 Q He didn't ask you to undress, correct? You didn't have  
6 to undress?  
7 A No, I don't believe I -- I really don't remember.  
8 Q Okay. And you talked about how your understanding was  
9 that the doctor was trying to figure whether you were  
10 paralyzed or not, correct?  
11 A Yes.  
12 Q But do you understand now that the purpose of the IME  
13 was to determine what your current level of  
14 rehabilitation was and what level you could achieve in  
15 the future?  
16 A No.  
17 Q But that was something you were striving at at the  
18 time, was to improve your level of rehabilitation,  
19 right?  
20 A Never did it dawn on me that this doctor would in any  
21 way be able to assess my ability to recover.  
22 Q Why not?  
23 A Because all he knew was that I was paralyzed.  
24 Q Okay. But you've told us that you were spending all of

1 Probably.  
2 Question: Did it have any effect on you  
3 during your examination that it was a male doctor?  
4 Answer: Well, it was that much more  
5 embarrassing, intrusive. I wasn't sure a male doctor  
6 could relate.  
7 Question: After the examination, did it  
8 continue to bother you that it had been a male doctor?  
9 Answer: I don't know. I didn't think about  
10 it.  
11 Is that fair to say, that that accurately  
12 summarized your feelings about the IME?  
13 MS. PINKHAM: Objection.  
14 THE COURT: Overruled.  
15 A My feelings towards being a male doctor or a female  
16 doctor was again focused on why was I seeing a doctor,  
17 when the accident happened in January of 2002, in 2004.  
18 Now, I again was very embarrassed that it was a male  
19 doctor over a female doctor, but my overriding question  
20 is, why was the doctor being seen -- brought into the  
21 picture this late in the game?  
22 (By Mr. Cohen)  
23 Q Okay. And, in fact, you've already told us that the  
24 doctor who did perform the IME didn't really perform a

1 your efforts and energies to try and get to the highest  
2 level of rehabilitation that you could, understanding  
3 that you weren't going to walk again, correct?  
4 A I was trying, yes.  
5 Q And some of the things that you were trying to do is  
6 that you were trying to learn how to drive so you could  
7 be more independent and go places yourself, correct?  
8 A I really can't remember when I started taking lessons  
9 for driving. I started so many different times because  
10 I would make some progress and then another setback and  
11 then progress and another setback, so I really couldn't  
12 tell you when it was that I officially learned to  
13 drive.  
14 Q Okay. But at some point -- and it was after the trial  
15 of the accident case you were able to get your license  
16 to drive a handicap-assisted vehicle.  
17 A Yes. Eventually, yes.  
18 Q And you're driving now, correct?  
19 A Correct.  
20 Q And that really has given you a lot more self-reliance,  
21 correct?  
22 A Yeah, I would say that.  
23 Q And another thing that you were trying to do at the  
24 time of the accident was that you were trying to learn

1 how to transfer yourself, correct?  
 2 A No.  
 3 Q No, you weren't?  
 4 A No, I wasn't learning it. I know I was supposed to be  
 5 learning it.  
 6 Q Okay. You were told by your doctors that it was an  
 7 important thing for you to do to try and learn how to  
 8 transfer yourself because you would be much more self-  
 9 reliant and able to do things -- to more things if you  
 10 could transfer yourself, correct?  
 11 A My doctors told me, as far back as Fairhaven, that the  
 12 ideal would be that I transfer myself. I learned to  
 13 transfer myself. And, in fact, it was either Fairhaven  
 14 or Whittier that had the policy, that before you could  
 15 leave there, you would have to know how to transfer  
 16 yourself. At Fairlawn there was no way because I had a  
 17 huge blood clot in my leg and it would take two doctors  
 18 just to lift my leg to get into a wheelchair, so I  
 19 didn't -- they didn't have any expectations then. And  
 20 then in the interim, I had broken legs. And, you know,  
 21 if you look, you can see, I'm still wearing these  
 22 protection casts, and I was told by my doctors that I  
 23 probably would never be able to independently transfer.  
 24 Q And have you not learned how to do that currently?

1 A I'm not aware of anybody, any one person who's a  
 2 paraplegic, except myself.  
 3 Q All right. And you haven't gone to a spinal  
 4 cord injury program as of today, correct?  
 5 A I've gone to several support groups where there  
 6 have been many men in the support group, and I  
 7 would be, with the exception of the woman who  
 8 was not paraplegic, the woman who organizes the  
 9 support group -- I would be the only female  
 10 there; and as such, I felt that these men could  
 11 not relate or they were not relating to my needs  
 12 and I stopped going. To tell you the truth, it  
 13 was very demoralizing.  
 14 Q Your own experts in the accident case  
 15 recommended that you go to an in-patient spinal  
 16 education program, either at the Craig Hospital  
 17 in Colorado or at Boston University Medical  
 18 Center, correct?  
 19 MS. PINKHAM: Objection.  
 20 THE COURT: Overruled. If she knows.  
 21 A Did someone suggest that this would be good for  
 22 me?  
 23 (By Mr. Cohen:)  
 24 Q Yes.

1 A I have not learned how to do it. We had somebody  
 2 there; I have not learned how to do that.  
 3 Q And part of that is because of your weight and your age  
 4 and the fact that you're a woman, correct?  
 5 A No. It has to do with the osteoporosis.  
 6 Q Okay. And that's something that is one of the other  
 7 complications that you suffered as a result of the  
 8 accident, right, in part?  
 9 A I don't think they looked at the depth of the  
 10 osteoporosis before the accident. I know they looked  
 11 at it very much after the accident.  
 12 Q A person with your injury who didn't have  
 13 osteoporosis and was able to transfer themselves  
 14 would be able to be a lot more independent than  
 15 you actually were and have been, correct?  
 16 MS. PINKHAM: Objection.  
 17 THE COURT: Overruled.  
 18 A Answer? I really can't tell you what another  
 19 person can be able to do or couldn't do.  
 20 (By Mr. Cohen)  
 21 Q Well, you're aware that there are paraplegics  
 22 that can transfer themselves, correct?  
 23 A No.  
 24 Q You're not?

1 A Yes, someone did suggest this would be good for  
 2 me.  
 3 Q Okay. And that's not something you've been able  
 4 to do for various reasons up through today,  
 5 right?  
 6 A Not until we finally got a settlement, no. We  
 7 could not afford to do that before we got a  
 8 settlement where we actually received money.  
 9 Q Okay. Well, you got a settlement and received  
 10 money in 2004, but you haven't gone to such a  
 11 program today, correct?  
 12 MS. PINKHAM: Objection.  
 13 THE COURT: Overruled. She may answer.  
 14 A Do I answer? To tell you the truth, again, I  
 15 don't even remember when we got all the money.  
 16 Our first step in my getting better was to get a  
 17 competent life-care planner. And we have got a  
 18 good life-care planner, but that's far as we've  
 19 been able to go in terms moving on into these  
 20 institutes, particularly ones that are out of  
 21 state and that are family -- these are family  
 22 institutes. These are not Marcia going by  
 23 herself. These are family institutes where  
 24 Harold, Becca, and Marcia learn to live and be

1 as a family with a paraplegic in the house.  
 2 (By Mr. Cohen:)  
 3 Q But you're aware of the one reason why it was  
 4 suggested that you go to such a program would be  
 5 to teach you things that would improve your  
 6 level of functioning as a paraplegic, correct?  
 7 A With the -- forgetting that I have to wear these  
 8 casts on my legs, yes.  
 9 Q Now let me turn to your life before the accident  
 10 and between the accident and the trial of the  
 11 accident case. Is it true that --  
 12 MS. PINKHAM: Your Honor, could I  
 13 object and ask what relevance Mrs. Rhodes' life  
 14 before the accident has to do with this 93A  
 15 case? We've already had a whole trial on the  
 16 injuries that she suffered.  
 17 THE COURT: I was hoping to get her off  
 18 the stand before the end of the day. Is that  
 19 going to be realistic?  
 20 MR. COHEN: I'm just trying to elicit  
 21 some foundation for the factors that my clients  
 22 took into account in determining what the  
 23 settlement value of the case was.  
 24 THE COURT: All right. I'll give you

1 ADHD and bipolar disorder and you were taking at  
 2 various time before the accident Prozac,  
 3 wellbutrin, Ritalin?  
 4 A Well, I was either taking Ritalin or wellbutrin.  
 5 I mean, it wasn't both. It was one or the  
 6 other.  
 7 Q But those were all medications you took before  
 8 the accident?  
 9 A At one time or the other, I tried, yes.  
 10 Q And you also had suffered from anxiety problems  
 11 all your life, correct?  
 12 A What kind of anxiety problems?  
 13 Q Well, I believe that you testified previously  
 14 that you had been suffering from anxiety all of  
 15 your life. Do you recall that testimony that  
 16 you gave at the accident trial?  
 17 A No. I mean, you would have had to be more  
 18 specific as to what kind of anxiety that I  
 19 allegedly suffered from.  
 20 Q Turning to page 142 of the trial transcript,  
 21 line 13:  
 22 The anxiety disorder that you also  
 23 spoke about was another thing that you had for  
 24 quite some time before the accident?"

1 some leeway.  
 2 (By Mr. Cohen:)  
 3 Q Prior to the accident, you had suffered from  
 4 bipolar disorder, correct?  
 5 A Everyone has bipolar disorder.  
 6 Q Okay. But you were diagnosed as suffering from  
 7 bipolar disorder in the early 1980s, correct?  
 8 A I think that was before people realized that  
 9 everyone suffers from bipolar disorder.  
 10 Q And you were put on medication for bipolar  
 11 disorder in the early 1980s, correct?  
 12 A I was put on medication to treat my attention  
 13 deficit hyperactive disorder.  
 14 Q Well, you were for many years before the  
 15 accident you were taking lithium and Prozac and  
 16 wellbutrin?  
 17 A No, no wellbutrin. Well, I was the one who told  
 18 my doctor about the ADHD and that we discussed  
 19 it. The bipolar disorder was probably a result  
 20 of the ADHD rather than the other way around.  
 21 And I was also the one who told my doctor about  
 22 the use of wellbutrin to treat ADHD, which again  
 23 a byproduct, which was bipolar disorder.  
 24 Q Well, in any event, whatever thus far you had

1 And your answer was: My whole life.  
 2 Do you recall giving that testimony?  
 3 A I recall -- when you asked me that, I would have  
 4 to say that I had in mind the ADHD, which, yes,  
 5 I had suffered through my whole life.  
 6 Q And in addition to the medications that you were  
 7 prescribed before the accident, you were also  
 8 using marijuana two or three times a week for  
 9 your ADHD; were you not?  
 10 MS. PINKHAM: Objection, your Honor. I  
 11 believe that the foundation that Mr. Cohen  
 12 claimed he was laying was to address certain  
 13 factors that his clients took into consideration  
 14 in assessing the settlement value.  
 15 MR. COHEN: That was a factor.  
 16 MS. PINKHAM: And I believe the only  
 17 documents that are referenced in the pleading  
 18 index is that the defendants sought Mrs. Rhodes'  
 19 mental health records relating to her attention  
 20 deficit hyperactivity disorder and her bipolar  
 21 disorder. So I would move in limine to strike  
 22 the question and any further questions of this  
 23 witness regarding marijuana use.  
 24 MR. COHEN: Your Honor, she herself

1 testified about the marijuana use at trial in  
 2 response to questions Ms. Pinkham asked her.  
 3 MS. PINKHAM: Actually, I did not  
 4 examine Mrs. Rhodes at trial.  
 5 MR. COHEN: Or Mr. Pritzker or whoever  
 6 it was.  
 7 MS. PINKHAM: In any event, your Honor,  
 8 the trial is done. We've already had a whole  
 9 trial on Mrs. Rhodes' injuries and I really  
 10 don't see the utility of spending any more time  
 11 on this in the 93A,176D case.  
 12 THE COURT: Well, I think we can move  
 13 on, so I will sustain the objection.  
 14 (By Mr. Cohen:)  
 15 Q Prior to the accident, you were seeing several  
 16 different mental health professionals, correct?  
 17 A No.  
 18 Q No? Prior to the accident, were you seeing  
 19 mental health professionals?  
 20 A I was seeing one guy, yeah.  
 21 Q Okay. Who was that?  
 22 A Bennett Aspel (phonetic)  
 23 Q Were you also seeing a Dr. Eisenberg for family  
 24 counseling?

1 Quote: Finally, since I suffer from  
 2 ADHD and bipolar disorder, my mental condition  
 3 has significantly worsened as a cause of this  
 4 accident. As a result, I have much difficulty  
 5 sleeping. Last, I live with a deep depression  
 6 of the knowledge of the limitations placed on me  
 7 as a result of the accident, which will continue  
 8 throughout the course of my life.  
 9 Do you recall saying that?  
 10 A If I said that, then I also said that if you are  
 11 an ADHD person in a wheelchair, it is not a  
 12 pretty sight.  
 13 Q Okay. But it's fair to say, is it not, that you  
 14 placed your mental condition at issue in the  
 15 accident case by bringing it up?  
 16 MS. PINKHAM: Objection, your Honor.  
 17 We've had two rulings on this.  
 18 THE COURT: We're not going back to  
 19 Judge Donovan's ruling. I'm aware that you had  
 20 thought it was appropriate to make inquiry with  
 21 regard to psychiatric records and Judge Donovan  
 22 disagreed. I realize you aren't happy with that  
 23 decision, but that's not what we're about here,  
 24 so let's move on.

1 A I think that was before the accident, yes.  
 2 Q And during the course of the accident case, you  
 3 asserted, did you not, that the accident had  
 4 exacerbated your mental health problems, right?  
 5 Made them worse?  
 6 A No, I think what I said or what I meant to say  
 7 was the accident, the resulting accident did not  
 8 in any way reduce the ADHD or increase the ADHD.  
 9 ADHD is something you're born with, you deal  
 10 with your whole life.  
 11 Now, when I was a child they didn't  
 12 know about ADHD and they called it a lot of  
 13 different things. My own mother would say,  
 14 "Can't you sit still? Can't you sit still?"  
 15 And the answer was -- turned out to be, "No, I  
 16 can't." We didn't find that out until I was 40.  
 17 So if you're talking about, did I  
 18 suffer from ADHD before the accident? Yes.  
 19 During? Yes. After? Yes.  
 20 Q Let me read for you your answers to  
 21 interrogatories in the accident case. And I'm  
 22 quoting, this is on page 10, in response to the  
 23 question that asked about what damages you  
 24 incurred as a result of the accident:

1 (By Mr. Cohen:)  
 2 Q During the trial of the accident case and at  
 3 your deposition you also testified about  
 4 depression that you were undergoing as a result  
 5 of the accident, right?  
 6 A I believe that I suffer from two distinct levels  
 7 of depression. There is depression that any  
 8 bipolar person would have, you have your down  
 9 days and your up days. And there is a  
 10 distinctly different depression about being  
 11 stuck in a wheelchair for the rest of my life.  
 12 Q Yes, that's all I have. Thank you.  
 13 THE COURT: Thank you. Mr. Vargas.  
 14 CROSS-EXAMINATION BY MR. VARGA:  
 15 Q Good afternoon, Mrs. Rhodes. My name is Greg Varga in  
 16 behalf of Zurich, and we met back in August of last  
 17 year at your deposition, as you may remember.  
 18 A No.  
 19 Q It's true in this case, Mrs. Rhodes, you and your  
 20 husband are claiming that my client and AIG and  
 21 National Union should have settled the case with you  
 22 and your family before going to trial in September of  
 23 2004, correct?  
 24 A Before the end of the year, after the Carlos --

1 whatever his name is, Carlos. I can't remember his  
2 name.  
3 Q Zalewski?  
4 A That's the guy.  
5 Q Okay.  
6 A After his finding that he was guilty, I truly expected  
7 a quick settlement, yes.  
8 Q Okay. And you understood, I think you words earlier  
9 were that a settlement involves a give and a take,  
10 right on both sides, right?  
11 A Now, yes. I understand that now.  
12 Q Okay. During the course of the accident case, you  
13 understood, didn't you, that there could only be a  
14 settlement if both sides agreed on at least a payment,  
15 a number, right?  
16 A A final number.  
17 Q A final number of payment of compensation to your  
18 family, correct?  
19 A On a timely basis.  
20 Q I'm sorry?  
21 A On a timely basis.  
22 Q Okay. And you understood, when you filed this lawsuit  
23 or when this lawsuit was filed on your behalf, that the  
24 amount of money that you and your husband were willing

1 MR. VARGA: My understanding is that there is  
2 not, your Honor. For the record, we attempted -- for  
3 some reason it appears that the binder of Zurich  
4 exhibits that prior witnesses had been referring to has  
5 disappeared and we have to conduct an additional search  
6 for it. Mr. Pritzker was kind enough to offer us any  
7 documents we might need out of his copy of the binder.  
8 That's what I was hoping to use with the witness. This  
9 is not a disputed exhibit.  
10 MS. PINKHAM: No, that's fine. --  
11 MR. VARGA: I don't have an extra copy.  
12 MS. PINKHAM: I gave you my binder.  
13 THE COURT: You can use mine.  
14 MR. VARGA: I understand. I'm only going to  
15 go through one interrogatory. --  
16 MS. PINKHAM: Let me see what it is --  
17 THE COURT: Sure.  
18 MS. PINKHAM: Okay. Thank you.  
19 MR. VARGA: Is that the court's copy?  
20 THE COURT: No.  
21 MR. VARGA: Okay.  
22 MS. PINKHAM: Is this the missing one?  
23 MR. VARGA: That's the missing one.  
24 MS. PINKHAM: There you go.

1 to accept during the course of the accident case, at  
2 various times in settlement, was an important fact,  
3 correct?  
4 A I don't understand the question.  
5 Q Sure. My question is when you filed this lawsuit  
6 alleging that my client failed to settle with you and  
7 your family during the course of the accident case, you  
8 understood that the amount of money that your family  
9 was willing to accept in settlement was an important  
10 fact.  
11 A It was an important fact in us feeling that the  
12 conclusion had been reached, yes.  
13 Q In other words, the question of how much money you were  
14 willing to accept and the amount of money that the  
15 defendants were willing to pay at various times in the  
16 course of the underlying case were important facts.  
17 A They were important facts, but they didn't agree.  
18 Q Correct. And that's why the case went to trial, right?  
19 Yes or no.  
20 A Yes.  
21 Q Okay. I just want to show you a document, Mrs. Rhodes,  
22 and I'll come up, if I may, just to display it to you.  
23 MS. PINKHAM: Mr. Varga, is there another  
24 binder still up on the witness stand?

1 MR. VARGA: Sorry for the confusion.  
2 (By Mr. Varga)  
3 Q My apologies, Mrs. Rhodes. I want to just hand you  
4 Exhibit Number 124 and ask you to take a quick look at  
5 that.  
6 I want to ask you, do you recognize that as a  
7 document that you signed -- if you turn to page 17,  
8 you'll see a signature at the top.  
9 A Actually, on page 16, and, no, I don't see my  
10 signature.  
11 Q Okay.  
12 MS. PINKHAM: Page 17.  
13 THE WITNESS: I don't have a page 17, unless  
14 it's -- I'm sorry. Yeah, okay, they're out of order.  
15 Q Page 17.  
16 A Yes, that's my signature.  
17 Q Okay. So the signature at the top of page 17, under  
18 "Signed under the pains and penalties of perjury this  
19 29th day of August 2005" is your signature?  
20 A Yeah, it's my signature.  
21 Q And you recognize this to be your answers to  
22 interrogatories served by AIG Domestic Claims, correct?  
23 A AIG and a bunch of others.  
24 Q Okay. Now this was a document that you signed after

1 reviewing it with counsel and with your husband,  
 2 correct?  
 3 A I didn't review it with my husband.  
 4 Q Okay. You reviewed it with counsel, correct?  
 5 A I had counsel look at it, yes.  
 6 Q Okay. Did you actually prepare any of the answers that  
 7 are in this document, or were they given to you just  
 8 for you to sign it?  
 9 A I'd have to look through it to see what kind of  
 10 questions they asked me.  
 11 Q Okay. Well, let me see if I can direct you to one that  
 12 I'm interested in, Mrs. Rhodes. If you could turn to  
 13 page number 8 and Interrogatory Number 9, which is the  
 14 second one on that page, page 8. And I'll read that  
 15 for the record. It says:  
 16 Please state what offers of settlement you  
 17 would have accepted from January 2002 until the  
 18 resolution of the underlying matter. If the amount you  
 19 would have accepted changed at any time, please  
 20 indicate for what periods of time each amount is  
 21 applicable.  
 22 And the answer that's stated there is: I  
 23 believe the family was willing to accept \$8 million to  
 24 resolve the underlying matter up through the mediation.

1 him.  
 2 Q I understand. But my question was, he attempted to  
 3 shield you from the things that were happening on a  
 4 day-to-day basis during the course of the underlying  
 5 action, correct?  
 6 A Which underlying action?  
 7 Q The lawsuit against the defendants, Mr. Zalewski, DLS  
 8 and Penske and GAP.  
 9 A The original lawsuit?  
 10 Q Yes.  
 11 A Yes. He tried to shield me as much as possible from  
 12 that lawsuit.  
 13 Q Okay. And during the course of those years, again 2002  
 14 and 2003 and 2004, obviously all after the accident,  
 15 you were experiencing a lot of anger and frustration  
 16 and other emotions with the -- obviously the injuries  
 17 that you had suffered and the pace of your  
 18 rehabilitation, right?  
 19 A Well, I would have to say that as time wore on, there  
 20 was also an emotion of complete disability. I couldn't  
 21 believe this was taking this long. And as the year  
 22 progressed, 2002, I found I would accept X; in 2003, I  
 23 found I would accept Y; in 2004, I would accept Z. It  
 24 just kept, you know -- yes, there was stress.

1 Stating what the family would have agreed to between  
 2 the time of the mediation and the jury announcing its  
 3 verdict would be speculative. After the jury verdict,  
 4 I was willing to accept the full amount of the jury  
 5 verdict, plus accrued interest, to resolve the  
 6 underlying matter.  
 7 That was among the statements that you signed  
 8 under oath back in August of 2005, correct?  
 9 A Yes.  
 10 Q Okay. And that was true at the time that you wrote  
 11 that, correct?  
 12 A Yes.  
 13 Q Okay. You can put that exhibit down now. Thank you.  
 14 Now, Mrs. Rhodes, I believe you testified a  
 15 few times today that in the years 2002, 2003 and 2004,  
 16 you and your husband had an understanding that you  
 17 would focus all of your energies on rehabilitation and  
 18 recovery, right?  
 19 A All my energies, yes.  
 20 Q Okay. And Mr. Rhodes did everything that he could  
 21 within his power to shield you from the day-to-day  
 22 things that were happening in the lawsuit, right?  
 23 A Well, he tried to shield me from the lawsuit, but he  
 24 couldn't shield me from what the lawsuit was doing to

1 Q And then the anger and the stress and the anxiety that  
 2 you felt were directed at your injuries and your  
 3 recovery and rehabilitation and the pace of that  
 4 rehabilitation, right?  
 5 MS. PINKHAM: Objection.  
 6 THE COURT: Overruled. You may answer.  
 7 A Say it again.  
 8 Q Sure. Again, during that time frame -- I'm saying  
 9 2002, 2003, and 2004 -- the anger and the stress and  
 10 the frustration and the anxiety that you felt were  
 11 directed primarily, or directed at your injuries and  
 12 the rehabilitation and the recovery process, right?  
 13 A Of that trial, yes.  
 14 Q At that time.  
 15 A Yeah.  
 16 Q And they were also directed to the fact that you had to  
 17 learn to live a new life after you got out of the  
 18 hospital and then out of the rehabilitation facility,  
 19 right?  
 20 A No. I didn't know if we had the money. I mean, I  
 21 didn't know when we'd get the money.  
 22 Q Okay. I'm sorry. My question, I may not have been  
 23 very clear, but your frustrations and your anger and  
 24 the distress that you felt in 2002 and 2003 and 2004

1 were also in part directed at or driven by the fact  
 2 that you had to learn to live a new life as a  
 3 paraplegic, correct?  
 4 A It was partially directed, yeah, I'd say. Yeah.  
 5 Q Now, you spoke a little bit earlier about observations  
 6 you made of Mr. Rhodes during these years after the  
 7 accident and the emotional distress or anxiety that you  
 8 saw him experiencing. It's true, Mrs. Rhodes, is it  
 9 not, that Mr. Rhodes was obviously very deeply affected  
 10 by what had happened to you, the injuries that you  
 11 sustained in January 2002.  
 12 A Well, yes. He was affected by the injuries that I had  
 13 in 2002.  
 14 Q Obviously, as your husband, that was a very profound  
 15 and difficult thing for him to deal with, right,  
 16 emotionally?  
 17 A Emotionally, yeah. I was damaged. I was his wife.  
 18 Q And that's also true for Rebecca. Obviously, her  
 19 having to see her mother go through what you had to go  
 20 through, that took a tremendous emotional toll on her  
 21 as well, right?  
 22 A Particularly since I almost died, yes.  
 23 Q And when you were discharged from Fairlawn  
 24 Rehabilitation Hospital in, was it February -- I'm

1 A Yes.  
 2 Q And while that was difficult for both of you, it  
 3 was also important to both of you that he be  
 4 there by your side to help you through this  
 5 process, right?  
 6 A We needed somebody there. We would have  
 7 preferred not my husband. We would have  
 8 preferred to keep a husband and wife  
 9 relationship rather than a caregiver-patient  
 10 relationship.  
 11 Q But you knew he didn't object to it because he  
 12 wanted to be there to help you as much as he  
 13 could, right?  
 14 A Well, I could say he wanted to be there to help  
 15 but I can't say that he wouldn't rather somebody  
 16 else be there to help me.  
 17 Q The process of assisting you on a daily basis  
 18 consumed a lot of Mr. Rhodes' time, correct?  
 19 A Yes, that would be so.  
 20 Q And I know that you testified during the  
 21 accident case, the underlying case, to some  
 22 extent at least, about the effect that this new  
 23 relationship between you and your husband had on  
 24 you emotionally, right? Do you recall that?

1 sorry, April of --  
 2 A April 16 is our anniversary and I insisted I be  
 3 discharged on that day.  
 4 Q That was April 16 of 2002?  
 5 A I don't know if it was --  
 6 Q About three months after the accident?  
 7 A I don't really -- yeah, I guess it would have to have  
 8 been, yes.  
 9 Q At Fairlawn, that's right. That's what I was  
 10 asking about, Fairlawn, to be clear.  
 11 And after you were discharged you came  
 12 home, correct?  
 13 A Yes.  
 14 Q And Mr. Rhodes at that point became, I think you  
 15 described him before as sort your caregiver,  
 16 right?  
 17 A Yes.  
 18 Q And you became his patient, so to speak?  
 19 A Those are terms you've used before to describe  
 20 the relationship after that point in time?  
 21 A Yes, right.  
 22 Q Okay. And he assisted you obviously with many  
 23 things, including transfers and personal care  
 24 needs of all manner, correct?

1 A I don't recall it, but --  
 2 Q Okay. The fact is, emotionally that was very  
 3 difficult for you to go from husband and wife to  
 4 caregiver and patient, right?  
 5 A Yes.  
 6 Q And it was also a very difficult thing for Mr.  
 7 Rhodes to undergo as well, correct?  
 8 A That would be speculation.  
 9 Q But you as his wife would know if that was  
 10 something that was among the things that were  
 11 upsetting him in 2002 and 2003, correct?  
 12 A That would probably be among them.  
 13 Q I'm sorry?  
 14 A It would probably be among the things that were  
 15 upsetting him.  
 16 Q But it was definitely at least one thing?  
 17 A It was one thing, yes, among many.  
 18 Q And while Mr. Rhodes may have adjusted to your  
 19 new relationship to some degree as of this point  
 20 in time, the change in the relationship still  
 21 impacts him today emotionally, doesn't it?  
 22 A He's not my caregiver-patient anymore, if that's  
 23 what you mean. But he's still stressed out  
 24 about this thing that has happened to his wife.

1 Q Even today?

2 A Well, I don't know if I could say if it's the  
3 same stress or not. I'm not Harold.

4 Q But you observe him on a daily basis, right?

5 A Yes.

6 Q And so you know when things are bothering him,  
7 the way a wife usually does?

8 A As much as he can shield it from me. The parts  
9 that he can't shield from me I can see, but he's  
10 pretty good at hiding how he feels.

11 Q During 2002 and 2003 and 2004, you had a number  
12 of doctor's appointments that you had to be  
13 transported to for various conditions, right?

14 A Yes.

15 Q There were well over a hundred doctor  
16 appointments, right?

17 A Yes.

18 Q Okay. And on those occasions when you had to go  
19 to the doctors was it Mr. Rhodes who would drive  
20 you?

21 A Yes.

22 Q Yes?

23 A Yes.

24 Q Okay. And so was it also Mr. Rhodes who

1 effort to do that.

2 (By Mr. Varga)

3 Q Mrs. Rhodes the process of setting up and  
4 coordinating these doctor's appointments and  
5 driving you to over a hundred doctor's  
6 appointments over the course of 2002 and 2003,  
7 that consumed a lot of Mr. Rhodes' time,  
8 correct?

9 A Yes.

10 Q And there was also a lot of time that was  
11 necessary to assist getting you ready to  
12 actually leave the house in the morning for a  
13 doctor's appointment, right?

14 A Every action was an event.

15 Q And sometimes the process of preparing to leave  
16 the house could take over an hour, right?

17 A I don't think so. I don't know if it would take  
18 that long. I really don't recall how long it  
19 would take to get me ready for any one doctor.

20 Q But it was a process, obviously?

21 A Yes, it was an event.

22 Q And by that you mean that there were certain  
23 steps that had to be taken to make the  
24 transfers, to get the van ready and so forth?

1 coordinated the doctor's appointments for you?

2 A I think so, yes.

3 Q So Mr. Rhodes was making sure that one doctor  
4 knew what another doctor was doing or  
5 prescribing or what course of treatment was  
6 being ordered?

7 A I believe what my husband would do is use the  
8 physiatrist to coordinate all the other doctors,  
9 because there was one doctor keeping control of  
10 all these various developments, physical  
11 developments that were occurring to me.

12 Q But Mr. Rhodes was part of that process dealing  
13 with the physiatrist, correct?

14 A Yes.

15 Q On your behalf?

16 A Yes.

17 Q And so the process of --

18 THE COURT: We have to call it a day  
19 unless you tell me you have two minutes left.

20 MR. VARGA: Actually I have probably  
21 three minutes left, your Honor.

22 THE COURT: Then I'll give you the  
23 three minutes to get her off the stand.

24 MR. VARGA: I will make my very best

1 A Yes, it just wasn't a matter of getting in the  
2 car and going.

3 Q Okay. And all of the time that it took for Mr.  
4 Rhodes to coordinate those appointments and to  
5 set them up and to coordinate and work with  
6 physiatrists and to transport you back and forth  
7 to the doctors and get you ready for those  
8 appointments, that was time that he was not  
9 spending at work, right?

10 A True.

11 Q And lastly, there were a number of instances in  
12 2003 and 2004 where Mr. Rhodes had to act as  
13 sort of your patient advocate with United  
14 Healthcare to try to get certain equipment that  
15 you needed, right?

16 A Yes.

17 Q And were there also times when he dealt with the  
18 health insurance company on issues of what  
19 medication you needed, for example?

20 A He dealt with United Healthcare on almost every  
21 issue.

22 Q And there were a lot of occasions when the  
23 health insurer was balking at making payments  
24 for certain things, right?

1 A Always.

2 Q Always. And that was something that Mr. Rhodes  
3 had to fight on a regular basis?

4 A Yes. He handled the insurance on a regular  
5 basis.

6 Q And from your observations of him, that caused a  
7 lot of stress for him to have to deal with that  
8 process over and over again, didn't it?

9 A I don't know if it was stress. I think it was  
10 more a sense of disbelief that they're fighting  
11 us on these things. I mean, like I said, it's a  
12 no-brainer, and they're fighting us on whether I  
13 need an Easy Stand or whether I need -- if you  
14 know what a B-Z board is, if I needed -- of  
15 course I needed it.

16 MR. VARGA: I have no further  
17 questions, your Honor.

18 THE COURT: Okay. Any redirect? If so  
19 we'll have to wait until tomorrow, unless you  
20 tell me it's one minute.

21 MS. PINKHAM: One minute, your Honor.

22 THE COURT: I'm trying, Mrs. Rhodes.  
23 I'm trying.

24 THE WITNESS: Thank you, I appreciate

1 settlement in either 2002 or 2003, would you  
2 have gone along with that recommendation?

3 MR. VARGA: Objection. Leading, your  
4 Honor.

5 MR. COHEN: Objection.

6 THE COURT: I'll allow it.

7 A I don't know. I wasn't offered it so I don't  
8 know how I would have reacted.

9 (By Ms. Pinkham)

10 Q If your attorney and your husband said it was a  
11 good idea in order to make the case go away,  
12 would you have listened to them?

13 MR. VARGA: Objection.

14 MR. COHEN: Objection.

15 THE COURT: I'll allow it.

16 A If they both thought it was a good idea and that  
17 that was a fair settlement, I probably would  
18 have gone along with them if they both agreed.

19 MS. PINKHAM: Nothing further, your  
20 Honor.

21 THE COURT: Any further questions?  
22 Before we get anywhere, I gather that Mr.  
23 Pritzker, that you have evoked the attorney-  
24 client privilege with regard to your discussions

1 your efforts, your Honor.

2 THE COURT: Okay, go ahead.

3 REDIRECT EXAMINATION BY MS. PINKHAM:

4 Q Mrs. Rhodes, Mr. Varga showed you your answer to  
5 interrogatory that referenced this statement  
6 that the family was willing to accept \$8 million  
7 to resolve the underlying matter up through the  
8 time of mediation. You knew the mediation was  
9 in 2004?

10 A That was the same year as the trial, yes.

11 Q Mrs. Rhodes, would you have agreed to accept an  
12 amount less than \$8 million in 2002 or 2003?

13 A I don't know because there was no offer  
14 forthcoming, so how would I know how I would  
15 have reacted?

16 Q In any event, would you have relied on the  
17 advice of your attorney as well as your husband  
18 in responding to any settlement offer that was  
19 communicated to you?

20 A If they both agreed with each other, yes.

21 Q And so if your husband and your attorney both  
22 agreed that some number less than \$6 million was  
23 an appropriate settlement -- strike that. If  
24 some less than \$8 million was an appropriate

1 with counsel?

2 MR. PRITZKER: That's true, your Honor.

3 THE COURT: So I don't quite see how  
4 this goes anywhere because we're never going to  
5 learn what had been said between you and the  
6 attorney with regard to your understanding of  
7 earlier offers. So this seems to lead nowhere,  
8 frankly, the fact that if you and Mr. Rhodes had  
9 agreed to a lesser amount, she would have given  
10 it careful consideration. It would matter only  
11 if I'm going to hear that indeed you and Mr.  
12 Rhodes had had discussions earlier and would  
13 have accepted an amount of less than \$8 million,  
14 but I gather I'm not going to hear that,  
15 correct?

16 MR. PRITZKER: You're not, your Honor.  
17 In fact, there was no -- I mean, I can't say  
18 that, but yes, but I will. There was no offers,  
19 there was no discussion.

20 THE COURT: All right. So I don't know  
21 that it goes anywhere. Do you still want any  
22 recross on it?

23 MR. ZELLE: No.

24 THE COURT: We will adjourn for the

1 day, we'll do our afternoon session at 2:08, so  
 2 we'll take the full hour .,and we'll see you  
 3 back -- I hope to have my car back, so I should  
 4 be able to get in at 9 tomorrow, I hope.

5 All right. We're adjourned.

6 (Hearing adjourned at 1:08 p.m.)  
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 12  
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 14

C E R T I F I C A T E

I, Paula Pietrella and Faye LeRoux, Court Reporters, do hereby certify that the foregoing transcript, Pages 1 through 177, is a complete, true and accurate transcription of the above-referenced case.

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Paula Pietrella

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Faye LeRoux